JJE

EMPLOYMENT TRIBUNALS

Claimant: **Mrs A Fleming**

Respondent: **A E Simmons Limited**

Heard at: **East London Hearing Centre**

On: **22, 23 & 24 August 2018**

Before: **Employment Judge G Tobin**

Members: **Mrs W Blake-Ranken**
Mr P Pendle

Representation
Claimant: Ms N Mallick, Counsel
Respondent: Mr A Ohringer, Counsel

JUDGMENT

The Judgment of the Employment Tribunal is that:-

1. **The claimant's claim in respect of direct sex discrimination, pursuant to section 13 of the Equality Act 2010, is dismissed upon withdrawal.**

2. **The claimant was not constructively unfairly dismissed pursuant to section 95(1)(c) of the Employment Rights Act 1996. This claim is dismissed.**

3. **The respondent was not in breach of contract for not paying the claimant discretionary sick pay. This claim is dismissed.**

4. **The claimant was not victimised pursuant to section 27 of the Equality Act 2010. This claim is dismissed.**

REASONS

1 By a claim form issued on 22 November 2017 the claimant issued proceedings in respect of: (constructive) unfair dismissal; direct sex discrimination; breach of

contract; and victimisation. The direct sex discrimination claim was withdrawn at the start of proceeding and Ms Mallkick confirmed that the breach of contract claim was in respect of the non-payment of discretionary sick pay only. At the commencement of the hearing, the agreed list of issues were as follows:

Unfair Constructive Dismissal: s95(1)(c) & s98 Employment Rights Act 1996 ("ERA")

1.1 Did the respondent, 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 it and the claimant?

The claimant relies upon the following conduct:

1.1.1 Being suspended, without reason, by the respondent for carrying out her contractual duties.

1.1.2 Failing to investigate adequately, or at all, the claimant's grievance, i.e. the letter from the claimant's solicitors dated 27 June 2017.

1.1.3 Treating the claimant differently by initiating disciplinary proceedings against her for carrying out her contractual duties.

1.1.4 Failing to allow the claimant to deal with the disciplinary matter by way of correspondence as agreed but later withdrawn.

1.1.5 Failing to pay the claimant her sickness pay [discretionary sick pay];

1.1.5.1 The claimant did not get contractual sick pay from 12 June 2017 as she was paid statutory sick pay ("SSP") only.

1.1.5.2 The respondent should have exercised its discretion to pay in full the claimant for her sick leave absence from 8 August 2017 to 30 August 2018.

1.1.6 Preventing the claimant's work colleagues from communicating with the claimant which caused embarrassment to the claimant.

1.1.7 Conducting itself inappropriately during the disciplinary process – Mr Andrew Ritchie subjecting the claimant to an intimidating and a hostile environment prior to her suspension, i.e. the claimant being shouted at on 9 June 2017 and the aggressive tone from Mr Ritchie in emails.

1.1.8 Requiring the claimant to return to work at 9am on 31 August 2017 not knowing if she was facing an investigatory meeting/without telling her that the suspension had ended.

1.2 If so, does this conduct amount to a repudiatory breach of contract so as to justify the claimant resigning?

1.3 Did the claimant resign, at least in part, as a result of this breach?

1.4 Did the claimant waive the breach by way of delay, or otherwise affirm the contract of employment before resigning?

1.5 If there was a dismissal, was there a potentially fair reason for the dismissal?

1.6 Did the respondent otherwise follow a fair process?

Victimisation: s27 Equality Act 2010 ("EqA")

1.7 The claimant alleges that her protected acts, pursuant to s27(2)(d) EqA, were as follows: the email sent by her solicitors on 20 July 2018[1] and 27 July 2018.

1.8 Did the claimant suffer a detriment? The claimant identified the following as detriments:

1.8.1 The respondent compelling the claimant to attend a face-to-face meeting having agreed to deal with its investigation through questions and answers in correspondence.

1.8.2 Not informing the claimant as to what was happening with her suspension.

1.8.3 Not having a solicitor present at any investigatory hearing.

1.9 If the claimant was subjected to the above detriments, was she subjected to these detriments for making the protected act above?

Non-payment of sick pay: breach of contract

1.10 The claimant was not contractually entitled to sick pay.

1.11 Did the respondent exercise its discretion not to pay the claimant sick pay reasonably?

1.12 If not, is the claimant entitled to be paid this sum and how much?

The law

2 Section 95(1) ERA provides that an employee is dismissed by her employer for the purposes of claiming unfair dismissal if:

> (c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct.

3 An employee may only terminate her contract of employment without notice if the employee has committed a fundamental breach of contract. According to Lord Denning MR:

[1] The assertion that this email amounted to a protected act was withdrawn during the hearing.

> If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer's conduct. He is constructively dismissed. *Western Excavating (ECC) Ltd v Sharp [1978] ICR 221.*

4 *Courtaulds Northern Textile Ltd v Andrew [1979] IRLR 84 (EAT)* held that a term is to be implied into all contracts of employment stating that employers will not, without reasonable or proper cause, conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between the employer and employee.

5 Brown-Wilkinson J in *Woods v WM Car Services (Peterborough) Ltd [1981] ICR 666 (EAT)* described how a breach of this implied term might arise:

> To constitute a breach of this implied term it is not necessary to show that the employer intended any repudiation of the contract: the tribunal's function is to look at the employer's conduct as a whole and determine whether it is such that its effect, judged reasonably and sensibly, is such that the employee cannot be expected to put up with it.

