Case No: 2602196/2017

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Fiona McLeod	**-v-**	Direct Care Works Ltd

Heard at: Leicester **On:** 18, 19th and 20th December 2018

Before: Employment Judge I Evans (sitting alone)

Representation
For the Claimant: Mr Bidnell-Edwards
For the Respondent: Mr Williams

JUDGMENT

1. The Claimant was not constructively dismissed. Her claim of unfair dismissal therefore fails and is dismissed.

2. The Claimant's claim that she was not permitted to be accompanied at a disciplinary hearing as required by section 10 of the Employment Rights Act 1999 fails and is dismissed.

3. The claim for unlawful deductions from wages is dismissed following its withdrawal by the Claimant.

REASONS

Preamble

1. The Claimant resigned from her employment with the Respondent with effect from 24 February 2017. Following the termination of her employment she brought claims of unfair dismissal, for holiday pay and arrears of pay, and for a failure to allow her to be accompanied as required by section 10 of the Employment Rights Act 1999 ("the 1999 Act") in a Claim received by the Tribunal on 6 June 2017.

2. The hearing of those claims took place before me between 18 and 20 December 2018 ("the Hearing") and at the end of the Hearing I reserved my judgment.

3. Before the Hearing the parties had agreed a bundle running to 212 pages. All page references in these reasons are to that bundle unless stated otherwise.

4. At the Hearing the Claimant gave evidence on her own behalf. She also called Christine Southin, a former employee of the Respondent, and Samantha Smith to

give evidence. The Respondent called Anna Korotko, the Office Manager of the Respondent, and Vena Mhaka, the owner of the Respondent, to give evidence.

The discussion at the beginning of the Hearing and the issues

5. The claim for holiday pay had been withdrawn and dismissed before the Hearing. The claim for wages had been withdrawn but not dismissed and so I have dismissed that claim by my judgment.

6. The parties agreed that the following issues fell to be determined in the remaining claims.

   Constructive unfair dismissal

7. Did the Respondent constructively dismiss the Claimant, which would require me to determine the following issues:

   7.1. Whether the Respondent breached the implied term of trust and confidence in the Claimant's contract of employment.
   7.2. Whether the Claimant affirmed the contract of employment following any such breach.
   7.3. Whether the Claimant resigned at least in part in response to the breach.

8. The Respondent conceded that if I found that the Claimant had been constructively dismissed then that dismissal would be unfair. It was agreed that in these circumstances the following issues would need to be determined:

   8.1. Should the compensatory award be reduced as a result of the Polkey principle, i.e to reflect the chance that the Claimant might have been fairly dismissed or might have resigned from her employment in any event.

   8.2. Whether the compensatory award should be reduced because the Claimant contributed to her dismissal and whether the basic award should be reduced in light of Claimant's conduct prior to dismissal.

   8.3. Whether any compensation awarded should be uplifted because the Respondent breached the ACAS Code by (1) proceeding straight to a disciplinary hearing on 24 February; and (2) denying Claimant the right to be accompanied at that meeting/hearing.

9. The factual issues that it was agreed that it would be necessary for me to determine to decide the Claimant's claim of unfair dismissal were agreed to be as follows by reference to the draft list of issues prepared by the Claimant:

   9.1. How the Respondent had handled the Claimant's contractual obligations following Ms Mhaka becoming its owner;

   9.2. Whether (and if so to what extent) the Respondent had limited the Claimant's access to the People Planner System ("People Planner");

   9.3. Whether the Claimant was denied minutes of a meeting which took place on 9 January 2017;

   9.4. Whether there was a lack of clarity in the Respondent's approach to the Claimant's responsibilities following Ms Mhaka becoming its owner as a result of her access to People Planner being limited;

9.5. Whether the Respondent failed to pay the Claimant the wages due to her in respect of 31 January 2017 (she was paid four hours but contends she should have been paid eight);

9.6. Whether Ms Mhaka failed to acknowledge the Claimant on the Claimant's return to work following a sickness absence on 22 February 2017;

9.7. Whether there was miscommunication about the Respondent's capacity to take on a new client which was the fault of the Respondent which resulted in a complaint to the Respondent ("the Client Complaint");

9.8. Whether an email sent by Mr McCarthy of the Respondent on 23 February 2017 sidelined and undermined the Claimant in her role by making changes to it in respect of which she had not been consulted;

9.9. The way in which the Client Complaint was dealt with by the Respondent;

9.10. Whether the Claimant was excluded from a meeting to which she should have been invited on 24 February 2017.

10. It was agreed that if necessary remedy would be dealt with separately at a further hearing.

Right to be accompanied

11. Whether the Respondent had failed to permit the Claimant to be accompanied as required by section 10 of the 1999 Act at a meeting on 24 February 2017 with Ms Mhaka.

The Law

Unfair dismissal

12. Section 94 of the Employment Rights Act 1996 ("the 1996 Act") gives an employee the right not to be unfairly dismissed.

13. In order to bring a claim of unfair dismissal, the employee must show that they have been dismissed. The circumstances in which an employee is dismissed are set out in section 95 of the 1996 Act. The burden of proof to show a dismissal has taken place is on the employee.

14. Section 95(1)(c) of the 1996 Act provides that an employee is dismissed when she terminates the contract with or without notice in circumstances such that she is entitled to terminate it without notice by reason of the employer's conduct. When the employee does this there is a constructive dismissal.

15. In order for there to be a constructive dismissal there must be a fundamental breach of contract by the employer. That is to say a significant breach going to the root of the contract or which shows that the employer no longer intends to be bound by one or more essential terms of the contract (Western Excavating (ECC) Ltd v Sharp [1978] ICR 221).

16. For an employee to show that they have been constructively dismissed, they must show that:

16.1. There was a fundamental breach of contract by the employer;
16.2. The employer's breach of contract caused them to resign;
16.3. The employee did not waive any breach.

17. If as in this case the employee relies on a breach of the implied term of trust and confidence, this is a term that the employer shall not without reasonable and proper cause conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee. The test is an objective one.

18. The implied term of trust and confidence is a broad one and many different acts (or failures to act) by an employer may cause it to be breached.

19. A single act or omission by the employer may of course comprise a fundamental breach of contract. However a course of conduct can also cumulatively amount to a breach of the implied term of trust and confidence entitling an employee to resign and claim constructive dismissal after a "last straw" incident, even though the last straw alone does not amount to a breach of contract and may not in itself be blameworthy or unreasonable. However the last straw must contribute something to the breach and be more than utterly trivial.

