EMPLOYMENT TRIBUNALS

Claimant: Mrs Julie Jones

Respondent: FMC Agro Ltd (formerly Headland Agrochemicals Ltd)

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

Heard at: Mold **On:** 13-14 November 2018

Before: Judge Brian Doyle (President)

Appearances
For the claimant: Ms T Ahari, of Counsel
For the respondent: Mr J Arnold, of Counsel

JUDGMENT

1. By consent the title of the respondent is amended to "FMC Agro Ltd (formerly Headland Agrochemicals Ltd)".

2. The claimant's resignation amounted to a constructive dismissal within the meaning of section 95(1)(c) of the Employment Rights Act 1996.

3. The claimant was unfairly dismissed by the respondent.

RESERVED REASONS

Preliminary matters

1. At the commencement of the hearing the parties introduced three additional documents (pages 150-152 of the hearing bundle), an agreed chronology and an agreed list of issues. The Tribunal agreed to a split hearing: liability first and then remedy.

2. The claim was originally brought against "Headland Agrochemicals Ltd". The parties are agreed that the correct title of the respondent is "FMC Agro Ltd (formerly Headland Agrochemicals Ltd)". The title of the proceedings is amended accordingly.

3. References to the hearing bundle (pages 1-152) appear in square brackets [ ] below.

4. A small number of employees of the respondent were named in the evidence. Apart from the claimant and the two managers who gave evidence, those other employees were not witnesses who gave evidence at the hearing. The Tribunal does not consider that it is necessary to name those employees in these reserved reasons. Their identity will be apparent to the parties from the context below.

The claim

5. The claimant's claim (ET1) was accepted by the Tribunal on 7 February 2018 [1-19]. The claimant relied upon her employment as a Sales Assistant with Headland Agrochemicals Ltd, said to have commenced on 18 May 2011 and terminated on 24 August 2017. She indicated that she had commenced new employment on 29 August 2017. The claim contained complaints of unfair dismissal and wrongful dismissal, although the complaint of wrongful dismissal is no longer pursued (the claimant having been paid for her notice period).

6. The claimant's grounds of complaint [16-19] rely upon her giving the respondent written notice on 27 July 2017 terminating her employment with effect from 24 August 2017. She asserts her entitlement to resign her employment because of a repudiatory breach of her contract. She relies upon the history of the matter set out at paragraphs 5(a) to 5(s) of her grounds of claim. Her contention is that the respondent's conduct was wholly unjustified and unreasonable. Together with the alleged failure of her line manager (Mandy Jones) to give her proper support, that conduct was said to have destroyed the relationship of trust and confidence between the parties (paragraph 6). The claimant relied upon there being a constructive dismissal and that that dismissal was unfair given the respondent's failure to recognise, acknowledge or address her "grievances" raised concerning excessive workload and lack of support (paragraph 7).

The response

7. The respondent presented its response (ET3) to the Tribunal on 6 March 2018 [21-32]. The claimant's employment details were agreed. The respondent asserted that the claimant had worked her notice period. Otherwise the claim was defended.

8. The grounds of resistance admitted or noted paragraphs 2-4 of the grounds of complaint. The respondent denied that it had acted in any manner that gave rise to a repudiatory breach of contract. Admissions or part admissions were made in respect of paragraphs 5(a) to 5(g) of the grounds of complaint. The assertions in paragraphs 5(h) to 5(s), 6 and 7 of the grounds of complaint were disputed. The complaint of wrongful dismissal was defended on the basis that the claimant had worked her notice period and had been paid for it. (As noted above, that complaint is no longer pursued).

Schedule of loss

9. A schedule of loss appears at [32A-32E].

List of issues

10. The respondent's counsel, Mr Arnold, had prepared a list of issues, which had been agreed by the claimant's counsel, Ms Ahari. That list of issues will be apparent from the discussion section below.

11. In his submissions Mr Arnold, for the respondent, referred to the claimant's particulars of claim at paragraphs 5(j) to 5(r) of the ET1 [17-18] as being the list of alleged failures on the part of the respondent and the events leading up to the claimant's resignation upon which the claimant relies.

12. However, in her submissions, on behalf of the claimant, Ms Ahari referred also to paragraph 5(s) of the ET1 [19]. That sub-paragraph reads: "On 3 August 2017 the claimant emailed Mandy Jones repeating that her resignation was a direct result of the lack of support and excessive workload over the preceding 2 years. The claimant further reminded Mandy Jones that she had only ever agreed to stay with the respondent based on Mandy Jones's express assurances that the claimant would be offered an enhanced redundancy payment if she chose to leave". That email appears at [94-98] and the questions of excessive workload, lack of support and a purported promise of an enhanced redundancy package were at the heart of the evidence heard and tested before the Tribunal.

13. There is no explicit reference to paragraph 5(s) in the agreed list of issues, although there is sufficient reference in the list of issues to workload, support and the alleged promise regarding a redundancy package to ensure that a reference to paragraph 5(s) is at least implicit.