6 *Western Excavating* established that a *serious* breach is required. In *Hilton v Shiner [2001] IRLR 727* the Employment Appeals Tribunal confirmed that the employer's conduct must be without reasonable and proper cause. For instance, instigating disciplinary action against an employee would not per se be a breach of mutual trust and confidence if there appeared good grounds for doing so. According to *Morrow v Safeway Stores [2002] IRLR 9* if a breach of mutual trust has been found, this implied term is so fundamental to the workings of the contract that its breach automatically constitutes a repudiation – a Tribunal cannot conclude that there was such a breach but, on the facts, hold that it was not serious.

7 If an employee contends that a particular matter amounted to a "last straw" entitling her to resign, the "last straw" must not be entirely innocuous. It need not be in itself a breach of contract, but it must contribute to the series of events alleged to amount to a breach of the mutual trust and confidence term: *Waltham Forest London Borough v Omilaju [2005] ICR 418.*

8 We have considered whether the claimant has established in the respects alleged by her a breach of the implied term of mutual trust and confidence. We have been careful to analyse not only the individual matters relied on by the claimant but also their cumulative effect.

9 Victimisation under s27(1) EqA is defined as follows:

> *A person (A) victimises another person (B) if A subjects B to a detriment because–*
>
> *9.1.1.1 B does a protected act, or*
>
> *9.1.1.2 A believes that B has done, or may do, a protected act.*

10 A "protected act" includes bringing proceedings under the EqA, as well as giving evidence or making allegations that a person has contravened the EqA. In this case the claimant contends that she suffered various detriments because she raised the possibility of a complaint – through her solicitors – that she had been discriminated against, pursuant to s27(2)(d) EqA. There is no need to find a comparator for victimisation as it is only the treatment of the victim that matters and establishing

causation; it is possible to *infer* from the employer's conduct that there has been victimisation.

11 S136 EqA implements the European Union Burden of Proof Directive. This requires the claimant to prove facts from which the Tribunal could conclude, in the absence of an adequate explanation, that the employer has committed an act of unlawful discrimination or victimisation, and it is then for the employer to prove otherwise.

12 The cases of *Barton v Investec Henderson Crosthwaite Securities Ltd [2003] ICR 1205* and *Igen Ltd v Wong [2005] EWCA* Civ 142*, [2005] ICR 931* provide a 13-point form/checklist which outlines a two-stage approach to discharge the burden of proof. In essence:

12.1 Has the claimant proved facts from which, in the absence of an adequate explanation, the Tribunal could conclude that the respondent had committed unlawful discrimination?

12.2 If the claimant satisfies (a), but not otherwise, has the respondent proved that unlawful discrimination was not committed or was not to be treated as committed?

13 The Court of Appeal in *Igen* emphasised the importance of *could* in (a). The claimant is nevertheless required to produce evidence from which the Tribunal could conclude that discrimination has occurred. The Tribunal must establish that there is prime facie evidence of a link between less favourable treatment and, say, the protected act and that they were not merely unrelated to the events: see *University of Huddersfield v Wolff [2004] IRLR 534*. It is usually essential to have concrete evidence of less favourable treatment. It is essential that the Employment Tribunal draws its inferences from findings of primary fact and not just from evidence that is not taken to a conclusion: see *Anya v University of Oxford [2001] EWCA Civ 405, [2001] ICR 847*.

14 The contractual jurisdiction of the Employment Tribunal is governed by s3 Employment Tribunals Act 1996 together with the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 SI 1994/1623. An Employment Tribunal may hear a contract claim brought by an employee if the claim can be one that a court in England would have jurisdiction to hear and determine and must arise or be outstanding on the termination of the employment of the employee who seeks damages for breach of a contract of employment or any other contract connected with employment. Damages for breach of contract is capped at £25,000 in the Employment Tribunal: Article 10 of the aforementioned Order.

Our Findings of Fact

15 We (i.e. the Employment Tribunal) made the following findings of fact. We did not resolve all of the disputes between the claimant and the respondent, we merely concentrated on those disputes that would assist us in determining the issues as identified above. We have set out how we have arrived at such findings of fact where this is not obvious or where, we determine, this requires further explanation. When resolving disputes about contested fact, we placed most reliance upon contemporaneous documents and correspondence unless there were especially

strong reasons not to do so. Contemporaneous sources tend to provide a more accurate picture of what occurred rather than after-the-event justifications or the re-casting or re-interpretation of events following professional advice.

16 The hearing bundle was fairly proportionate, 137 pages. At the outset of the hearing, the Employment Judge emphasised to the parties that, as a matter of course, we would not read all of the documents contained in a hearing bundle. He stated we would read documents referred to us and we may read additional documents that have not been cross-referenced in any statement; however, if a party thought that a document was relevant and important, then he or she needed to bring that document to our attention.

17 The claimant was employed as an Office Manager. She initially started work for the respondent company on 8 November 2004 as a receptionist/office assistant. From December 2012, the claimant took over the role of an Office Manager.

18 The claimant's most up-to-date written contract of employment was signed on 26 May 2017. This contract included an express duty of confidentiality over matters including "business, accounts, finance or affairs of the Employer". The claimant's contract of employment also contained an express duty of fidelity, i.e. "to use [her] utmost endeavours to promote the business of the Employer.".

