

EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4105558/2016

5 Held in Glasgow on 3, 4, 5, 17, 18 ,19 May, 1 and 2 August 2017

Employment Judge Shona MacLean

10 Ms A Heaney

Claimant
Represented by:
Mr K McGuire
Advocate

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BAE Systems Surface Ships Limited

Respondent
Represented by:
Mr G Mitchell
Solicitor

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal is that the claim of constructive dismissal is dismissed.

REASONS

25 Introduction

1. The claimant presented a claim form to the Tribunal's office in which she complained of constructive unfair dismissal and disability discrimination. The complaint of disability discrimination was withdrawn before the Hearing on liability.
- 30 2. At a case management Preliminary Hearing on 12 January 2017 it was established that the alleged breach of contract relied upon by the claimant was the implied term of trust and confidence based on the following:
 - a. Alleged treatment of the claimant by Lisa Taylor at a Senior Directors meeting in March 2016 where it is said that Ms Taylor treated the
35 claimant differently to male colleagues.
 - b. An email from Ms Taylor listing the objectives of all team members. The claimant considered her objectives were less favourable than her

colleagues and considered that these were used to insult and degrade her.

- c. A meeting between the claimant and Ms Taylor to discuss those objectives.
 - 5 d. The frequency and tone of messages from Ms Taylor to the claimant when the claimant was absent between 18 and 26 May 2016 (as set out in paragraphs 15-21 of the claim form).
 - e. The respondent's failure to deal with the claimant's request to move departments and instead the claimant was told she had to go through
10 the grievance process.
 - f. The respondent's failure to consider the points made by the claimant during the grievance process.
 - g. Continuing with the appeal hearing on 11 October 2016 in the claimant's absence despite knowing that the claimant was to undergo
15 a procedure the next day and the respondent had been notified by ACAS that the date was not suitable for this reason. This incident was relied on as the "last straw."
3. It was agreed that the Hearing would be confined to dealing with issues of liability only.
- 20 4. The issues to be determined by the Tribunal were:
- a. Did these incidents so far as proved to have occurred, amount to conduct that was calculated or likely to destroy or seriously damage the relationship of trust and confidence between employer and employee?
 - b. If so, was there reasonable and proper cause for that conduct?
 - 25 c. If not, and there was therefore a fundamental breach of contract, did that conduct cause the claimant's resignation (it being noted that it need not be the sole cause).

- d. If there was a fundamental breach, did the claimant affirm the contract by delay in resignation?
5. At the Hearing the claimant gave evidence on her own account. Her husband, Steven McIntosh gave evidence on her behalf. For the respondent, the Tribunal heard evidence from Caroline Haffey, Counsel, Labour Law, Lisa Taylor, Head of Business Strategy and Improvement, Donna Cook, HR Adviser Case Management, Joanna Wood, Head of Programme Management and Strategy and Caroline MacKinnon, HR Adviser.
6. The parties lodged a joint set of productions to which the Tribunal was referred during the Hearing.
7. The Tribunal found the following facts to have been established or agreed.

Findings in Fact

8. The respondent is a defence and security company. It is part of a wider group of companies delivering a range of products and services for air, land and naval forces along with electronics, IT and consumer support services.
9. The respondent employed the claimant from 4 May 1999. In April 2015, the claimant was promoted to the position of Head of Change Management, Maritime Naval Ships (Watson & Wyatt (WW), level 14) (production 10/65 to 88). The claimant was responsible for Change Managers within each of the functions of the respondent's businesses namely Engineering, Supply Chain and Quality.
10. The claimant reported to Katie Callan, Project Management Director for approximately four months. Ms Callan advised the claimant in December 2015, that the respondent was creating a new position: Head of Business Strategy and Improvement, which would be a grade above the claimant's grade (WW, level 15). The claimant decided not to apply for the new position. She was content with her current role and the work/life balance that she had.

11. Around November 2015, the claimant had noticed a large growth in her abdomen. After medical investigation in January 2016, the growth was diagnosed as a possible ovarian cyst.