14. The Tribunal does not consider that this is a situation covered by *Chapman v Simon* [1994] IRLR 124 CA. It agrees that a Tribunal should be slow to depart from an agreed list of issues, save in exceptional circumstances, and that a Tribunal can only determine the complaints that have been made to it. The Tribunal is satisfied that it is not constrained by the legal authority in *Chapman v Simon* in the context of the present case. The scope of *Chapman v Simon* and of the related decisions in *Parekh v London Borough of Brent* [2012] EWCA 1630 and *Scicluna v Zippy Stitch Limited* [2018] EWCA Civ 1320 has very recently been considered by the EAT in *Saha v Capita plc* (EAT, 29 November 2018, Slade J). The core duty of the Tribunal is to determine the claim before it in accordance with the evidence and the relevant legal principles. That is an uncontroversial proposition.

15. Mr Arnold conceded that he had not been entirely prejudiced, although he had suffered a little disadvantage, given his focus had been on the factual matrix and his cross-examination had been constructed by reference to the list of issues and the pleadings (the Tribunal's emphasis).

16. The Tribunal is satisfied that the claimant's case in paragraph 5(s) falls to be considered by it. The respondent's position in relation to that is entirely clear and the

Tribunal does not consider that the respondent is prejudiced or disadvantaged to any significant degree.

The evidence

17. The Tribunal heard evidence from the claimant, Mrs Julie Jones and, for the respondent, Ms Mandy Jones (Finance Director) and Ms Sue Keenan (HR Business Partner). All three witnesses relied upon witness statements (Ms Mandy Jones relied upon a second witness statement also), which were taken as read, and they were then subject to cross-examination, the Tribunal's questions and re-examination.

18. The Tribunal was referred selectively to a hearing bundle of relevant documentary evidence [1-152]. The claimant also provided a supplementary bundle [JJ1].

Assessment of the evidence

19. The Tribunal is satisfied that all three witnesses gave their evidence honestly and to the best of their knowledge and belief. It is not necessary to reject a witness's evidence, in whole or in part, by regarding the witness as unreliable or as not telling the truth. The Tribunal naturally looks for the witness evidence to be internally consistent and consistent with the documentary evidence. Is the evidence probable? Is it corroborated by other witness evidence and/or by the contemporaneous records or documents? How does the evidence withstand cross-examination? How reliable is a witness's recollection? Is a witness speculating rather than testifying? What is the witness's motive for their account? How does the witness compare to other witnesses?

20. The Tribunal found the claimant to be a consistent and compelling witness, whose account was detailed and plausible, with an impressive recollection of events that were of considerable significance to her, and in keeping with the documentary record. The Tribunal guards against the possibility that her evidence illustrates how "the wish can be father to the thought", but any suggestion of that is overtaken by the consistent account given by the text messages and the email evidence.

21. In contrast, the evidence of Mandy Jones and Sue Keenan was in many places vague and less well-informed. Both witnesses had a tendency to say what they "would have done" rather than what they "did do". Sue Keenan was somewhat remote from the events in question, perhaps understandably so, as a business HR Partner covering a number of sites. Her answer to a number of questions in evidence was that she could not recall or that she was not aware or that matters had not been brought to her attention. Mandy Jones gave an impression of a line manager who was forever "fire-fighting" and for whom the constant theme was to keep the claimant and the Customer Service Department on board or risk a meltdown of the relevant part of the business.

22. The Tribunal preferred the evident of the claimant where there were matters of dispute or contest for the above reasons.

Findings of fact

23. The respondent company is part of the FMC Corporation. It is a leading supplier of speciality and generic crop production products, foliar nutrition (including advanced micronutrient products), soluble fertilisers and adjuvants. It services UK customers in the agricultural, horticultural, industrial and amenity sectors as well as overseas export markets. It is based in Deeside, North Wales.

24. The claimant's employment with Headland Agrochemicals Ltd commenced on 18 May 2011 [33]. At first she was employed as a Part-time Customer Service Assistant. From 1 March 2012 she became a Full-time Customer Service Assistant [43]. From July 2014 her job title was amended to Customer Service Manager until the late Summer 2016, when her job title changed to that of Sales Assistant [16 and 28] with effect from 9 September 2016. Her normal working hours were 37.5 hours per week. Her role was a combination of order management and customer liaison.

25. The department within which the claimant worked had shared responsibility for customer service and for exports. The staff establishment fluctuated in numbers as employees were brought in and let go on temporary contracts, and as the effects of a restructuring in 2016 were felt. The Tribunal has been shown two tables [151-152], the accuracy of which the Tribunal accepts, which show that the numbers employed in the relevant department fluctuated between 5 staff in January 2016 (3 staff in customer services and 2 staff in exports) to as low as 2 staff in October 2016 (when 2 other staff were made redundant) and 3 staff in August 2017 just before the claimant's resignation. Temporary staff were hired as required (the question of authority to hire is addressed below). This is also reflected in the chronology. At the relevant times, authority to hire temporary staff resided with Mandy Jones, although the claimant would be actively involved in the hiring process.

26. In 2014 the respondent company was acquired by the FMC Corporation, a US corporation. Later it acquired Cheminova, based in Copenhagen. The company intended to transition to a centre-led model. As part of the restructuring that followed the order management/customer service department where the claimant worked was due to move to Copenhagen in Denmark. The claimant was worried about the change in her job role.