19 On 6 June 2017, Mr Andrew Ritchie (joint Managing Director of the respondent) was alerted to a suspicious incident involving the claimant by Mr Nigel Bullen-Bell (the Sales Manager). Mr Bullen-Bell thereupon gave Mr Ritchie a handwritten envelope addressed to Mrs Jacqueline Ritchie (a former employee, current shareholder and the estranged wife of Mr Stuart Ritchie, another Director who was the brother of Mr Andrew Ritchie). Mr Bullen-Bell informed Mr Ritchie that the claimant had handed a letter to Mr Michael Morton, the company accountant, early that afternoon telling him that she could not put it in the usual post tray as she did not want Mr Ritchie to see it. Both Mr Bullen-Bell and Mr Morton were concerned about this and informed Mr Ritchie that the claimant had said "Don't let Andrew Ritchie see this – I don't want to get my P45". Mr Morton had been responsible for the post on the day in question.

20 Mr Ritchie opened the envelope and saw that it contained information in respect of the monthly dividends paid to Mrs Ritchie for the months of January 2017 to April 2017.

21 We accept Mr Ritchie evidence at the hearing that he was concerned about the circumstances of this disclosure of seemingly confidential financial information and he believed that the claimant was not authorised to provide such information to Mrs Ritchie. Mr Ritchie also said in evidence to the Tribunal, which we accept, that he was also concerned about the claimant seemingly blurring professional and private boundaries. Mrs Ritchie was the previous Office Manager; she was a former consultant, the wife of Mr Stuart Ritchie, and also a long standing close personal friend of the claimant. Mr Ritchie was concerned that the claimant may have been behaving in a way that might have been contrary to the interest of the company and that she may have been in breach of her contract of employment; specifically, that the claimant may have been breaching company confidentiality in order to assist Mrs Ritchie compile company financial information for personal reasons (i.e. for use in her divorce from a fellow-Director).

22 The claimant was off work the following day, which was 7 June 2017 and Mr Ritchie briefly went to her work computer to allay his fears that she may have been sending confidential information out to other parties. In the course of checking through her computer, Mr Ritchie discovered that the claimant had sent to her private email address the minutes of a meeting for a confidential redundancy consultation with Mrs Ritchie's son, James Bushall. This increased Mr Ritchie's concern that the claimant may have breached company confidentiality and could have been acting in a way that was contrary to the interests of the company. He said that he considered that this was potentially an act of misconduct.

23 Mr Ritchie then took some legal advice and he was advised that it was appropriate to suspend the claimant whilst a full investigation could be carried out.

24 Mr Ritchie spoke in detail about the events in question to Mr Bullen-Bell, Mr Morton and Joe Patrick (who also worked in the office). They told him that the claimant had received a call on her mobile phone, which she walked away to take in private. She then returned to her desk and typed a document before placing it in an envelope and passing it to Mr Morton.

25 The claimant returned to work on 9 June 2017. Mr Ritchie suspected misconduct and he considered that suspension was appropriate and proportionate as he was concerned that, should the claimant remain at work, she may seek to further breach company confidentiality (if in fact she had) and remove company documents without permission. As part of her role as Office Manager (which included human resources lead) the claimant had access to personnel and company documents including financial information and client details.

26 From enquiries subsequently made, it is clear that Mr Ritchie did not fully appreciate the wide parameters of the claimant's responsibilities. We are satisfied that the claimant undertook extensive and responsible duties. We are also satisfied that it would not be practical for Mr Ritchie to re-deploy the claimant into alternative activities, which could avoid her suspension.

27 At this time, Mr Ritchie envisaged a short suspension as he asked the claimant to return to work on the following Tuesday at 11am to discuss this matter further and for him to decide whether or not the claimant had a case to answer. Mr Ritchie informed the claimant that Mr Bullen-Bell would conduct an investigation in the interim.

28 Mr Ritchie confirmed the claimant's suspension by letter which was delivered by hand to her home address later that day. The letter stated

> In accordance with the organisation's disciplinary rules and procedures and following our conversation of 09/06/2017, I confirm that you are suspended on full pay pending an investigation into allegations of Breach of Confidentiality made against you.
>
> Once the investigation is complete, we will have a meeting at 11am Tuesday, if we are to need more time to complete the investigation I will contact you, and arrange a different time/date.
>
> This suspension is in order to allow us to conduct the investigation impartially and fairly and is in no way a form of disciplinary action against you.
>
> You are requested to remain available within reason should I need to contact you. I would ask that, at this stage, you do not contact any of the organisation's customers, suppliers or your work colleagues (save for your union representative for the purpose of obtaining advice).

> In the meantime, should you have any information that might be of assistance to our investigation or wish to discuss anything, please contact me, and if I am not available, contact Michael.

29 The plural nature of the allegations indicate that Mr Ritchie was dealing with more than one allegation of breach of confidentiality.

30 In response to the delivery of her letter of suspension, the claimant texted Mr Bullen-Ball (the investigating officer) in the early evening and said: "So you didn't have the balls to knock at the door? Totally gutless……sleep well tonight!"

31 The respondent discovered after the claimant's resignation, that the claimant had also sent Mrs Ritchie a copy of the front of her personnel file in a covert fashion, and also a similar disclosure was made to Mrs Ritchie's son. This indicated to us that Mr Ritchie was genuine in his account of his initial discovery of the redundancy consultation minutes by saying that the latter disclosure was not discovered until after the claimant had resigned.