20. Because the implied term of trust and confidence is fundamental, any breach of it is likely to be repudiatory (<u>Morrow v Safeway Stores plc</u> [2002] IRLR 35).

21. Whether a repudiatory breach has occurred is a question of fact for the Tribunal and the objectively assessed intention of the employer towards the employee is of paramount importance (<u>Tullet Prebon Plc and others v BGC Broker LP</u> [2011] EWCA Civ 131).

22. So far as the link between the repudiatory breach of contract and the employee's resignation is concerned, it is not necessary for the employee to show that the breach of contract was the only cause of the resignation. However the resignation must be at least in part in response to the breach (<u>Nottingham County Council v Meikle</u> [2004] EWCA Civ 859).

23. Turning to the issue of the employee affirming their contract or waiving the breach, there is no fixed period of time within which an employee must make up their mind and a reasonable period is generally allowed.

<u>Section 10 of the Employment Rights Act 1999</u>

24. Section 10 of the 1999 Act provides that where a worker is invited to attend a disciplinary or grievance hearing and reasonably requests to be accompanied at that hearing the employer must permit the worker to be accompanied by either a fellow worker or a trade union representative.

25. Section 13(4) of the 1999 Act contains the definition of "disciplinary hearing". It is a hearing which could result in the administration of a formal warning to a worker, the taking of some other action in respect of a worker or the confirmation of a warning issued or some other action taken.

<u>Findings of Fact</u>

26. I am bound to be selective in my references to the evidence when explaining the reasons for my decision. However, I wish to emphasise that I considered all the evidence in the round when reaching my conclusions. The standard of proof I have used in reaching these findings is the balance of probabilities.

<u>Background</u>

27. The business of the Respondent was the provision of home-based domiciliary care to people with mental and physical needs. At the time the Response was sent to the Tribunal it employed 35 people.

28. The Claimant had a long history with the Respondent. When the Respondent had been set up in 2012 she and her partner had been two of its four owners. The Claimant and her partner had sold their own shares in the Respondent in 2014 to the other two owners, Carin and David Davies. The Claimant had, however, continued to work in the business as a team manager.

29. In 2016 the Davies sold the shares in the Respondent to Ms Mhaka. There was correspondence between the Davies and the Claimant between pages 49 and 60 of the bundle. It is clear that considerable upset was caused to the Claimant by what she regarded as the failure of the Davies to inform and consult her about this. It seems that the Claimant was erroneously advised that TUPE applied (it did not because the sale was a share sale). This resulted in her writing on 14 July 2016 to the Davies accusing them of having displayed a "lack of trust" and referring to TUPE consultation obligations (page 53). The same letter refers to the dissatisfaction of the Claimant with the fact that Ms Mhaka was unavailable for four weeks because she was on holiday. I therefore find that the Claimant was angered by the fact that as a team manager (and former owner) of the Respondent she had not been involved in its sale to Ms Mhaka and that Ms Mhaka had not met her at an early stage. Sufficiently angered to threaten, at least implicitly, employment tribunal proceedings in her letter of 14 July 2016. I find that this set the tone for her subsequent relationship with Ms Mhaka.

30. Ms Mhaka took control of the Respondent's business in September 2016. In October 2016 Ms Mhaka employed or engaged Mr Gary McCarthy as a business development consultant.

The Claimant's contractual obligations

31. On 15 December 2016 Mr McCarthy sent the Claimant a new contract of employment. It was attached to a curt email stating "we are giving you the required 28 days' notice of change". In fact the Claimant's previous contract (copies at page 41 and 44) did not have any term permitting changes on four weeks' notice, although in it the Respondent did have "a right to vary the duties of your post from time to time at its discretion and to meet the needs of the organisation".

32. The Claimant emailed Mr McCarthy on 19 December 2016 (page 65) raising various queries in relation to the draft contract sent to her. Mr McCarthy replied on 21 December 2016 asking her to "discard the contract" and to make an appointment so that they could "have a chat with regards going forward". The matter was not in fact subsequently revisited in any significant way.

33. I find that this exchange of emails suggested that Mr McCarthy lacked experience, expertise, common sense and tact in employment matters and that it will have irritated the Claimant. However, given that he immediately abandoned his request that the Claimant sign a new contract when she raised concerns in relation to it, I also find that this was not (and did not appear to be) an attempt to pressurise the Claimant into agreeing changes to her contract of employment against her will.

Limiting the Claimant's access to People Planner

34. On 14 December 2016 Mr McCarthy sent an email to all of the managers of the Respondent in relation to People Planner. People Planner was the computer program which the Respondent used to ensure that all of its clients received the care

that they were meant to receive at the appropriate time. In very basic terms, it was a tool for ensuring that the right employee was in the right place at the right time.

35. In his email Mr McCarthy stated:

> *With immediate effect no manager will change people planner **with regards to planning**. The only person allowed to do this will be Anna. All reviews will be completed on paper copy of the review form then scanned into people planner by the office team. Any breach of this will result in disciplinary action.* [Emphasis added.]

36. Again the tone of the email suggests that Mr McCarthy was not a skilled manager of people. It was expressed in a way lacking tact and also common sense, given that it was directed to managers and Mr McCarthy had only recently begun to work for the Respondent. The threat of "disciplinary action" at the end is heavy-handed.

37. The Claimant argued in her witness statement that the email when taken together with a subsequent meeting that she had with Mr McCarthy on 9 January 2017 meant that she was being treated differently to other employees. She said that at that meeting she had discovered that a decision had been taken to "limit my access to the "People Planner" system. This was only applicable to myself and not any of the Respondent's other team managers, such as Chris Southin". She went on to suggest in her witness statement that the change in access would make it "difficult for me to carry out my role".

38. In cross examination the Claimant accepted that contrary to the impression given by her witness statement she would have been physically able to make changes to People Planner (i.e. her actual access to the system had not been limited). However the Claimant argued that she had been treated differently to other managers because of what was said to her by Mr McCarthy at the meeting on 9 January 2017. She said that this was illustrated by an incident that subsequently occurred when employee had called in sick.