27. In February 2016 the Export Customer Service Manager left. The claimant's most immediate colleague was then seconded to take on the export role. The claimant took over the customers that her most immediate colleague had handled. The claimant had administrative help from another member of staff, but that employee took long term sick leave from July 2016. Some assistance was also provided by a temporary employee between February and May 2016, until the claimant's most immediate colleague returned to the customer services role. At about this time the claimant advised Mandy Jones that she was struggling. Management recognition that despite all of this the claimant had achieved well "with an inexperienced team" is evidenced in a Facebook message at [73C].

28. In August 2016 Mandy Jones told the claimant and her most immediate colleague that she would make sure that they would receive enhanced redundancy

packages and a handover bonus if they were not happy in their altered roles at the end of the 2017 season.

29. On 16 August 2016 reference was made in a text between the claimant and her most immediate colleague to her wish to have in writing that the respondent would honour a redundancy package at the end of the 2017 season if they did not like the jobs or the people they were working with [60A].

30. On 19 September 2016 it was recorded that the claimant's job title had been changed to Sales Assistant, now reporting to Mandy Jones [61]. Her role as customer services manager moved to Copenhagen with effect from 1 October 2016 and two members of staff were made redundant.

31. On 30 September 2016 Mandy Jones texted the claimant and her most immediate colleague [62]: "Ladies, I know today was a tough, shitty day! I also know [another employee] is no use and a pain. We move forward and look now to try to support the new way of working and how we fit together with the new team. Thank you, be safe when you travel and call at any time if you are concerned or need anything at all. Big hugs to you both! Tough times I know! Mand xxxxxxx"

32. On 1 October 2016 the claimant replied to Mandy Jones [63]: "Yes it was, probably the worse week I've had there, topped off by takin my dog to be put to sleep last night, I haven't slept properly for weeks, its to effect everything, but when its my health its not good. I also want to put in a complaint about [another employee] and why she singled me out, I'm sorry if this causes problems but enough is enough x."

33. On 3 October 2016 the claimant and her most immediate colleague went to Copenhagen to assist with the transition there. They discovered significant customer service and supply chain problems. These problems continued over several weeks and resulted in a number of complaints.

34. There then followed an exchange of text messages between the claimant and Mandy Jones. On 3 October 2016 the claimant reported that all orders were blocked due to credit limits [64]. Mandy Jones undertook to follow this up. She inquired about the claimant and her most immediate colleague. The claimant replied: "Yeah fine just tired, its every order …" [64]. Mandy Jones responded: "Bloody hell. Thanks for being there, I know this is tough. Enjoy DK and keep in touch on how u r getting on. Have you been able to check ur emails. Xx" [64]

35. On 4 October 2016 Mandy Jones texted to ask whether they were both home safely, whether the journey went smoothly and that she would see them the next day [64].

36. On 5 October 2016 the claimant's most immediate colleague exchanged texts with the claimant [65A]: "We need to sit down with her [Mandy Jones] today and she needs to listen to what we have to say. She won't like it but tough". The claimant replied [65A]: "yes im with you about sitting down with her … I wont say anything about the trip to her till we sit down together. I don't feel any different today about anything I just want out … it's a joke!". Her colleague replied [65A]: "No I feel worse if anything. They are taking the mick out of us now. Hopefully won't be long".

37. There followed a meeting with Mandy Jones immediately following the return from Copenhagen. They explained the problems that they had found in Denmark. They asked about their redundancy packages. Mandy Jones told them to trust her. She repeated her promise that she would make sure that they would receive enhanced redundancy packages and a handover bonus if they were not happy in their altered roles at the end of the 2017 season.

38. During October and November 2016 the claimant emailed Mandy Jones and Order Management in Copenhagen that evidenced her stress levels and state of mind. It appears from discovery that those emails have been deleted from the server following the ending of the claimant's employment.

39. On 4 November 2016 the claimant texted Mandy Jones to say that she would be late into work. Mandy Jones acknowledged the text and said: "Stop stressing and take care. Xx" [65].

40. On 9 November 2016 Mandy Jones texted the claimant and her most immediate colleague [65]: "Hi …, spoken to [a named manager] again this eve! He has spoken to [another named manager] and trying to line up a meeting for him to fly to DK next week. He is finally there with us, at his breaking point!!! Keep with us, we will sort this. Love u both dearly, u know that. Xxx".

41. On 14 November 2016 the claimant texted her colleague [65B]: "Okey dokey, no worries, don't worry about me, after the melt down they wont put on me at all … I recommend it, think you should have one 2 … no one gives a toss … yr no better thought of if your there are not, or if u get in at half 9, daily for 52 weeks of the year! I f.in Mondays!! I've prob just swayed u to stay off now, barrel of laughs aren't I, this is what that stupid place turns u into!! Rant over and breath x". Her colleague responded [JJ1/3]: "My meltdown is on it's way I think, I cry at everything at the moment, it's ridiculous. I have no patience with Mandy or that stupid bint in Copenhagen or the whole situation. I'll see you soon, safety in numbers me thinks".

42. The reference to "the melt down" is a reference to the fact that the claimant was not coping well with work at this time as a result of the problems with Order Management in Copenhagen. She had had an emotional episode at work and had made as if to walk out. Mandy Jones persuaded her not to do so and reassured her that things would improve. It is likely that this emotionally affected Mandy Jones herself. She spoke to another manager and also involved Sue Keenan. She again confirmed, in the presence of Sue Keenan, that she would make sure that the claimant and her colleague would receive enhanced redundancy packages and a handover bonus if they were not happy in their altered roles at the end of the 2017 season. It seems likely that Sue Keenan had not been made aware of this assurance previously and would have been unlikely to have approved it, although she did not intervene to contradict it. The reassurance was the main reason the claimant was prepared to remain at work at this time and she made this plain.