32 On 12 June 2017, the claimant sent Mr Ritchie a sick certificate for 2 weeks lasting until 26 June 2017 citing "stress at work". As the claimant was signed off sick from work, the respondent transferred her to statutory sick pay – which was her contractual entitlement. This was not communicated to the claimant at the time. No issue has been raised by the claimant that she should have been afforded the opportunity to make representation at that time in respect of transferring her to SSP.

33 Mrs Ritchie telephoned the respondent's office on 16 June 2017 and requested the information about dividends paid to her during 2017 (which was the information the claimant sought to disclose). On that same day, Mr Ritchie instructed Mr Morton to provide the appropriate dividend information which was communicated to Mrs Ritchie on company headed paper.

34 On 23 June 2017, the claimant wrote to Mr Ritchie as follows:

> Having spoken to my solicitor he has suggested that I try to get this out of the way due to the stress it is causing me. He has suggested 2 options. Option 1 I come in face to face and have the meeting although under the circumstances this is not my preferred option. Option 2 is you provide me by email a list of questions to which I can provide answers. Please let me know how you wish to proceed.

35 Mr Ritchie asked, by email later that day, whether the claimant will be coming back to work on the Tuesday, when her sick note was due to expire. The clamant responded early the following day stating that she would not be returning as she had been signed off for a further 2 weeks.

36 On 27 June 2017, Mr Ritchie wrote to the Claimant as follows

> I am sorry to hear that you remain unwell and will not be returning to work today.
>
> I regret that your kind offer of email participation is at this stage not agreed. The reality is that in practice, it may not be possible for Nigel to gather sufficient information from you via email, as if nothing else there are documents that I would need you to see and for you to let Nigel have your comments upon. Whilst it is possible for employees to participate by electronic means, it is far from desirable and is only used in rare situations. However, as your return to work is not imminent, it may be that in a few weeks your health will have improved sufficiently to enable us to have the investigatory meeting we have requested.
>
> I propose putting the matter into abeyance until the expiry of your present medical certificate in two weeks' time…

> The company wishes you well and hopes that your health will improve shortly. If there is anything that we can do to assist you please do let me know."

37 The claimant's solicitor then became directly involved. An exchange occurred, the details of which have not been provided to the Employment Tribunal. So, from the evidence provided to us, the next relevant link in the chain was an email from Mr Ritchie to the claimant's solicitor dated 27 June 2017 at 15:43. The salient extracts from this email are as follows:

> An investigatory process has been initiated which may or may not result in further action being taken in respect of your client…
>
> Your client has been invited to participate in such process – whilst your email is unclear it does appear to imply that we as your client's employer have no right to initiate such a process? Your client is unwell, we have agreed to delay and/or modify such process until your client is well enough to participate. We have agreed to review matters when your client's current [sickness certificate] expires.
>
> … No disciplinary action has been taken against your client we are merely investigating certain allegations.
>
> Your comments reclaims [sic] in respect of discrimination and constructive dismissal leave us non plussed. We have not discriminated against your client on the grounds of any protected characteristic covered by the Equality Act 2010…
>
> Does your client wish to initiate a statutory [sic] grievance in respect of allegations of discrimination? If you please advise us of the substance of the alleged discrimination conduct on our part?
>
> In essence:
> … Does your client wish to participate in the investigatory process whilst she is unwell or would she rather wait until the expiry of her present [sickness certificate]?
> Does she wish to participate by some other method?
> Does she wish to initiate a grievance?...

38 The claimant's solicitor responds as follows:

> …You state my client's allegations are refuted yet you seek to enquire as to whether or not my client wishes to raise a formal grievance. If you have already decided that her claims are refuted, what would be the point of her raising a grievance with her employer who has already dismissed it?...

39 Rather than clarify issues, this correspondence sought to heighten confrontation. In his evidence Mr Ritchie said that he felt intimidated by the claimant's solicitor, which was a significant reason he gave for objecting to his attendance at any formal meeting.

40 Mr Ritchie responded to the claimant's solicitor later that day as follows:

> Your client is welcome to participate in the investigatory process by email if that's what she wants. We made clear that we would wait to see if the medical situation resolved itself before considering other methods of participation…

41 The next day, 28 June 2017, Mr Ritchie emailed the claimant's solicitor asking a list of questions. At the hearing we asked Mr Ritchie questions about his correspondence. We quickly gained the impression that Mr Ritchie did not really seem to engage with the complexities of this situation. He felt out of his depth. He obtained legal advice and followed this seemingly without questioning and with little comprehension. He was not able to explain the purpose of some of his emails. We are satisfied that Mr Ritchie was honest and frank in his account. His insurers told he what to do and what to write and Mr Ritchie followed this advice with little perception as to what was going on. Mr Ritchie was entirely dependent upon his insurer advisor taking him through the process. To further illustrate Mr Ritchie's lack

of understanding, he relayed a number of questions, which the first 3 of which, were questions that we determine Mr Ritchie's adviser was asking Mr Ritchie to address rather than relay these to the claimant's solicitor.