39. The Claimant said she had called Mr McCarthy on 24 January 2017 because she was not allowed to deal with this issue as a result of her limited access to People Planner. She said Mr McCarthy had said that he would contact Ms Korotko at home and ask her to deal with it. However Ms Korotko had then telephoned her and told her that it was her responsibility to deal with it as the on-call manager. The Claimant's explanation for Ms Korotko having said this to her was that she believed Mr McCarthy had said different things to the Claimant and Ms Korotko.

40. The Claimant had sent an email to Mr McCarthy about this on 25 January 2017 (page 104). In that email she said;

> *When we met on Monday 9th January at the office, you informed me that the decision had been taken to limit access to People Planner, including allocation and reallocation of calls. You also said that there is a risk of disciplinary action should that instruction not be followed. At the time I questioned what happens when I am on call and highlighted a scenario whereby a member of staff calls in sick and, as a consequence, other calls/staff are impacted and changes need to be made. You told me this would not be an issue as last minute changes wouldn't be allowed.*
>
> *Last night this happened with LS. He phoned in 40 mins before his next visit was due and was obviously unable to undertake the call. When I spoke to you on the phone about it, you confirmed that Anna should deal with this at home and confirmed you would call her to speak to her about it. Anna later called me and*

told me it was up to me to cover, so I reconfirmed with her the conversation we had had.

As I was on call I would happily have managed the situation as I always have done, successfully, in the past. However I remain confused as to my 'new' role and the expectations you have of me. Following our meeting on 9th you said you would put into writing what we have talked about. Perhaps I could have a copy of that?

41. Mr McCarthy replied on the same day by email saying:

    Thank you for your email.

    I am putting together a new on call procedure.

42. The oral evidence of Ms Korotko was that the change to the managers' use of People Planner was in essence an administrative one which applied to everyone who worked for the Respondent (including Ms Mhaka, which Ms Mhaka in her own evidence confirmed). It had been Ms Korotko's idea to make the change because managers had made "too many mistakes. A massive mess." when they had made changes to the "planning" part of People Planner. However "[the managers] carry on what they are doing but I make the actual changes so that it could be right, nothing limited or taken away. It's a change on the computer. The decision still made by manager." In other words, the evidence of Ms Korotko was that, if it was necessary to change which employee was going to visit a particular client, the manager would still make the decision. What the manager could not do was make an entry in People Planner reflecting the decision that they had made. They had to ask Ms Korotko to do this. This evidence was consistent with what the Claimant had said had been Ms Korotko's reaction when asked to deal with an on-call matter on 24 January 2017: she had told the Claimant that she should deal with it (i.e. find someone to cover the client in question). Under the changed arrangements Ms Korotko would then have made any necessary "planning" changes in People Planner. An example of the Claimant giving Ms Korotko information that would then be updated on People Planner by Ms Korotko was at page 88 of the bundle.

43. Ms Southin said in her witness statement that her access was "not limited in any way". However in her oral evidence she did not deny that she had received the same instruction by email from Mr McCarthy. Further, it became clear that she had misunderstood the position in relation to the Claimant - she said the Claimant had told her that her actual access to the system had been restricted by whoever administered it but that was not in fact the Claimant's case by the date of the hearing (although it was implied by what she had said in her witness statement).

44. I did not have the benefit of hearing evidence from Mr McCarthy about what had happened at the meeting on 9 January 2017 because by the date of the Hearing he was no longer employed by the Respondent.

45. Taking matters in the round, I do not find that Mr McCarthy imposed restrictions on the Claimant's use of People Planner which he did not impose on others. I so find for the following reasons:

    45.1. The Claimant's evidence has fluctuated over time. Her witness statement and what she had previously said to Ms Southin suggested that her actual physical access to People Planner had been curtailed but she accepted at the Hearing that that was not the case. As such, I find her recollections to be not entirely accurate and to be tinged by her anger at the Respondent generally and Mr McCarthy in particular.

45.2. When emotions run high, contemporaneous documents are very often a better source of evidence than the recollections of those involved. The email of the Claimant of 25 January 2017 set out above does not suggest that as at 25 January she thought she was being treated differently to other managers as a result of what was said in the meeting on 9 January. The first two sentences clearly suggest that the position as outlined to the Claimant was that which applied to all employees. I have no doubt that if the Claimant thought she was being singled out, she would have said so in this email.

45.3. Further, this is consistent with what Ms Korotko said the position was: a restriction was imposed on all managers in relation to them making changes to the "planning" part of People Planner. A restriction made at her suggestion to improve administrative efficiency. I found Ms Korotko to be a more impressive witness than the Claimant. She gave her oral evidence carefully and in a manner which suggested that she had no axe to grind. She listened carefully to questions put to her in cross examination and answered the actual questions asked rather than seeing them as an opportunity to put forward a particular version of events. Her evidence remained consistent.

45.4. By contrast, the Claimant's evidence did not remain consistent. For example she implied clearly in her written witness statement that her actual access to People Planner had been curtailed when this was not the case. Further, as set out below, there were times when her evidence was simply not credible. In particular her insistence that she had invested money in Your Independence Matters Limited even though no decision had been taken to launch it as a business and her refusal to clearly accept that Your Independence Matters Limited is in competition with the Respondent. Those are issues to which I return below.

46. In light of Ms Korotko's evidence, I also do not accept that this was a change which impaired the ability of the Claimant to perform her role although it may well have made things less convenient – changes would have had to be given to Ms Korotko so that she could input them into the system.

47. In particular, I do not accept that at the meeting on 9 January 2017 Mr McCarthy told the Claimant that she could not reallocate calls when on call. I find that what he told was she could not make changes to the "planning" part of People Planner arising from such reallocation and that when she raised what she regarded as practical difficulties with this he was unsympathetic. However I do find that Mr McCarthy dealt with what was a sensible administrative change in a heavy handed and insensitive way and that, in all probability, that extended to the way that he dealt with the Claimant in the meeting on 9 January 2017.

Failure to provide minutes of meeting on 9 January 2017

48. I find that the Claimant did ask for "minutes" of this meeting. I also find that this was a somewhat unusual request: it would not be normal in most organisations for a manager to provide minutes of a one-to-one meeting concerning the circumstances in which an administrative system should be used after setting out the position in writing (Mr McCarthy's email of 14 December 2016). Further, no significant evidence was put before me to suggest that other managers were concerned on a practical level by that email.