12. In February 2016 Lisa Taylor was appointed Head of Business Improvement and Strategy. In addition to the claimant, Ms Taylor had other direct reports including Steven Clark and Steven Fraser (production 150/613 to 614). Ms Taylor reported to Ms Callan.

13. From initial meetings with Ms Callan Ms Taylor understood Ms Callan's view was that there were too many projects; Ms Callan was keen to focus fewer projects and ensure objective delivery. Ms Taylor's role was overarching and was endeavouring to pull the teams together with a view to looking how to save money by improving efficiency, materials used and the processes adopted.

14. In early February 2016 Ms Taylor made face-to-face contact with her direct reports. She met the claimant on 12 February 2016 (12 February Meeting). The claimant expressed concern about organisational design and the fact that the claimant was a "head of" and reporting to another "head of".

15. After the 12 February Meeting the claimant sent an e-mail to Ms Taylor which included the following (production 21/215):

"Thanks for your time on Friday, mainly to allow me to express my concerns and "vulnerabilities" especially as Naval Ships is in the process of defining the business structure under the OD Umbrella.

As you are now aware, Business Change is the role that I wish to do going forward and I am now concerned about where this fits into the organisation going forward. I am also concerned about my role as Head of Change being somewhat diluted and that this business perhaps hasn't got the same desire for this.

As discussed, I do not expect you to have the answers just now as you are new to the role, however if you do get any steer on this, I would be happy to sit with you again. I have subsequently set some time with Richard Hussey

next week to talk through business change, he was a big advocate for this when he first joined the business with Al Simmonite and I would like to take his steer on this.”

5 16. An executive level Business Improvement Review Meeting arranged on 18 December 2015 was scheduled to take place on 18 February 2016 (the Senior Directors’ Meeting). The claimant sent an e-mail to Ms Taylor asking if she wished the claimant to attend “*some of this meeting, all of it or none of it*” (production 83/224). Ms Taylor replied that the claimant should attend so that she could hear the discussion first hand on a proposal of how the improvement plans will be managed going forward.

10 17. At the Senior Director’s Meeting Ms Taylor asked her team who wished to be part of the meeting going forward. This query was not directed solely at the claimant. The claimant said that she would not attend. The following day the claimant spoke to Ms Taylor and advised having reflected on the matter she did wish to attend. Ms Taylor agreed.

15 18. On 22 February 2016 Ms Taylor emailed Mr Clark, Mr Fraser and the claimant attaching a copy of the Naval Ships vision mission strategy for 2016 from the Managing Director, Mick Ord. Also attached was an improvement plan for the Business Improvement and Strategy Team, which covered the milestones for the year. In the e-mail, Ms Taylor requested that this be used as a basis for them to develop their objectives for 2016 (the Objectives Email) (production 20 25/227 to 229A). Ms Taylor said that she would meet them to discuss their 2016 objectives and make sure that they were aligned but not limited to the attached plan. The Objectives E-mail continued to set out what each of the plan should include in relation to the claimant the it stated:

“Knowledge Management: Develop route map for embedding knowledge management within the business.

- a. *Understand the business need for knowledge management.*
- b. *Undertake pilot studies on key roles.*
- 30 c. *Integrate knowledge management requirements for training & education strategy (Project Management dependency).*

Business improvement: Review, understand and mature Open Doors as both an input & output.

- a. *Review the approval structure.*
- b. *Ensure process has ownership*
- 5 c. *Ensure timely review & feedback of issues.”*

19. The claimant was upset when she received the Objectives E-mail. She felt singled out and considered her colleagues had more challenging projects.

20. The claimant responded by e-mail on 23 February 2016 advising that before agreeing to her objectives she would like to understand Ms Taylor’s thoughts on the claimant’s role going forward in a change management capacity. The claimant said she would obtain a copy of her role profile and forward it to Ms Taylor before their meeting. The claimant sought clarification as to whether this was a change of her role and wanted an open conversation to allow her to get all her concerns on the table. Ms Taylor replied confirming that there has been no change to the claimant’s role. She confirmed that to have a better understanding the claimant could talk her through what had been achieved in 2015 against a role profile and the claimant’s objectives and plan for 2016.