43. In mid-November 2016 the respondent's management announced that Order Management was being transferred back to the UK from Denmark. Export processing remained in Copenhagen. Despite this, the claimant remained worried about the

security of her role. She worked hard to repair the damage that had been done to customer relationships as a result of the problems that had arisen when the function had been moved to Copenhagen. She continued to feel under pressure and without support. The returning work had to be handled by the claimant and her most immediate colleague alone following the reductions in staff that had been made earlier. The claimant gave evidence of the stress that this created at paragraphs 32-42 of her witness statement, which the Tribunal accepts. This is also evident from her texts in late 2016 [65D-65E].

44. The respondent's business is seasonal, with a very busy period from March to June inclusive (when 80% of orders are placed), quieter periods during the summer and winter months, and a second busy period into September onwards [129-130]. The claimant identified a need to recruit temporary assistance in the early New Year 2017, with a view to having help in place for February 2017 in time for the start of the busy season.

45. In January 2017 the claimant requested temporary assistance. Mandy Jones did not think that such assistance was necessary as the claimant and her colleague were experienced enough to handle the workload and she declined the request. The request was repeated in February 2017 and again declined. The Tribunal is satisfied that the respondent was being made aware by the claimant (to Mandy Jones) that she was under pressure and struggling with her workload at this time.

46. The position was exacerbated with stock problems within the Logistics Department. These problems are described by the claimant at paragraphs 47-50 of her witness statement, which the Tribunal accepts. A further request for assistance was refused by Mandy Jones. Recognition of the stock and logistics problems is reflected in an email of 14 March 2017 from Mandy Jones to the claimant, her most immediate colleague and the relevant manager in the Logistics Department [66]. Tellingly, her email contains the following: "WE MUST WORK TOGETHER – We are a team … If we all agree and work together, we can get through this season without all killing each other – we all want the same thing!". The problems are further evidenced in email exchanges in mid-March 2017 [67-70, 71].

47. In February 2017 a new operations manager was engaged, but this had no direct effect upon the claimant's workload.

48. By March 2017 the claimant was regularly working a 10-11 hours day and sometimes 12 hours without a rest break or lunch break [74A]. Again she made Mandy Jones aware of her position. In early March 2017 Mandy Jones agreed to recruit a temporary employee, who would be a shared resource. The claimant contacted a temporary employee who had previously worked in the department [65I] [70A-70B] [JJ1/4-6] and efforts were also made via a recruitment agency. The temporary worker was recruited by early April 2017.

49. Following a particularly stressful day on 3 April 2017, evidenced by an email at [73A], the claimant texted Mandy Jones. The claimant needed time out and told Mandy Jones so and that she was taking a day's sick leave on 4 April 2017 [74]. Mandy Jones replied on 3 April 2017 [73, 74]: "Jules – u need to just take a step back and not get so angry! I know it is frustrating, it will get addressed but u need to not get so worked up it

doesn't help anyone. [Named manager] speaking to customers as they should not be taking it out on u …".

50. On 4 April 2017 Mandy Jones texted the claimant to ask her how she was [74, 73D]. The claimant replied [73D]: "Yes im ok Mand feeling much better now ive had a cry and kicked the cat, and pulled myself back together, I will be in tomorrow". Mandy Jones then asked whether she could call the claimant, to which the claimant agreed [73D].

51. The claimant returned to work on 5 April 2017, identifying stress as the reason for her absence.

52. The logistics problems continued into April 2017 [112-118]. The Tribunal has noted in particular the claimant's cry for help at [117 and 118].

53. In May 2017 the claimant's most immediate colleague went on sick leave for a non-work-related reason [65D-65H] and also had time off to support her mother. A text message to the claimant referred to her condition and treatment and the fact that she had been given a number for Parable [65F], a counselling service. Some temporary cover was engaged.

54. Logistics problems continued into May 2017 [73A-73B, 79-80]. Further temporary assistance was obtained at the end of May 2017 [72A-72C, 73D, 75A]. The claimant's view was this was too little and too late. She remained under considerable stress.

55. On 24 May 2017 the claimant emailed another manager about the stock and logistics problems [77]. Her frustration was apparent from the email. The manager replied in a way that acknowledged the problem, but also suggested that there was more that the claimant could do to support other, less experienced, staff during the rebuilding process.

56. This elicited an email response the same day from Mandy Jones [76]: "Need to protect and look after our "experienced" staff too! [The claimant] under enormous pressure already with other issues, [other colleague] signed off sick for a couple of weeks and these internal errors that need solutions now and not after the season are not helping. We need some assistance in the Logistics area so I do not know why we are not hiring? The operational staff to get orders out and correct are so much more important than other staff right now. We are suffering as you know, with reputational damage, trust and credibility all of which is the single most important thing to correct and get back. Customer service is the face of this – they need the support and tools to be able to do the job."