The lack of clarity in relation to the Claimant's responsibilities

49. The Claimant's case was essentially that the instructions she had been given in relation to the use of People Planner caused a lack of clarity about her responsibilities when on call as set out in her email of 25 January 2017.

50. In light of my findings of fact above, I do not accept that the instruction given by Mr McCarthy in his email of 14 December 2016 when taken with what was said during the meeting on 9 January 2017 caused any real lack of clarity about the responsibilities of the Claimant. In light of the evidence of Ms Korotko about the changes made, I find that what was in fact going on was that the Claimant was digging in her heels and being difficult about an administrative change which she regarded as being unnecessary and, from her point of view, unhelpful. In light of the evidence of Ms Korotko I find that it was clear that it continued to be the Claimant's job to deal with situations arising when she was on call, including a situation where a particular employee could no longer perform a particular job for a particular client, and that all that had changed was who should document any necessary change in the "planning" part of People Planner. I find that the Claimant is one of the founding owners of the Respondent and, as someone with very considerable experience in the work of the Respondent, resented being told what to do by Mr McCarthy.

51. I find that the change in who could make changes to the "planning" part of People Planner would have necessitated some administrative changes to on-call arrangements. That was reflected in Mr McCarthy's response to the email of 25 January 2017. I find that he had not put in place a new on-call procedure by the time the Claimant resigned on 24 February 2017.

The Respondent's failure to pay wages on 31 January 2016

52. I find that the Claimant worked for eight hours on 31 January 2017 but that she was only paid for four hours. I find that the Claimant raise this issue once three days before she resigned on 21 February 2018. I find that the Respondent failed to pay those hours at the end of February 2018 and subsequently until after proceedings had been issued.

The Claimant was not acknowledged on her return to work by Ms Mhaka on 22 February 2017

53. The Claimant was absent from work between 3 February 2017 and 22 February 2017. She contended that Ms Mhaka failed to acknowledge her on her return to work. Ms Mhaka had no recollection of this. Nor did Ms Korotko.

54. I find that if Ms Mhaka had made a point of greeting the Claimant on her return to work after what was nearly a three week sickness absence, then she would have remembered doing this. Consequently, in light of her absence of recollections, I find that Ms Mhaka did not acknowledge the Claimant on her return to work on 22 February 2017.

Miscommunications about the capacity to take on a new client

55. This is the matter which gave rise to the Client Complaint. On 17 January 2017 the Claimant made a home visit to a prospective new client ("the New Client") who had recently been discharged from hospital. The Claimant's evidence was that prior to conducting the home visit she had checked with Ms Korotko who had assured her that the Respondent had capacity to undertake certain calls if they fitted into a particular window of time. The Claimant said that subsequently, on 20 January 2017, Ms Mhaka had told her "we're not doing it". The Claimant said that she had queried this with Ms Mhaka. The Claimant said she had then spoken to Ms Korotko about this on Monday, 23 January 2017 and Ms Korotko had said that she was "surprised because there was capacity". Ms Korotko had told her to leave it with her. The Claimant had then sent to Sam Smith, the daughter of the New Client, an email in which she stated (page 94):

Hi Sam
I have completed the support plan and personal details for mum – please see attached. I have forwarded all details and requested hours to Anna, who does the planning. You should hear from her soon.
I need to take a couple of weeks off from next week so will hand over outstanding paperwork to Anna too. This will include T&C's, H&S assessment and Risk Assessment.
Kind Regards
Fiona

56. The evidence of Ms Smith was that Ms Korotko had confirmed that the Respondent had availability to provide the care required prior to the home visit by the Claimant. She said that during the home visit the Claimant had indicated that Ms Korotko would contact her to clarify the cost of the services and to identify the start date.

57. The evidence of Ms Korotko was that when she had spoken to Ms Smith she had told her that it was possible that the Respondent would be able to provide care. She said that she had not gone beyond this: decisions in relation to whether to definitely take on a new client were only made after a home visit and assessment of their needs had taken place. Ms Korotko agreed that she had told the Claimant prior to the home visit that from a planning perspective it would be possible for calls to be made to the New Client if they fell within a certain window. However Ms Korotko was clear in her evidence that this did not amount to her saying that the new client would be taken on. Ms Korotko said that she did not make decisions about whether to take on a new client: these were taken after a home visit during which a prospective client's needs had been assessed during the course of a management meeting. Ms Korotko was clear that her role was to deal with the planning aspect of a prospective new client, i.e. to identify whether in principle the Respondent would have capacity to take the new client on.

58. Following her conversation with Ms Mhaka on 20 January 2017 the Claimant emailed Ms Korotko (page 89). She stated:

Hi Anna
I understand that decision was made yesterday not provide support for the Groby referral I visited on Tuesday morning. I was not informed of this decision. However, because of the couple of conversations we had and the reassurance from you that we could take the package on, I have already informed them we can start the evening calls from the next rota.
Please can you let them know of the change of availability.
Thanks
Fiona

59. Ms Korotko replied on same day (page 89). She stated:

Hi Fi
Re: new referral, the decision is still pending as we need a bit more information about another Anstey referral which potentially would be more beneficial for DCW. Chris will be contacting Anstey one on Monday and then we will decide.
Anna

60. The Respondent had also included in the bundle a "procedure for taking on a new client" (page 187). This suggested that management would decide whether to take on a new client before meeting them. Ms Korotko indicated that she had seen that document but that it was not a procedure which was followed "dot by dot". She was unaware of there being a clearly documented procedure which was followed. She acted on the instructions of managers in a way which reflected what the Davies had told her when they had owned the Respondent.

61. Taking the evidence in the round, I find that the procedure at page 187 was not a procedure which was generally followed as a guide to how a new client should be taken on. In making this finding I have taken account of the fact that it was not a procedure to which the Claimant referred in her witness statement. Further, it was not a procedure which would have made much sense, requiring as it did a decision whether to take on a new client prior to an assessment of their needs having been made.

62. I find that, generally speaking, the decision whether to take on a new client was made by the management team after an assessment of the prospective client's needs (and so a home visit). However, I find that this was not a procedure which was scrupulously adhered to.

63. I find that Ms Smith is known to the Claimant as a result of her partner's friendship with the partner of the Claimant.