42 On 5 July 2017 Mr Ritchie wrote to the claimant's solicitors as follows:

> We are finding it increasingly difficult to progress expeditiously with our investigation due to the clumsy way that questions inevitably have to be put and replied to (no criticism is levelled at you or your client) – the process is simply, unworkable.
>
> We need hardly remind you of the process that an employer needs to go through when investigating allegations again [sic] an employee. In the vast majority of cases these investigatory interviews are conducted face to face – the ACAS Codes provide for that process to be followed. As we have pointed out before, on your instructions, Anne did give us the choice of how to proceed, and we chose the face to face meeting option, as we do have an obligation to offer your client an opportunity to take part in the investigatory process. We accept that due to her incapacity she cannot do this at present. That situation may resolve itself when your client's health improves. Anne is due back at work on Tuesday 8th July, so hopefully the meeting can take place after that…….
>
> If Anne is unable to return to work on the 8th July, we have already confirmed that we are prepared to wait for a reasonable period to ascertain whether your client's health will improve. A Med3 fit note does not automatically preclude an employee from attending an investigatory meeting – a fit note relates to not being able to carry out normal duties and being under investigation is not a normal duty. In due course it may be that we need clarification from your client's GP that she is too unwell to participate in an investigatory process – it is at that point that alternative methods of participation will be considered.
>
> We fervently hope that the email process would be an adequate process of conducting this investigation but it is not. There are some other questions that we need to put to her in due course. These will be asked face to face unless your client's health does not allow at the germane time…
>
> … We wish your client well and hope that the medical issues will resolve themselves over the next few week...

43 The claimant's solicitor responded 2 days later. He said that the claimant had indicated that she had been discriminated against and that if the employer's officers wished to ask specific questions face-to-face then the respondent should allow the claimant to be accompanied by him at any meeting.

44 Mr Ritchie refused this request on 7 July 2017. He referred to legal precedent and said that the claimant had no right to be represented by a solicitor at such process meetings. Mr Ritchie said that he was prepared to allow the claimant to bring a work colleague or a trade union official to the meeting, although he would not allow the claimant's solicitor to attend. Mr Ritchie said that if it would make the claimant feel more at ease, he was content to hold the meeting at an off-site location. These concessions were significant as under the contractual disciplinary procedure, or otherwise, the claimant was not entitled to representation (or accompaniment) to an investigatory meeting nor the have an investigatory meeting held offsite.

45 On 10 July 2017 the claimant obtained a further sick note for 2 weeks citing 'stress at work'.

46 On 11 July 2017, Mr Ritchie wrote to the claimant's solicitor expressing concerns about the delay in holding the investigatory meeting and made the point that this was causing the claimant to be stressed and that the only way for this to be resolved was for the claimant to come to the meeting.

47 On 21 July 2017, the claimant posted a Facebook or Messenger message in response to Mrs Ritchie's enquiry of whether "they" knew her intentions yet:

> No my solicitor insists i musnt resign yet as it will damage my case but i don't know how long GP will keep signing me off…i can only burst into tears so often hehe.

48 On Friday 21 July 2017, Mr Ritchie wrote to the claimant as follows:

> … This matter can hopefully be dealt with very quickly once the investigatory meeting has taken place and you return to work (dependent on the outcome of the investigation).
>
> I attach a copy of your employment contract which clearly sets out the terms of our sick pay policy. The payment of sick pay is entirely at my discretion, and I have to take many factors into consideration, including the ability of the company to pay sick pay at any given time.
>
> Since Christmas, we have had another member of staff off for a number of weeks with stress and he was only paid SSP, and we currently have a member of staff off work (he is seriously ill in hospital) for four weeks, he again is on SSP so I fail to see how you are being treated differently to any other members of staff at this financially difficult time for the company.

49 The claimant went to her GP on 27 July 2017 and obtained a further sick note, which took her up to the 8 August 2017. It is not clear whether she burst into tears on this occasion, but we do find that the claimant's sick leave absence was manufactured (and deceitful) from at least from one week prior to this.

50 On 26 July 2017 Mr Ritchie wrote to the claimant asking her if she was "up to coming to a meeting?". He reiterated "you can have anyone from work with you, or a trade Union Representative, and we can make it a neutral venue". The claimant responded that she would agree to the meeting "ONLY if my solicitor can accompany me…I am not prepared to face you and/or Nigel without someone to represent me…"

51 On 28 July 2017 Mr Ritchie requested the claimant give her consent to the respondent seeking a medical report. He set out the various legislative provisions regarding the access to this information and he detailed the safeguards available to the claimant. He did not ask to go through the claimant's private and confidential medical records. The claimant refused to complete the consent form.

52 On 14 August 2017 Mr Bullen-Bell wrote to the claimant requesting an up-to-date sick note as the previous sick note expired on 8 August 2017. The claimant did not respond to this request, so Mr Bullen-Bell repeated this request 2 days later stating that this would allow the respondent to update its records and continue to pay the claimant's SSP.

53 The claimant responded later that day, i.e. 16 August 2017:

> In response to your emails, I am no longer signing off. However, I do not intend to enter into any further correspondence until my solicitor returns from holiday.

54 In evidence the claimant said that at this stage she was resolved to treat herself as constructively unfairly dismissed. She said that she did not resign at that stage because she wanted to approve her resignation letter with her solicitor. The claimant did not clarify to the respondent when her solicitor was to return from holiday.

55 In response to her email, Mr Bullen-Bell informed the client that her absence was treated as unauthorised.

56 At this time Mr Ritchie was still on holiday. Upon his return he initially wrote to the claimant's solicitor noting that she is away from work uncertified and had been since her Fit Note expired on 8 August 2017. He asked whether the claimant had

terminated her employment as he said he was "somewhat in the dark as to her intentions".