21. The claimant attended work on 23 February and was very upset. She had not slept well and discussed matters with a colleague, Keith Miller. She decided to go home. The claimant telephoned Jean Marsh, Ms Callan’s PA to say that she would be taking the rest of the day off.

22. Ms Marsh advised Ms Taylor that the claimant had gone home sick. Ms Taylor sent a text message to the claimant as follows (production 16/205):

25 *“Anne, Jean mentioned you had gone home unwell. Drop me a line or call me tomorrow to see how you are doing. Hope you feel better soon. LT”.*

23. The claimant and Ms Taylor met on 24 February 2016. There had been a series of discussions about focusing the group and narrowing the objectives to some of those required by senior management. Knowledge management and open door projects were important projects and projects, which, fell within

the claimant's, job description. After the meeting Ms Taylor sent the claimant an e-mail which included the following (production 28/237):

5 *"Just to follow up on our chat earlier, after the way you were feeling yesterday, I want to make sure that you feel supported. Please have a think and let me know if you want me to arrange any time with Occupational Health?"*

I am in MBR all day tomorrow but will monitor my phone and can step out if needed and arrange for you."

24. The claimant replied indicating that she did not need Occupational Health support. The claimant said that she felt more comfortable after their face to face conversation she also felt that they were: *"both aligned of the way forward and I look forward to us both working together to achieve successful outcomes for the benefit of the business."*

25. On 16 March 2016, the claimant attended a further project management meeting. It also coincided with the claimant attending a hospital appointment. Ms Taylor was aware of the hospital appointment but had no knowledge to what it related.

26. Following medical complications, the claimant was admitted to hospital on 20 March 2016. The claimant's husband, Steven McIntosh contacted Ms Taylor to advise the claimant had been taken into hospital. Ms Taylor emailed Mr McIntosh enquiring whether it would be appropriate to send flowers or a card to the ward (production 17/207).

27. Ms Taylor also sent text messages to the claimant on 21 March 2016 as follows (production 17/205):

25 *"Anne I spoke with Steven this morning, sending you best wishes and a way back to good health. Please take it easy and I will talk to Steven again for an update. Take care, Lisa."*

"Just spoke with Fiona Shanks who has passed your message on. That is great news. Please do not be worrying about work or calling people – work will keep, your health is most important! Take care. Lisa."

28. The claimant replied: *"Thanks Lisa I am going for an MRI today and then to see a consultant to view my options. I'll drop you a line when I know what is going to happen. Everything is a bit up on the air at the moment. Thanks again for your kind words. Anne"*

5 29. Ms Taylor replied: *"I can imagine. Just you take it easy and let the experts take care of you. X."*

30. On 23 March 2016, the claimant emailed to Ms Taylor providing an update on her health (production 83/249). The claimant explained that she had opted for a procedure that had a quicker recovery and she anticipated being back at work relatively soon. She was still waiting dates for the surgery and would advise Ms Taylor when she knew. The claimant also indicated that she was keen to stay involved in the current project and provide support to the team. The claimant also thanked Ms Taylor for her nice text. Ms Taylor replied encouraging the claimant not to think about work and to focus on looking after herself.

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31. The claimant emailed Ms Taylor on 29 March 2016 providing a further update on her health (production 84/251). The claimant stated that she was keen to keep in touch and provide support where possible. The claimant said that she was still awaiting a date for surgery. She proposed scheduling an appointment for Occupational Health to discuss appropriate attendance at work and the lead in to surgery. The claimant stated: *"I look forward to continued engagement in my role during this period of required work place absence."*

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32. Between 1 April 2016 and 15 April 2016 Ms Taylor and the claimant exchanged texts and emails regarding a proposed time to speak and discuss the claimant's appointment with Occupational Health.