64. I find that what happened on 17 January 2017 was that the Claimant made a commitment to take on the New Client because she felt that the Respondent would be able to do this in light of her own assessment of the New Client's needs and the fact that Ms Korotko had indicated that it would be possible to schedule visits to the New Client if they fitted within a certain window. I find that the Claimant in all likelihood made a firmer commitment to the New Client than she would normally have done because she knew Ms Smith but that, equally, she was not acting in clear breach of any procedure of the Respondent. This is because the reality was that there was no clear procedure which needed to be followed in every case. Further, in light of the conversation with Ms Korotko, it was not unreasonable for the Claimant to believe that the Respondent would be able to take on the New Client. However, equally, I find that she would have been aware that nothing that Ms Korotko said to her could reasonably have been regarded as having given her authority to take on the New Client.

65. I find that what then happened was that Ms Mhaka was irritated by the Claimant acting unilaterally in this way because she was considering another prospective client and the Respondent's resources meant that it would not be possible to take on both the New Client and that other client. Hence she told the Claimant on 20 January 2017 that they would not take on the New Client.

66. I find that when Ms Korotko emailed the Claimant on Friday, 20 January 2017 she set out the position accurately: there were two prospective new clients and no decision had been taken.

67. I find, however, that against this background the decision of the Claimant to send her email of 23 January 2017 to Ms Smith can reasonably be criticised. In her oral evidence the Claimant argued that sending this email did not amount to a commitment to provide the care requested. However, this is a best disingenuous. Ms Smith understood the email as being confirmation of the previous oral commitment which she said she had received for the care to be provided with just the cost and start date to be arranged (see paragraph 3 of her witness statement). Further, as a matter of common sense, this was the obvious way to understand that email especially given that the Claimant does not deny that she had previously made a commitment (see her email to Ms Korotko on Friday 20 January). Her email of 23 January did not suggest that there was any question mark over the Respondent's ability or willingness to provide the service to the New Client. The Claimant should not have sent this email because it should have been clear to her that at best the Respondent had not made a decision to provide the care (Ms Korotko's email of 20 January 2017) and at worst simply would not provide it (what Ms Mhaka had said to her on 20 January 2017). I find that the Claimant sent the email because she was

irritated by the possibility of the Respondent not taking on the New Client contrary to what she had told Ms Smith the previous week.

68. I also find that these events did not arise as a result of any changes made to the procedures of the Respondent following the change of ownership in September 2016.

Whether the Respondent sidelined and undermined the Claimant in her role by making changes to it as set out in an email of 23 February 2017 from Mr McCarthy

69. On 23 February 2017 Mr McCarthy emailed all of the Respondent's employees (page 139). In that email he explained that the care sector faced many challenges with budget cuts and that the Respondent wished to form a staff consultative group to consider the way forward.

70. The email also set out certain changes which would apply from 5 April 2017. These were described as follows:

    - *Mileage between clients will change from not 0.45p per mile to 0.25p per mile.*
    - *Meetings will all be conducted in the office.*
    - *Supervisions will be held in the office only and will be conducted by HR.*
    - *You will no longer have assigned managers, all managers will be able to deal with your questions.*
    - *All staff are given 5 hours paid a year to cover things like training, meetings and supervisions. Remember that once the five hours have been used all other training, meetings and supervisions will not be paid for but you will still need to attend.*
    - *Please use the land line number during office hours (Monday – Friday 8:30 am – 4:30 pm). The mobile is for emergencies and out of hours.*

71. In her oral evidence Ms Mhaka accepted that with the benefit of hindsight she should have consulted with the Claimant and other managers about the change.

72. In terms of the extent to which the changes would when implemented have affected the Claimant in her capacity as a team manager, I find that this would have been limited. In light of the evidence given by Ms Mhaka and Ms Korotko, I find that the Claimant would have continued to conduct the supervisions of team members. The reference to "HR" in the email ultimately remains a mystery: the Respondent simply did not have any employee with a designated HR function. In making this finding I take account of the fact that both Ms Southin and the Claimant accepted that they had not clarified the significance of the reference to HR or asked whether in fact they would no longer be performing supervisions. I find that the main change would have been that the Claimant would not have had responsibility for certain specified employees but rather would have had to deal with matters relating to all employees when on duty. I find that this would not have been a change which would have diminished the Claimant's role. Further, it would have been a change falling within the Respondent's contractual rights as referred to in paragraph 31 above.

73. This alleged breach as set out in the list of issues Mr Bidnell-Edwards prepared before the beginning of the Hearing expressly defined the issue by reference to the email of 23 February 2017. However there is at last a hint in his closing submissions that the argument was a wider one (see their paragraph 32). I find, however, that the Claimant's role had not been more generally reduced or side-lined.

The handling of the Client Complaint

74. Further to the events set out above, Ms Smith had been told that the Respondent would not be able to provide care services to the New Client. This had been done by phone on 31 January 2017 by Mr McCarthy. Ms Smith was understandably cross that a decision had been taken not to provide the care requested given what the Claimant had said to her when they had met on 17 January 2017 and the email to her of 23 January 2017.

75. Ms Smith therefore made the Client Complaint by email (page 115). This was sent to Mr McCarthy on 31 January 2017. The gist of the complaint is that first Ms Korotko and subsequently the Claimant had told Ms Smith that the care requested would be provided but that then Mr McCarthy had told her that in fact the Respondent would not provide the care after all. This change of heart had caused "stress and upset". It had also caused practical problems because Ms Smith had only had a limited period of time to arrange care for the New Client: just four weeks of immediate care had been provided via the HART service following the New Client's release from hospital.

76. The Claimant argued vigorously that the Client Complaint was nothing to do with her but was really about Mr McCarthy. I find that this is quite clearly not the case: the Client Complaint was in reality about the Respondent committing to provide care (such commitment had been made by the Claimant) and then having changed its mind (such change of mind having been communicated to Ms Smith by Mr McCarthy). The Client Complaint quite clearly did therefore involve the Claimant because it resulted directly from her commitment made on behalf of the Respondent to provide the care requested.

77. Ms Mhaka tried to speak to the Claimant about the Client Complaint on her return to work on 22 February 2017. However the Claimant had a busy day and so the discussion was postponed. On 24 February 2017 the Claimant saw the Client Complaint before speaking to Ms Mhaka. There was then a meeting between the Claimant and Ms Mhaka.