57. Despite this, matters took an unwarranted turn at the Spring Bank Holiday weekend. Monday 29 May 2017 was the Spring Bank Holiday. In addition, the claimant would not be working that Saturday and Sunday. Nevertheless, at 17:54 on Saturday 27 May 2017 Mandy Jones texted the claimant as follows [75A]: "Hi Jules, sorry to bother you on a weekend/bank holiday. JK vehicle broke down and some deliveries will be delayed. [Logistics manager] has sent an e-mail and has the order details on it.

If you are around this weekend are you able to log on and send a note to customers? Thanks Mand xx". She emailed the claimant at 17:57 to the same effect [JJ1/11-12].

58. The claimant did as she was asked. It was at about this time that she began to look for alternative employment.

59. On 21 June 2017 further reference was made in a text from the claimant's immediate work colleague to the redundancy package that it was believed Mandy Jones had promised [150]. That colleague returned to work from sick leave.

60. By the end of June 2017 Mandy Jones was asking the claimant whether she would welcome experience on the exports side of the department [119].

61. On 5 July 2017 the claimant emailed the respondent to say that she was unwell and would not be attending work [82]. She confirmed that she was not feeling any better the following day [83]. She made an appointment to see her doctor. She remained on sick leave for a week. She was diagnosed with work-related stress.

62. On 11 July 2017 at 00:15 Mandy Jones emailed the claimant to ask how she was feeling [84-85]. She asked to be kept in the loop as to what the doctor said. She referred to the claimant's symptoms and the need to find out what was wrong and to have medication to get her back to full health. She continued: "Let me know if we can help at all, and keep us all updated on what is wrong with you and when you think you will return to work, if you get signed off please send in your doctors note for my attention".

63. The claimant replied at 06:25 [84]: "Fragile. I did feel sick, not as much now. I'm struggling with everything at the moment and feel burnt out! I emailed in as I didn't want to speak to anyone. If you are in today, I will ring you". Mandy Jones replied at 08:19 that she was at home and that if the claimant wanted to talk she could call her mobile later. At 11:26 the claimant emailed to say that she had just returned from the doctor and that she had been signed off for a month with "work related stress resulting in anxiety and depression". Her doctor would see her again in 3 weeks. She undertook to post her fit note, which is at [86].

64. On 13 July an occupational health referral was prepared [87].

65. There was no response to the claimant until 25 July 2017. On that date Sue Keenan left a voicemail message for the claimant [87A, JJ1/13]: "I just wanted to let you know that, I appreciate that you're off work sick at the moment but I've asked occupational health to get in touch with you. We've got an appointment for tomorrow. I appreciate that you've been signed off sick for 4 weeks, but as part of that sickness I would just like to have you assessed and reviewed and go and have a discussion with them given that you get paid sick pay obviously from ourselves. So I just didn't [?] them to come and be surprised and wonder what it was about. If you could attend tomorrow and they're going to find a time that will be suitably convenient to yourself. So if you've got any questions, give me a call back on my mobile number which is …… Thanks Julie. Bye".

66. Payment of up to 30 days company sick pay would be discretional [48].

67. At 16:20 the claimant texted Sue Keenan [91]: “Sorry, I can’t talk right now”.

68. The occupational health referral form in respect of the claimant appears at [87]. It does not appear to have been made with any great regard for the claimant’s previous employment history. The referral date is recorded as 13 July 2017. The questions to be addressed were expressed as: “We need to understand the work stress that Julie is suffering, all actions have been taken to support Julie and her workload is not large at this moment of time (in fact, very low since we are a seasonal business). We need to dig into the actual cause of the stress and what as an employer we can do to avoid such occurrence in the future”. The referral made no reference to the potentially relevant and related absence in April 2017.

69. The claimant attended the occupational health appointment on 26 July 2017. She was shown the referral for the first time. The terms of it did not assist her state of mind and she felt betrayed by it. She questioned its accuracy.

70. The resultant report is dated that day [88-90]. How the claimant presented herself to the occupational health adviser evidences what she says about her stress and its symptoms. It is supportive of the account that the claimant provides of cause and effect in her witness statement for the present proceedings. The adviser concluded that the claimant was not fit for work and she could not say when she would be so. The report spoke to a need for a review, leading to a possible phased return to work and the need for the respondent to be alert to signs of stress and fatigue.

71. On 27 July 2018 at 12:43 Sue Keenan texted the claimant [91]: “thanks for attending the Occ health assessment yesterday. I am waiting for the report. Would you be able to let me know when you are due to return to work please, so that I can ensure I am available to do your return to work interview and decide what measures we need to put in place.” Sue Keenan was about to go on leave and was covering other matters at this time. The claimant had 48 hours to consider the report before the respondent would receive it. The claimant felt that Sue Keenan’s text took no account of that or her state of health.

72. Just over an hour later the claimant resigned as a result of the immediate events described above and how she had been treated generally. At 1.52 pm on 27 July 2017 she emailed Mandy Jones [92]: “Please accept this email as confirmation of my resignation. As required I am giving 4 weeks notice, my last day will be Thursday 24th August. If you need me to do anything else, please just let me know. Thank you for all your assistance over the last 6 years. Many thanks”.