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33. The claimant met with Rose Muller, Occupational Health Adviser on 13 April 2016. Ms Muller had a long conversation with the claimant on 20 April 2016 following which Ms Muller advised Ms Taylor that the claimant expected to be admitted for surgery in the following two weeks (production 44/273). The nature of the proposed surgery would depend on the findings on the day of the surgery. Ms Muller advised that the claimant should remain on sick leave

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and the length of the absence would depend on findings, treatment options and the speed of the claimant's recovery. Ms Muller indicated that she had set herself a reminder to contact the claimant on 18 May 2016 at 1pm.

5 34. On 25 April 2016, the claimant emailed Ms Taylor to advise that she was to have surgery but did not yet have a date for the operation. The claimant said that once she had a date she would set up a call to discuss an expected return to work date. The claimant also told Ms Taylor not to hesitate to contact her (production 45/274).

10 35. On 3 May 2016, the claimant e-mailed Ms Taylor to advise that the surgery had been scheduled for Monday 9 May 2016 (production 49/279). On 9 May 2016 Ms Taylor sent a text message to the claimant to say that she hoped the claimant's surgery that day would go well. The claimant responded on 11 May 2016 saying that she was hoping to be released from hospital that day (production 48/281).

15 36. The respondent has an absence procedure (the Absence Procedure) (production 13/175 to 196). An absence of a continuous period of four weeks or more is long term. The Absence Procedure provides that:

20 *"During periods of long term sick absence the employee and line manager should keep in regular contact as agreed, to check on the employee's progress, provide any necessary support and where appropriate plan for the employee's return to work. In some instances HR/CNAT or OH may be the nominated point of contact with the employee. The employee and line manager/nominated point of contact should mutually agree times and dates of the contact."*

25 37. As the claimant had been absent on sick leave since 21 March 2016 she was on long-term sick absence. Her medical certificate was due to expire on 30 May 2016.

30 38. On 18 May 2016 Ms Taylor received an email from Brinda Fowdar, Senior Occupational Health Adviser who had replaced Ms Muller (production 50/286). Ms Fowdar had tried to contact the claimant on 18 May 2016 as this

had been agreed with Ms Muller but was unable to leave a message on the claimant's landline. Ms Fowdar asked if Ms Taylor could shed any light and confirm with the claimant when would be a good time to rearrange an Occupational Health review

5 39. Ms Taylor then called the claimant on her mobile telephone She left a voicemail message saying that she tried to contact her but was unable to reach her. Ms Taylor said that Occupational Health had been trying to reach the claimant on her home telephone as they had previously agreed to speak to her on 18 May 2016 for a catch up. Ms Taylor asked the claimant whether
10 there was a better number to reach her on going forward.

40. The claimant had had complications with her surgery and had been re-admitted to hospital on 18 May 2016. She had turned off her mobile telephone.

15 41. On receiving Ms Taylor's message on 23 May 2016, the claimant returned the call and left a voicemail for Ms Taylor. The claimant then emailed Ms Taylor on 23 May 2016 at 16:15 (production 49/284)

20 *"Further to my voicemail this morning at 9.30, I would like to confirm with you that you have the relevant correct details to contact me if necessary. As per my voice, I have double checked for your previous calls and have no other voicemails from you other than your voicemails from last Wednesday; perhaps there is a fault on the systems.*

I have experienced a number of complications since my surgery and I have been in and out of hospital, most recently re-admitted on Wednesday 18 May.

25 *Prior to that I checked my Blackberry daily for any updates or calls and will continue to do so now that I am home. Therefore, if you drop me a text, e-mail or voicemail I will pick it up and get back to you. You have access to my husband's number which is [].*

I would also suggest that it might be worth pencilling in a weekly catch up between us at a set time.

To be honest, I felt upset when I received your call as it sounded as if I had been avoiding calls from you and that I have absolutely no trace of.

Therefore, having set weekly checks between us means that I don't feel pressurised to have my work Blackberry with me at all times."