78. The Claimant contends that Ms Mhaka questioned her rudely about events relating to the Client Complaint. Her evidence was that she had tried to answer the questions as best she could but felt unable to do so properly without referring to her diary and emails. However Ms Mhaka had refused to allow her to leave the meeting to consult her diary and emails. Ms Mhaka had become "accusatory" and her demeanour had become "threatening". The Claimant had said that she was not prepared to continue with the discussion until she had time to prepare and until she had a representative present. The Claimant said that Ms Mhaka was "loud and aggressive".

79. In her oral evidence the Claimant said that ultimately she had resigned because of the way the Client Complaint had been handled. In her oral evidence she insisted that that Client Complaint "was about Mr McCarthy not about me". In her oral evidence she accepted that she had accused Ms Mhaka of "scapegoating" her: she said that Ms Mhaka was trying to hold her responsible for the Client complaint when we "both knew it was about Mr McCarthy".

80. Ms Mhaka's account of the meeting on 24 February 2017 was substantially different. In her witness statement she said that she had tried to ask the Claimant questions from a list which she had prepared in advance but that the Claimant did not want to answer the questions and became aggressive towards her. Ms Mhaka said that the Claimant accused her of scapegoating her and pointed her finger at her "in what I felt was an intimidating manner". She accused the Claimant of being "verbally aggressive". Ms Mhaka said that she had terminated the meeting because she was "emotional and upset" as a result of the Claimant's attitude towards her.

81. In her oral evidence Ms Mhaka said that she was taking notes during the meeting. She denied having refused to give the Claimant time to prepare for the meeting. She

said that the Claimant had refused to continue with the meeting. She denied being accusatory and said that she had not raised her voice.

82. The notes of Ms Mhaka of the meeting were at pages 143 to 148 of the bundle. I find that those notes quite clearly record a list of questions which Ms Mhaka had prepared in advance to ask the Claimant about the Client Complaint. I further find in light of my findings above that all of those questions were entirely reasonable. They were exactly the kind of questions that an employer would ask to establish how the Client Complaint had arisen.

83. I find that the hand written text inserted in and around the list of questions was not all written during the meeting. I find that while some of the handwritten text will have been written during the meeting, some of it will have been written afterwards. Ms Mhaka accepted, after some prevarication, that this would in all likelihood have been the case during her oral evidence and it is also clear from the style in which the handwritten text is written. However, I find that all of the handwritten text was contemporaneous, that is to say to the extent that it was not written during the meeting on 24 February 2017 it was written shortly afterwards.

84. I have no doubt that the hand written text is not an entirely objective account of the meeting. Rather it records the recollections of Ms Mhaka which will have been coloured by how she felt at the time. However, I find that it is of note that the handwritten text records that it was when the Claimant was asked about her email of 23 January 2017 that she accused Ms Mhaka of “scapegoating” her and that she demanded a representative be present. Overall, the handwritten text suggests that it was from this point that the meeting had become heated.

85. There is a clear conflict of evidence between the Claimant and Ms Mhaka in relation to what occurred in the meeting on 24 February 2017. The handwritten text supports the evidence of Ms Mhaka, but that is unsurprising given that she wrote it. I did not find the evidence of either the Claimant or Ms Mhaka in relation to this meeting to be entirely credible. On the one hand, the Claimant persisted in arguing that the Client Complaint to be dealt with at the meeting was nothing to do with her when quite clearly it was. On the other hand, Ms Mhaka was excessively reluctant to concede that the document between pages 143 and 148 of the bundle was not notes taken exclusively during the meeting.

86. Overall, I find that what happened was this. Ms Mhaka had prepared a series of questions to ask the Claimant about the Client Complaint. They are set out in the document between pages 143 and 148. They were questions which would it was entirely reasonable for her to ask. At the point at which the Claimant felt that those questions were implying that she might be responsible for the Client Complaint (i.e. the point which she was asked about the email of 23 January 2017), she became uncooperative and accused Ms Mhaka of scapegoating her. This was unreasonable behaviour on her part. However, I find that Ms Mhaka then reacted in an irritated fashion. A sense that she was already exasperated by some of the Claimant’s comments comes across in her handwritten notes. I find that what then happened was that the Claimant and Ms Mhaka had a row in which they both raised their voices and both behaved in a way which they should not of behaved but for which they were both responsible. This row resulted in the meeting terminating acrimoniously.

The Claimant discovering that she had been excluded from a meeting concerning EB

87. The Claimant’s evidence was that immediately after her meeting with Ms Mhaka she became aware that there had been a meeting involving Ms Korotko, Mr McCarthy and other employees concerning a client referred to as EB. The Claimant stated that she should have been invited to that meeting because she had been actively

involved in arranging the care plan for EB. She was aware of this meeting from staff passing her desk.

88. The evidence of Ms Korotko was that in fact this meeting was not about EB at all. Her evidence was that it was a general meeting which had been set up expressly to assist her with a Level 5 qualification for which she was studying and for which she needed to be able to demonstrate that she was able to lead a meeting. She said that neither Ms Mhaka nor Mr McCarthy had been present throughout the meeting: that would have been inconsistent with her having led it as required. However, Mr McCarthy had been at the meeting briefly at the beginning, to make sure that she was okay. She had been very nervous. She said that the meeting was not about EB. It was a general meeting. However the subject of EB had been mentioned a lot.

89. For the reasons that I have set out above, I found Ms Korotko to be a credible witness. Further, she had attended the meeting and the Claimant had not. I accept that the meeting was not a meeting convened to discuss EB. I find that given the purpose of the meeting (to give Ms Korotko an opportunity to lead a meeting) and the fact that neither Mr McCarthy nor Ms Mhaka were present at it, there was nothing inappropriate about the Claimant not being invited to it.

The Claimant's resignation

90. The Claimant sent an email of resignation at 15.27 shortly after he conclusion of her meeting with Ms Mhaka on 24 February 2017 (page 142). In that email she stated:

    Please accept this as notice of intention to leave Direct Care Works limited. My last working day will be Friday 3rd March.
    I cannot continue to work for a company that no longer demonstrates the values that were originally fundamental to it's [sic] being. We have always shared an ethos of being person centred, with both clients and staff, and it's quite apparent that this is no longer the case.
    On a personal level, my role has been diminished without any consultation or discussion. The "senior" management team continues to be secretive in their dealings and I feel both excluded and devalued.
    I am well aware that there have been a number of complaints into the company within the past month or so, even though these have not all been recorded. I would have been happy to discuss issues around these with you if this had been done from the point of trying to ascertain what has happened. I am not prepared to be scapegoated and held responsible for these complaints, when there is absolutely no doubt at all that the person making the complaint identified Gary as the culprit.
    If scapegoating and trying to victimise me was not your intention Vee, then I suggest you rethink your approach.
    Regards
    Fiona

91. Either just before or just after sending this email she sent an email to Mr McCarty (page 139) complaining about the contents of his email of 23 February 2017. This refers to her exclusion from the management team and to her being demoted, undermined and de-skilled by changes which had or would take place.