73. At 8.15 pm that evening Mandy Jones replied [92]: “I am deeply sorry to lose you, you have been an exceptional member of the team at Headland and will be missed by many of your colleagues and by me, personally and as your employer! I acknowledge your resignation, I will ask [HR] to start the process and will inform you if we need anything further. I wish you the very best in whatever you decide to pursue as a career and if I can help you at all, you know where I am”. The email thread was forwarded to Sue Keenan [93].

74. On 3 August 2017 at 2.43 pm Mandy Jones emailed the claimant again [94]. She asked her to confirm her plans as her sick note was due to run out on 11 August 2017 and her entitlement to 30 days paid sick would run out at the same time. She pointed out that her notice period would expire on 24 August 2017. She indicated that she was looking to seeing whether any accrued holiday entitlement would bridge the gap between 11 and 24 August 2017. She asked whether to pack up her things and return them via a colleague. She concluded with: "Would be nice to see you and say goodbye".

75. The claimant replied by email at 3.53 pm, just over an hour later [95 and 96]. It is an email of 7 paragraphs. It really needs to be reproduced in full to do it full justice. The Tribunal incorporates its contents by reference. It might be summarised as follows.

76. She referred to her present health and the fact that this was the first time Mandy Jones had enquired about it. She questioned whether she was seriously considering stopping her sick pay. She queried whether this had been done to other employees. She referred to the causes of her ill health and the lack of support provided to her. She referred to her view that she had only remained at Headland in October/November 2016 because of the assurances given to her about a redundancy package. She said that she had "been pushed into getting another job as I couldn't cope with the pressure I was under. I never wanted to leave Headland but felt I had no choice, you weren't listening to me – if I had been left to switch off and recover and you had shown any concern for my well being then this probably wouldn't be happening". She referred to Sue Keenan's voicemail adding insult to injury, that she felt bullied into attending the occupational health appointment and that the follow up text the next day added to the pressure. She said that she felt let down and would be seeking legal advice.

77. On 4 August 2017 the respondent recorded that taking into account accrued leave the claimant was 7.5 hours short [99].

78. Mandy Jones replied to the claimant by letter on 8 August 2017 [102-103]. Again it really needs to be reproduced in full to do it justice. The Tribunal incorporates its contents by reference. It might be summarised as follows.

79. Mandy Jones referred to her emails of 11 July 2017 as enquiries as to her health. She referred to the restructuring in October and November 2016 that created uncertainty for the claimant's role, but that within 4 weeks the role reverted to its previous position. She asserted that the claimant had been provided with significant support and that she had not been bullied or pressurised. She explained Sue Keenan's message and the policy of an OH referral. She advised that she was obliged to point out that the sick pay would stop. She stated that payment of 30 days sick pay was discretional. She said that she was concerned that she had attended a job interview while off sick. She asked for confirmation of a return to work or a further sick note.

80. On 11 August 2017 the claimant informed the respondent that she would not be returning to work, but would rely upon her accrued leave and banked hours [104].

81. On 13 August 2017 the claimant responded to Mandy Jones's letter of 8 August 2017 by means of a closely typed 7 page letter [105-111]. Again it really needs to be reproduced in full to do it justice. The Tribunal incorporates its contents by reference. It set out in considerable detail the history of her employment with the respondent and the details of the events that had affected her adversely from 2016 onwards and which led to her resignation.

82. It appears that the claimant's final salary payment reflected that she remained 7.5 hours short [127].

83. On 27 July 2017 the claimant was offered employment by another employer as a customer service manager commencing on 29 August 2017 [135]. She attended interviews for this alternative employment on 6 and 20 July 2017. She had applied for this position in June 2017. She was desperate to leave the respondent's employment because of all the circumstances. Nevertheless, she was not sure that she would accept this offer. Sue Keenan's message of 27 July 2017 tipped the balance.

Respondent's submissions

84. The respondent's counsel presented written submissions comprising 23 pages (69 paragraphs) and an appendix. The Tribunal will not attempt to summarise those submissions, but incorporates them by reference.

85. In supplementary oral submissions, Mr Arnold referred the Tribunal to the claimant's ET1 paragraph 5(j)-(r) as the list of failures and events leading up to the resignation. He referred to the agreed list of issues. He referred to the hiring of a new operations manager in February 2017, intended to provide assistance and support to the customer services function. Mr Arnold commented upon the claimant's counsel's written submissions.

Claimant's submissions

86. The claimant's counsel also presented written submissions comprising 6 pages (43 paragraphs). The Tribunal will not attempt to summarise those submissions, but incorporates them by reference.

87. In supplementary oral submissions, Ms Ahari referred the Tribunal to the claimant's ET1 paragraph 5(s) and an implicit reference to the email of 3 August 2018. The claimant's case is put in chronological order in paragraph 5 and her case is implicit throughout

88. Ms Ahari commented adversely on the reliability of the respondent's witnesses. The promise of a redundancy package was one understood and shared by both the claimant and her closest work colleague. The respondent had tried to play down the extent of their workload and the contribution to it made by an employee who had been made redundant in 2016. There had been no evidence of a follow-up to or an acknowledgment of the claimant's text to Mandy Jones at [63]. As for the meeting of 5 October 2016, the claimant's evidence was clear and was corroborated by the text messages. The claimant's evidence was that she had always had assistance from temporary workers during the busy season. They were hired in January or February so

that they could be trained in time for March. The claimant had time off in April 2017 for stress, yet nothing was done to support her. Knowing that a counsellor might be available is not the same as being provided with access to a counsellor. The message on 24 May 2017 was the trigger for the claimant looking for other jobs. It is understandable how and why the claimant would then react to Sue Brennan's voicemail regarding the OH referral.