57 On 30 August 2017 Mr Ritchie wrote to the claimant as follows:

> We understand you are now fit to return to work.
>
> Please therefore present yourself for work tomorrow morning at 9:00am.
>
> We will reconvene the investigatory meeting within a few days after your return tomorrow. All arrangements for you to be accompanied at the meeting remain in place as previously advised'.

58 The Claimant thereupon resigned within 20 minutes via her solicitor.

> I note your email and request for my client to return to work tomorrow with the view to the investigatory meeting taking place a few days later. This confirms my client's suspicion that she was suspended without lawful reason and that the suspension was not a neutral act but a detriment.
>
> Given the treatment that my client has received, and her loss of trust and confidence in her employer to act reasonably, I am instructed to tender my client's resignation with immediate effect and my client will be issuing a claim for constructive unfair dismissal along with claims for discrimination which you are already aware of……"

Our Determination

59 Our first task was to examine the respondent's conduct identified in the list of issues above at 1.1.1 to 1.1.8. This is the conduct that the claimant said lead to her constructive dismissal.

60 The claimant was not suspended without reason. The claimant had attempted to send financial information about dividend payments from the company to Mrs Ritchie in, what appeared to be, a rather suspicious manner. This raised Mr Bullen-Bells' suspicions. He reported this to Mr Ritchie and this gave rise to his legitimate concern in respect of breach of confidentiality. This matter was ventilated at length at the Employment Tribunal hearing. The claimant received a telephone call from Mrs Ritchie on her mobile phone and she left the office. She then came back and typed the information in a word document. This was not printed on headed company paper, presumably because the information sent out on company paper would need to be signed by an authorised signatory of the company. So, providing this type information on plain paper was, in itself, suspicious. The manner in which the claimant took the telephone call could also be construed as suspicious when taken with the other features. The comments that the claimant said to Mr Morton, which we found proven, were also suspicious. We are not convinced by the claimant's response that she wanted to get this information out quickly as we could see no urgency in itself to convey the information and by sending this information on headed paper, it would save the necessity of the claimant writing out an envelope, as she said there were window envelopes available for this purpose.

61 Having explored this matter in the hearing, we are satisfied that the claimant was not acting in breach of her duties as Office Manager. We note that she did not have a detailed job description and that she gave Mrs Ritchie information that she was entitled to. But that misses the point. This was sensitive financial information about the company. The claimant's behaviour was odd and furtive. It gave concerns to Mr Ritchie that the claimant could have been disclosing other financial matters. Whether or not the claimant did anything wrong in this instance, it was unlikely that her actions would have translated into disciplinary action following a proper

investigation. However, how she went about sending Mrs Ritchie such financial information about the company that looked conspiratorial.

62 This gave rise to a legitimate concern for Mr Ritchie. Mr Ritchie after clarifying the method of the disclosure of this information went to look at the claimant's computer. We are satisfied that he found that the claimant had sent a confidential document concerning Mrs Ritchie's son to her private email address and that this also warranted further investigation. We therefore determined that the Respondent had a good (or at least sufficient) reason to suspend the claimant given her access to confidential documents.

63 There was no evidence that Mr Ritchie was particularly engaged with considering whether action short of suspension was appropriate in this case. This could be directing the claimant to work from home or limiting her duties. However, the claimant was the senior administrator. She has far-ranging duties and extensive discretion. As this was coupled with a matter under investigation that suggested that there could be a breach of trust, we could not see how any action short of suspension could possibly have worked.

64 On 27 June 2017 the claimant's solicitor became directly involved. Rather than clarifying issues, unfortunately the correspondence descended into tit-for-tat point scoring and censure. Mr Ritchie invited the claimant to raise a grievance in his email to her solicitor of 15:43. In his response, at 16:10 the claimant's solicitor muted a possible grievance and then discounted raising this, he mooted "what would be the point". The claimant went to a professional advisor and she followed his advice. The claimant's professional advisor specifically discounted raising a grievance at this point. There patently was no grievance raised by the claimant's solicitor's email of 27 June 2017 so the contended poor conduct by the respondent at 1.1.2 is rejected.

65 The claimant complained that she was treated differently by initiating disciplinary proceedings. "Initiating disciplinary proceedings" amounted to her suspension and the ensuing investigation, both of which were covered by the contractual Disciplinary Policy and Procedure. For the different treatment the claimant complained of, the claimant compared herself to Mr Morton who actually sent out the information to Mrs Ritchie on headed paper. Firstly, Mr Morton raised the claimant's surreptitious behaviour with Mr Bullen-Bell. Prior to suspension Mr Ritchie spoke to Ms Jo Patrick (who subsequently confirmed it in an email) that the claimant had asked Mr Morton to post the envelope. So Mr Morton conduct was blameless. Finally, when Mr Morton posted the information to Mrs Ritchie (on headed paper), this was specifically authorised/instructed by Mr Ritchie. So the claimant's comparison of her circumstances with that of Mr Morton is absurd.