92. It is notable that although the Claimant's witness statement makes something of her alleged exclusion from senior management meetings (see its paragraph 5c) this was not one of the 10 "breaches" identified in the opening note or closing submissions of Mr Bidnell-Edwards. It is therefore not something in relation to which, strictly speaking, I need to make findings of fact. However, for the sake of completeness, I find that the Claimant did continue to attend regular meetings concerning the day-to-

day running of the business with Ms Korotko and Mr McCarthy. The change was that the owner (Ms Mhaka) no longer attended whereas previously the Davies had.

The setting up of Your Independence Matters Ltd

93. Your Independence Matters Ltd ("YIM") was established as a result of an application to Companies House made on 13 January 2017. The Companies House documents show that it had six directors (including the Claimant) and that 60 shares were issued with an aggregate nominal value of £6000. Each of the six directors is recorded as owning 10 shares all of which have been paid up. As such by no later than 13 January 2017 the Claimant had invested £1000 in YIM. A further £1000 had been invested by her partner who was also a director. The other directors of YIM included Ms Southin and Mr Narendra Mistry, who at the time both worked for the Respondent.

94. Ms Southin and Mr Mistry both resigned their employment with the Respondent around the same time as the Claimant did.

95. The Claimant's evidence in her witness statement was that "I set this up because I was concerned about my future with the Respondent. I did not want to start up a new business as it was very demanding when I had done so previously.… The new company is a social inclusion company only, and is not in competition with the Respondent.… This new company had been registered in January to 2017, but I did not start trading until April 2017, after I had left my employment with the Respondent". In her oral evidence the Claimant stated that she and her fellow directors had not met to discuss setting up the company until after her meeting with Mr McCarthy on 9 January 2017. She stated that the reason for setting up YIM was not simply that those involved wanted a business of their own but rather was because the Claimant thought that her position might be untenable. The Claimant accepted that the six directors had at the point of setting up the company each paid £1000 into the accounts of YIM.

96. The Claimant also gave evidence to the effect that she began work for YIM in March, having briefly applied to other jobs, and that she was first paid by it in April 2017.

97. I found the Claimant's evidence that she had not made a definite decision to establish YIM by 13 January 2017 completely implausible. This was because the steps taken clearly went beyond the purely preparatory: I simply do not accept that the Claimant and her five fellow directors would have each paid £1000 out if they had not reached a firm decision to establish YIM. There would simply have been no good reason to do so. I find that by that date she and her fellow employees (Ms Southin and Mr Mistry) had reached a firm decision to establish YIM.

98. Further, the Claimant's evidence in this respect damages her credibility. So too did her assertion in her witness statement that YIM was not in competition with the Respondent, in light of her sensible concession during her oral evidence that it was.

Submissions

99. Both representatives prepared written closing submissions. I do not set these out here. Copies of them are held on the Tribunal's file. The representatives also made brief oral submissions. However their respective written submissions had been prepared after all the evidence had been heard and so their oral submissions did not significantly develop them.

Conclusions

100. I return now to the issues which it was agreed that I would need to decide.

The unfair dismissal claim

Issue 1: whether the Respondent breached the implied term of trust and confidence

101. Mr Bidnell-Edwards stated in his closing submissions that "In summary the Claimant alleges there to have been 10 key breaches of the implied term which encompassed the start of the change in different treatment of the claimant, until her resignation on 24 February 2017". However, in reality his oral arguments focus not so much on there having been 10 separate breaches of the implied term of trust and confidence but rather there having been a course of conduct by the Respondent which when taken as a whole amounted to a breach of the implied term of trust and confidence and so it is this issue which I consider first.

102. In light of the findings of fact which I have reached above, the course of conduct of which the Claimant complains can reasonably be summarised as having been as follows:

102.1. Mr McCarthy providing a revised contract of employment by attaching it to a rather curt email but swiftly discarding it when the Claimant raised objection to it;

102.2. Mr McCarthy instructing the Claimant along with all other managers not to make changes to the planning entries in People Planner in a rather heavy-handed email which ended with the threat of disciplinary action;

102.3. Mr McCarthy failing to provide minutes of the meeting on 9 January 2017 after the Claimant had asked for them;

102.4. The Respondent failing to clarify the necessary administrative changes to the on-call arrangements in light of the changes made to who could make planning entries in People Planner;

102.5. The Respondent failing to pay the Claimant four hours' wages due in respect of 31 January 2017 after the Claimant had raised this as an issue on 21 February 2018;

102.6. Ms Mhaka not acknowledging the Claimant on her return to work following a sickness absence on 22 February 2017;

102.7. A decision by Ms Mhaka not to take on the New Client after the Claimant had made a commitment so to do;

102.8. A prospective but limited change to the Claimant's supervision responsibilities being announced by Mr McCarthy without prior consultation with the Claimant;

102.9. Ms Mhaka becoming involved in a heated argument with the Claimant during their meeting on 24 February 2017; and

102.10. The Claimant not being invited to a general meeting organised by Ms Korotko for training purposes.

103. The issue for me is whether when taken cumulatively these matters objectively viewed represent conduct by the Respondent which was likely to destroy or seriously damage the relationship of trust and confidence between it and the Claimant. I conclude that in all the circumstances of the case these matters simply did not strike at the heart of the employment relationship as the Claimant contends they did for the following reasons:

103.1. Mr McCarthy acted with a lack of judgement when he sent the revised contract of employment to the Claimant and the queries which the Claimant raised in relation to it were reasonable. However, the fact that Mr McCarthy swiftly abandoned his request that the Claimant sign the revised contract means when objectively viewed the initial request was no more than a minor lapse of judgement on his part. I might have taken a different view if Mr McCarthy had pursued the matter and placed pressure on the Claimant to sign the revised contract, but he did not;

103.2. So far as the changes to the use of People Planner were concerned, the instruction was made in a heavy-handed manner with an unnecessary threat of disciplinary action attached to it. However, in light of my findings of fact about the nature of the change and the reasons for it, the change itself was entirely reasonable. Consequently it was not a matter which when objectively viewed was of any great significance because the substance of the decision by the Respondent could not reasonably be criticised;

103.3. There was no requirement on Mr McCarthy to produce minutes of the meeting that he had had with the Claimant on 9 January 2017. As such the fact that he did not do so when asked is not a matter for which the Respondent can reasonably be criticised.