Relevant law

89. As the claimant resigned her employment and relies upon a constructive dismissal, she must establish that she terminated the contract under which she was employed (with or without notice) in circumstances in which she was entitled to terminate it without notice by reason of the respondent employer's conduct (section 95(1)(c) Employment Rights Act 1996).

90. The relevant principles are found in *Western Excavating (EEC) Ltd v Sharp* [1978] ICR 221. The test of a constructive dismissal is a three-stage one: (1) was there a fundamental breach of the employment contract by the employer? (2) did the employer's breach cause the employee to resign? and (3) did the employee resign without delaying too long and thereby affirming the contract and losing the right to claim constructive dismissal?

91. The claimant's counsel also referred the Tribunal to *Millbrook Furnishing Industries Ltd v McIntosh* [1981] IRLR 309; *Waltham Forest LBC v Omilaju* [2005] IRLR 35; *Nottinghamshire CC v Meikle* [2005] ICR 1.

92. The respondent's counsel also referred the Tribunal in addition to *Malik & Mahmud v BCCI SA* [1997] IRLR 462; *Baldwin v Brighton & Hove City Council* [2007] IRLR 232; *Buckland v Bournemouth University* [2010] IRLR 445; *Wright v North Ayrshire Council* (EAT unreported); *Kaur v Leeds Teaching Hospital NHS Trust* [2018] EWCA Civ 978; *RDF Media Group v Clements* [2008] IRLR 207; *Chapman v Simon* [1994] IRLR 124.

Discussion

Did the claimant undertake substantial additional duties, including working significant amounts of overtime, during the 2016 transition period?

93. Reminding itself of its findings of fact above, the Tribunal agrees with the claimant's reliance upon a series of events, commencing as early as February 2016, heightening in October 2016 and continuing until her resignation in July 2017. Those events are described in the findings of fact above. Throughout this period, and at various times, she was undertaking additional work resulting from the transition to Copenhagen, the return of activities from there, damaged relationships with customers, a new computer system, reduced staffing and orders and logistics problems that led to her working through rest breaks and undertaking additional overtime hours. The respondent was aware of the effects that this was having upon the claimant's health.

Did the respondent fail to provide any (or any adequate) resources to allow the claimant to correct the problems and repair the damaged relationships in October-November 2016 caused by the transition?

94. The intended centralisation of functions had led to the customer services/export team being reduced by redundancies such that the department comprised only the claimant and her closest colleague for much of the period after September 2016. This placed a considerable burden upon the claimant and her colleagues. Despite requests being made for temporary assistance in early 2017, those requests were declined (or not acted upon) by the respondent. The Tribunal does not accept that the claimant had a standing authority to obtain such assistance of her own initiative and authority. Temporary staff were not hired by the respondent either until late into the busy season or only as a result of sickness absence. The lack of resources was exacerbated by the issues with stock and logistics.

Did the respondent fail to confirm whether the claimant's role would remain in the UK after announcing that order management would be transferred back to the UK from Copenhagen for the remainder of the 2017 season?

95. There is no or no adequate evidence of the respondent reassuring the claimant of the security of her employment once the customer service function returned to the UK from Copenhagen in mid-November 2016. To the contrary, the Tribunal is satisfied that a promise of an enhanced redundancy package remained on the table at this time and into the 2017 season.

Upon the return of the claimant's role to the UK, did the team within which she worked reduce from 4-5 staff to 2 staff (inclusive of the claimant), causing an unsustainable workload?

96. The Tribunal has found as a fact that over the period in question (2016 and 2017) what had been at its height a 5 person team, with occasional assistance from temporary workers, reduced to two members of staff. This fact, together with the problems and issues that arose after the repatriation of the customer services function, caused there to be an unsustainable workload for the claimant and her colleague.

Did Mandy Jones promise the claimant that, if she remained unhappy at the end of the 2017 season, the respondent would pay the claimant a severance package based on enhanced redundancy terms together with a handover/retention bonus?

97. The Tribunal has found as a fact that Mandy Jones made such a promise in August 2016 and repeated it in October 2016 and November 2016.

Had the workload decreased to a manageable level before the claimant resigned?

98. The claimant commenced a period of sick leave of at least one week plus one month from 5 July 2017 for work-related stress resulting in anxiety and depression. While she might have expected her workload to have returned to manageable levels during the relatively quieter summer period between the two main seasons, her workload had not returned to manageable levels at the time she went on sick leave, despite the fact that she was able to agree the release of a temporary worker at that

time. The fact that there was no work for the temp to do is not the same as saying that the claimant's workload had reduced.

Did the respondent fail to provide the claimant with proper support and resources and fail to put any adequate measures in place to support the claimant at work before she resigned?

99. That is the obvious implication of the Tribunal's findings of fact.

Did the above alleged acts breach the implied term of trust and confidence or did the respondent act with reasonable and proper cause at all material times?