66 The complaint of failing to allow the claimant to deal with a disciplinary matter by way of correspondence as agreed but later withdrawn is similarly ludicrous. At no stage did we see that the respondent agreed that they may not need to interview the claimant as part of an investigatory process. This is a fiction. The claimant is not being frank in raising/pursuing this issue. In a disciplinary investigation generally and in particular an investigation involving a possible breach of trust and the handling or sensitive financial and/or confidential information an investigation without interviewing the main protagonist would be exceptional. The claimant was off sick. Mr Ritchie agreed to put a number of questions to her in correspondence. Mr Ritchie subsequently thought this process was clumsy. He said that, amongst other things,

he wanted to ask the claimant about the notes of the redundancy meeting which had not been explored in correspondence. We accept his evidence that he wanted to ask the claimant about this matter and that it was reasonable in the circumstances not to address this in correspondence. He said that he wanted to raise this directly with the claimant to gauge her reaction.

67 We also find that the claimant had not answered all of the questions put to her by Mr Ritchie particularly as she answered the last question by saying that she did not understand the question. This in itself highlighted the limitation of written questions as an investigatory method.

68 The claimant was not entitled to contractual sick pay, even if she was genuinely sick, which we find that, by at least 21 July 2017, she was not. According the claimant's contract of employment, sick pay above SSP was "not payable other than at the Employer's absolute discretion". So far as we can ascertain, Mr Ritchie did not give very much thought about how he exercised his discretion. The claimant was on sick leave absence pending a disciplinary investigation. He did not allow the claimant sick pay because he said when asked, he said the company was going through financial difficulties and he referred in correspondence to 2 individuals who had not received sick pay. One person had received discretionary sick pay in the past, but that was back in 2013. We were not provided with evidence about the circumstances of this individual and whether his case was similar to the claimant's in order to explore the possible precedent. It was apparent to us that Mr Ritchie did not know that the claimant was fabricating her sick leave absence from 8 August 2017. It would have been unusually to exercise a discretion to pay for sick leave absence for someone subject to a disciplinary investigation, and the claimant has not proffered any evidence to suggest that that Mr Ritchie should have exercised his discretion differently.

69 In respect of issue 1.1.6, on 20 July 2017 the claimant accused Mr Ritchie of telling "all staff" not to talk to her. This was part of the claimant's contrivance to enable her solicitor to represent her in the disciplinary investigation meeting. In that email, the claimant dismissed being accompanied by another member of staff as "out of the question". This accusation was a significant escalation of the dispute, the claimant said that she did not intend to identify the person who told her that work colleagues had been prevented from communicating with her for fear of reprisals against them. At the hearing, the claimant refused to identify her colleague who could corroborate that staff were told not to speak to her. The claimant did not substantiate this accusation at the time and, when repeatedly asked, she refused to substantiate the allegation at the hearing. We conclude that this was because it was not true. We reject the claimant's allegation in this respect.

70 The claimant also complaint of Mr Ritchie subjecting her to an intimidating and hostile environment prior to her suspension. Specifically, that Mr Ritchie shouted at her on 9 June 2017 and the aggressive tone from Mr Ritchie in emails. The claimant made no allegations against Mr Bullen-Bell as to being aggressive or intimidating; at the hearing she said it was just Mr Ritchie.

71 Mr Bullen-Bell attended the suspension meeting, which occurred early on Friday 9 June 2017. He sent minutes of the meeting to the participants, i.e. the claimant and Mr Ritchie on 13 June 2013. Although the claimant did not see this email for some time we accept that this is an accurate account of the meeting and its

immediate aftermath. This provides contra-indication of aggressive questioning or an over-bearing attitude by Mr Ritchie at the meeting.

72 Mr Ritchie arranged for a suspension letter to be sent to the claimant straight after meeting. The letter was delivered by Mr Bullen-Bell. The claimant texted Mr Bullen-Bell later that day complaining about his apparent cowardice in not seeing her. This text did not raise any issue of being bullied to Mr Bullen-Bell. The claimant was a robust co-worker. We are satisfied that if she felt intimidated then she would not have sent such a combative text to her colleague.

73 Having heard the case and the claimant evidence, we determine that the claimant was not bullied or intimidated or subject to a hostile environment prior to her suspension or at all.

74 According to the claimant's own case, she did not raise any bullying or harassment complaint against Mr Ritchie until 6 weeks after her suspension and sometime after she had sought legal assistance. On 20 July 2017 the claimant wrote to Mr Ritchie stating that it was not only the meeting itself that had caused her stress, but the way that she had been treated differently which had also caused a great deal of stress and concern. At the hearing the claimant said that this was a reference to being bullied. We reject the contention that this email referenced being bullied. The email contained a reference to an allegation of detrimental treatment on the grounds of her sex which the claimant's solicitor was pursuing with Mr Ritchie at the time. This was not a reference to being bullied and we determine that the claimant made no complaint of bullying during her employment with the respondent.

75 There were no emails brought to our attention from Mr Ritchie that could be properly described as "aggressive". So far as the correspondence is concerned, there is nothing in the correspondence that we have seen to indicate that Mr Ritchie was aggressive and intimidating towards the claimant. In fact, it was quite the reverse his correspondence was calm, measured and supportive.

76 The allegation that the respondent required the claimant to return to work not knowing that she was facing an investigatory meeting and/or without telling her that her suspension had ended is another hopeless contention. It was quite clear that Mr Ritchie instructed the claimant to return to work in his email of 30 August 2017. It is evident that an instruction to return to work ends a period of suspension. Mr Ritchie was explicit that an investigatory meeting would be arranged promptly and after the claimant returned to work. The email was clear; the claimant was to return to work – to work. An investigatory meeting would follow "with a few days".