103.4. So far as the failure to clarify changes to the on-call arrangements prior to the Claimant's employment terminating, this is something for which the Respondent can reasonably be criticised but objectively viewed it was not a very serious matter;

103.5. The failure to pay the Claimant four hours wages in respect of 31 January 2017 was a breach of contract for which the Respondent can reasonably be criticised. However, the reality is that this issue had only just been raised when the Claimant's gave notice to terminate her employment. Objectively viewed as at the date of termination, it was not a long-standing and unresolved complaint. I conclude it would in all likelihood have been swiftly resolved if the parties had not descended into the trench warfare of litigation shortly after it had arisen;

103.6. The failure by Ms Mhaka to speak to the Claimant in a pleasant way on her return to work following a period of absence – in effect a failure to welcome her back to work – was a failure of good management etiquette. However its significance as a one-off incident was limited;

103.7. The decision by Ms Mhaka not to take on the New Client after the Claimant had made a decision so to do is not one for which the Respondent can reasonably be criticised. In light of my findings of fact above, the reality is that the Claimant had made a greater commitment than would have been normal on her first visit to the New Client, even if there was no clear breach of any procedure. In the end Ms Mhaka as the owner of the business was entitled to decide not to take on the New Client, particularly when the Claimant had not discussed her decision in this regard in a management meeting as would have been normal. Further, the unfortunate turn of events which then led to the Client Complaint was essentially the fault of the Claimant: if she had not sent the email on 23 January 2017 confirming that the care services would be provided, it

would have been much easier for the Respondent to have extracted itself from the commitment made to the New Client by the Claimant just a few days before. Overall, therefore, this is not a matter for which the Respondent can reasonably be criticised;

103.8. The limited change to the Claimant's supervision responsibilities which was announced (but not implemented) prior to the Claimant's resignation was not in and of itself a matter for which the Respondent could reasonably be criticized because the prospective changes were changes which the Respondent was entitled to make under the claimant's contract of employment and/or as a matter of general management prerogative. However they were changes in respect of which there should ideally have been at least a little consultation;

103.9. Ms Mhaka cannot reasonably be criticised for having asked the Claimant to attend a meeting on 24 February 2017 as part of her investigation of why the Client Complaint had arisen and, as I have found above, the questions which she asked the Claimant were all entirely reasonable and appropriate. Ms Mhaka can reasonably be criticised for becoming involved in heated argument but, objectively viewed, the extent of that criticism is inevitably very substantially limited by the way in which I have found the Claimant behaved in that meeting. That is to say a row developed for which the Claimant was at least 50% to blame and perhaps more;

103.10. The Respondent cannot reasonably be criticised for the Claimant not being invited to a meeting which was convened essentially for training purposes.

104. Overall, I have therefore concluded that the acts and omissions for which the Respondent could reasonably be criticised when taken <u>either</u> individually <u>or</u> cumulatively were **<u>not</u>** sufficiently serious to amount to conduct which when viewed objectively was likely to destroy or seriously damage the relationship of trust and confidence. Viewed objectively the acts and omissions were a mixture of: (1) relatively minor bumps-along-the-road of the kind which are inevitable for managers whenever the ownership of a company changes hands and the new owner seeks to make some changes to the way in which the company is managed; and (2) relatively minor acts or omissions representing less than surefooted management on the part of Mr McCarthy and, to a lesser extent, Ms Mhaka. I conclude that the Claimant was overly sensitive to the way in which she was treated by both of them as a result of her dissatisfaction with the way in which the business had been sold to Ms Mhaka and as a result of her previous role as an owner of the business.

105. Because I have concluded that there was no breach of the implied term of trust and confidence, it inevitably follows that the Claimant was not "dismissed" and that consequently her claim of unfair dismissal fails and is dismissed.

<u>Other issues which it is not strictly speaking necessary for me to determine</u>

106. For the sake of completeness, I will set out my conclusion in relation to the reason for the Claimant's resignation. I conclude that although the immediate reason for her resignation was that she was upset about the meeting on 24th February 2017 with Ms Mhaka, the underlying reason was that she had decided by no later than the end of 2016 to set up YIM. I find therefore that events post-dating 31 December 2016 were not relevant to her decision to resign, although they may have affected the exact timing of her resignation. I have so concluded because I find that in order to have established a company with paid up share capital by 16 January 2017 the Claimant, Ms Southin, Mr Mistry and the other directors would have decided to set up the company and to make it active by no later than 31 December 2016. I conclude that the reason that the Claimant, Ms Southin and Mr Mistry decided that they

wanted to go into business together themselves was that they did not wish to work for Ms Mhaka. I conclude that this was above all simply because they were displeased to find the business for which they worked suddenly owned by Ms Mhaka in circumstances when they would in all likelihood have preferred to take on its ownership themselves (or to at least have had that option). I conclude that the decision resulted from this general dissatisfaction rather than the way in which Ms Mhaka herself actually conducted the Respondent's business.

107. If I had found the Claimant's dismissal to be unfair, I would have substantially reduced her compensation to reflect the possibility that she might have been fairly dismissed for having taken steps to set up a competing business during the course of her employment.

108. I have not reached any conclusion in relation to the issues set out at paragraph 7.2 (affirmation) because it was conceded by the Claimant. I have also not set out what my conclusions would have been in relation to the issues set out at paragraphs 8.2 (contribution) and 8.3 (uplift) as it is not necessary for me to do so.

The section 10 claim

109. I conclude that the meeting on 24 February 2017 was quite clearly not a disciplinary hearing as defined by section 13(4) of the 1999 Act. It was no more than an investigative meeting. The Claimant had no right to be accompanied to it. Her claim that her rights under section 10 of the 1999 Act were breached therefore fails and the claim is dismissed.

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Employment Judge Evans

Date: 30 January 2019

JUDGMENT & REASONS SENT TO THE PARTIES ON

FOR EMPLOYMENT TRIBUNALS