100. The Tribunal is satisfied that both individual and cumulatively the above actions or omissions on the part of the respondent served to breach the implied term of trust and confidence. While the respondent was entitled to restructure its business and to introduce new working systems and working practices, it was not entitled to do so without due regard to the workload, support systems and health of its employees. It did not act with reasonable and proper cause at all material times. Looked at objectively, the respondent's actions over a period of time seriously damaged the relationship of trust and confident between the claimant and the respondent. There was no reasonable and proper cause for this. It went to the root of the contract.

Did the claimant waive or affirm any of the alleged breaches of the implied term of trust and confidence?

101. Clearly the claimant could not have relied upon individual breaches of the implied term that occurred some time prior to her resignation. Although she had protested the position on a number of occasions, by continuing to work it could be said that she had waived those breaches or affirmed the contract. However, her resignation was triggered by Sue Keenan's actions on 25 and 27 July 2017. She was entitled to treat those actions as a breach of the implied term and, more significantly, she was entitled to react to the cumulative breaches of the implied term, of which Sue Keenan's actions were the final straw. She put these matters in issue on 3 and 13 August 2017 during her notice period.

Did the claimant resign in response to the alleged breaches of the implied term?

102. The series of repudiatory breaches and the final straw in an accumulation of breaches were a primary or an effective cause of the claimant's resignation. She sought alternative employment because of her contemplation of the possibility of resignation. She did not resign simply because she had been offered alternative employment. At the very least, the breaches remained an effective cause of her resignation, even if they were not the only cause.

If there is a constructive dismissal, did the respondent have a fair reason for it and did it follow a reasonable procedure in relation to it?

103. The respondent concedes that if the claimant was constructively dismissed then the dismissal would be unfair within the meaning of section 98(4) as there was no reason for it and no procedure was followed in relation to it.

Decision

104. The claimant's resignation amounted to a constructive dismissal within the meaning of section 95(1)(c). The claimant was unfairly dismissed by the respondent.

Remedy

105. The Tribunal heard evidence from the claimant as to remedy and oral submissions on behalf of both parties.

106. It is accepted that there is no loss in respect of any promised enhanced redundancy payment package. It is accepted that there is a loss of statutory rights and that the appropriate sum is £500. Taking account of the loss of earnings and pension in the old employment and the loss of earnings and pension in the new employment, the respondent is in credit to the sum of £64.88. A bonus due in December 2017 in the sum of £2,500 is accepted, as is a loss of BUPA benefits in the sum of £1,000.

107. The issues that remain between the parties are (1) *Polkey*; (2) contribution; and (3) breach of the Acas Code by the claimant (the claimant makes no claim under this head).

108. The claimant gave evidence as to her new employment which commenced on 28 August 2017 and ended on 28 September 2018. The Tribunal finds that the claimant terminated her new employment in order to care for her father. She now claims Carers Allowance. The Tribunal considers it improbable that the claimant would not have left the respondent's employment in those same circumstances. It does not accept that in those circumstances she would have sought reduced hours or a job share arrangement or flexible working with the respondent. Although her position with the new employment was managerial, whereas her position with the respondent was not, the Tribunal does not consider that this would have made any difference to the claimant's choice in reality.

109. The Tribunal concludes that, subject to the statutory cap, the claimant's loss terminated at 28 September 2018. The Tribunal also accepts that any bonus going forward into 2018 would not have been guaranteed and cannot be accounted for in measuring loss.

110. The Tribunal does not consider that this is a case where a *Polkey* deduction readily suggests itself. It has not been advanced with any obvious vigour on behalf of the respondent, other than to include it in the list of issues.

111. The Tribunal also does not consider that there has been contributory conduct on the claimant's part. The reality was that there was no explicit support on offer to her that she could or should have availed herself of. The respondent was aware of her position, yet made no obvious offer to her of support. The fact that another employee had been offered counselling (or that references to counselling had been made at a health and safety event) is insufficient to support any suggestion that the claimant should have sought such support and that she contributed to her dismissal by not so

doing – similarly, in respect of any argument that the claimant could have asked for reduced hours (to what purpose and to what effect, the Tribunal asks rhetorically?).

112. It is argued that the claimant breached the Acas Code (paragraph 32) by failing to raise a formal grievance in writing. The Tribunal accepts that the claimant had done all that she could have done short of resorting to a formal grievance. Should a reduction be made under section 207A of the Trade Union & Labour Relations (Consolidation) Act 1992? The Tribunal does not consider, surveying its findings of fact, that the claimant acted unreasonably in failing to raise a formal grievance with the respondent. Her situation had been made very clear to the respondent throughout. The two managers concerned had ignored her situation and had added to the weight of the circumstances that led to her resignation. Moreover, even if it would have been a reasonable step to have raised a grievance, the Tribunal does not consider that it would be just and equitable in all the circumstances to reduce any award to the claimant on this basis.

113. As the Tribunal agreed to settle the question of remedy on a provisional basis, it will now leave the parties to agree the final sum in compensation on the basis of the above reasoning. Should this prove difficult, the parties may apply within 4 weeks of the date that this judgment and reasons are sent to the parties, either for the matter to be dealt with on the basis of written representations (and a revised schedule and counter-schedule) or at a resumed hearing.

_____
Judge Brian Doyle, President
13 December 2018

Sent to the parties on:

……14 December 2018…….

For the Tribunal:

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