77 It is our determination that the claimant was never going to return to work. As early as 16 August 2017 the claimant indicated that she was waiting for her solicitor's return from holiday to check through her resignation letter. It was only when the respondent took firm steps designed to get the claimant back to work that she resigned.

78 Issues 1.1.1, 1.1.3, 1.1.6 and 1.1.7 represented allegations of clear and obvious fundamental breaches of contract. Issues 1.1.2, 1.1.4, 1.1.5 and 1.1.8 amount to allegations of serious poor conduct by the respondent that may not reach the threshold of a fundament breach in themselves but could contribute to the last straw principle. The purported breaches amounted (either individually or cumulatively) to a

breach of the implied term of trust and confidence. However, we determine that the respondent has not conducted itself in the manner contended, at all. There was no conduct by the employer that was calculated or likely to destroy or seriously damage the relationship of trust and confidence between the employer and the employee.

79 We do not accept that the employer's actions were a significant breach of contract (either individually or cumulatively) so the claimant has not got past the first stage of the *Western Excavating* test referred to above. If there was no breach of the implied terms, then there can be no finding that the claimant resigned in response to the breach or breaches as identified at issue 1.1.

80 As there was no fundamental breach of contract, we do not determine whether this was affirmed or not.

81 The claimant resigned claiming that she was constructively dismissed. As there was no dismissal by the respondent issues 1.5 and 1.6 are immaterial.

82 In respect of victimisation, it was not disputed by the respondent that the claimant's solicitor's email to Mr Ritchie amounted to a "protected" act under s27(2)(d) EqA. The email explicated asserted that the claimant might exercise her rights under the EqA. However, with victimisation, causation is everything, specifically, did the respondent subject the claimant to a detriment, and, if so, was the claimant subjected to those detriments for raising the possibility that she may exercise her rights pursuant to the EQA.

83 The claimant said that her detriment amounted to:

83.1 The respondent compelling her to attend a face-to-face meeting having agreed in correspondence to deal with its investigation through questions and answers.

83.2 Not informing the claimant as to what was happening with her suspension.

83.3 Not having a solicitor plaque present at an investigatory meeting.

84 We do not accept that asking an employee to attend a face-to-face investigatory meeting amounted to a detriment. The claimant was not entitled to such an investigatory method and she was wrong to assert that Mr Ritchie agreed to dispense with the need for the claimant to attend a face-to-face meeting. The claimant was away from work on sick leave. We now know that sick leave to be orchestrated and dishonest (from at least 21 July 2017). However, Mr Ritchie was keen to progress the investigation into possible breaches of confidentiality. He agreed to submit written questions that the claimant. This was time-consuming and proved to be a convoluted process because the respondent's questions were prepared by its legal expenses insurers and the claimant's answers was scrutinised and responded to by her solicitors. A face-to-face meeting would have resolve matters so much quicker. So therefore, we did not regard this as a detriment. Indeed, if there was a detriment then it was prolonging matters, and this was caused by the claimant who was resolved not to return to work from an early stage (most likely from her response in her suspension meeting). Had the claimant returned to work promptly and attended a face-to-face investigatory meeting then these matters could have been sorted out without further rancour.

85 Mr Ritchie kept the claimant informed throughout her absence, either directly or through her solicitor. He was keen to progress the investigation. The claimant frustrated his efforts at various opportunities. The claimant's solicitor then entered the fray and pursued an argumentative and deflecting course. We determine that the claimant (and her professional representative) were completely clear about what was happening with her suspension and they did everything they could to frustrate the investigation, which had the effect of prolonging matters.

86 Not having a solicitor present at an investigatory meeting is not a detriment in the circumstances. This was not a legal process; it was an internal workplace investigation into what looked like suspicious activity and an apparent breach of confidentiality. The meeting in question was not even a disciplinary hearing and the claimant had no clear basis to insist on her solicitor been present. The claimant was an intelligent, articulate and forceful person. She did not need a solicitor to be present at any investigatory hearing and there was no reason for him to attend.

87 Even if the above could amount to detriments, there simply was no causal link between any possible detriment and the protected act contended. To establish that the treatment was because of a protected act, it must be shown that Mr Richie was either consciously or subconsciously influenced by the protected act: see *Reynolds v CLFIS (UK) Ltd [2015] IRLR 562*. The *Barton* and *Igen* guidance offer practical guidance on applying the shifting burden of proof. Significantly, the burden of proof does not shift to the respondents and Mr Ritchie unless the claimant has raised facts from which the Tribunal could conclude, in the absence of any adequate explanation that the respondent committed the victimisation contended.

88 Issue 2.2.2 is simply wrong; the claimant was never in the dark as to her suspension. For the reasons that we state in respect of constructive dismissal, there were perfectly rational, understandable and reasonable reasons why Mr Ritchie pressed the claimant to attend a face-to-face investigatory meeting and why he did not want a solicitor present at such a meeting. Furthermore, we believe Mr Ritchie in his account as to why he wanted to meet the claimant face-to-face and why did not want to meet her solicitor.

89 Finally, in respect of the claimant's breach of claim for discretionary sick pay, we accept Mr Ritchie's account that he thought about whether or not he should pay the claimant sick pay when this was raised, but he decided not to make such discretionary payments. He did not exercise his discretion in the manner that breached the claimant's contract. That said, we accept that it was reasonable not to pay the claimant discretionary sick pay in the circumstances of this case.

Employment Judge Tobin

13 November 2018