5 42. Ms Taylor replied shortly afterwards as follows (production 49/283):

10 *"Great to hear from you but sorry to hear about the complications. I have been in the QBR today and I have just picked up your voicemail. Absolutely nothing for you to be upset about, I am just keen to hear that you are keeping well and I know your signal can be ropery on your mobile so it is a great idea to have a scheduled time together. Brinda from Occupational Health tried to give you a call at home last week but wasn't able to leave a message. Some background to that is that she is following up from your last meeting with Rose and it would be great to get you arranged for another visit with Occupational Health at a convenient time.*

15 *Is tomorrow afternoon a good time to call you? Between 3 to 4.30pm is good for me but I appreciate you may have medical appointments etc. I can call your work mobile or any other number which is suitable for you."*

43. The claimant replied (production 49/283):

20 *"Thanks Lisa I have the hospital tomorrow morning so suggest we talk at 16:00-16:30.*

With regards to occupational health, I can [be] contacted on this number or by my work email and if I'm unable to answer it will divert straight to voicemail, if a message is left for me I will respond immediately as I check my work phone on a regular basis.

25 *Thanks for responding to my email and we will talk tomorrow."*

44. As arranged Ms Taylor telephoned the claimant on 24 May 2016 at 4pm. The telephone call diverted to voicemail. Ms Taylor left a message to say that she would try again in 10 minutes (production 159/641-542). Ms Taylor telephoned the claimant again about 10 minutes later. The telephone call

again diverted to voicemail. Ms Taylor left another message to let the claimant know that she had tried to reach her, as agreed the previous day and that she would be leaving the office at 4.30pm but would be available the following morning. The following day, still not having heard from the claimant Ms Taylor telephoned her and left another voicemail message.

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45. The claimant had attended hospital on 24 May 2016 and was given an emergency biopsy surgery. Further surgery was scheduled for 1 June 2016. The claimant listened to the voicemail messages on 25 May 2016. On hearing these messages the claimant to felt pressurised and that she should have been working from home despite being severely unwell. The claimant telephoned Ms Taylor and left a message regarding her medical condition. She advised Ms Taylor to contact Mr McIntosh for updates as the claimant was mentally and physically exhausted. Mr McIntosh texted Ms Taylor to advise that she should contact him.

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15 46. Mr McIntosh sent a text message to Ms Taylor on 25 May 2016 in the following terms (production 116/515):

“Hi Lisa, its Steven McIntosh, Anne’s husband. Anne did ask me to contact you yesterday. It’s been a bit hectic and slipped my mind. I’ve not long uplifted Anne from hospital, again, as she has been in & out. I appreciate you may be very busy but can u contact me on this number at your earliest convenience please. I pleaded with Anne to leave her works mobile alone as she is constantly checking in with it and due to her medication I feel its better that if any update is required then I be contacted. I’ll explain it all better when we chat. Thanks Lisa. “

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25 47. Ms Taylor responded to Mr McIntosh explaining that she just wanted to speak to the claimant to check how she was and ask if he could ask the claimant to suggest a good time for Ms Taylor to call. Ms Taylor suggested telephoning on the claimant’s landline to avoid the need for the claimant to look at her work mobile telephone.

30 48. On 26 May 2016 Mr McIntosh contacted the respondent’s Human Resource department and requested that Ms Taylor stop contacting the claimant. He

said that Ms Taylor was not fulfilling her duty of care towards the claimant and requested that all communications going forward went through him. The claimant was unaware that Mr McIntosh had made the contacted the respondent's Human Resource department and had not asked him to do so.

5 49. Joe Rowan, Maritime Sector Lead – HR Case Coaching told Ms Taylor about the situation. Mr Rowan suggested that Ms Taylor contact Mr McIntosh to explain that she was concerned for the claimant and that it was normal for an employer to have contact with an employee while they were on sick leave. Ms Taylor then telephoned Mr McIntosh and left a message explaining that she
10 was keen to arrange dedicated times to speak to the claimant to check how she was getting on. As Mr McIntosh had previously indicated the claimant found her work mobile telephone distracting Ms Taylor queried whether she should contact the claimant on a different number. Ms Taylor explained that the reason she wanted to speak to the claimant was to make sure that the
15 claimant was alright.

50. On 27 May 2016 Mr McIntosh sent a text to Ms Taylor thanking her for the message and explaining that on the guidance and advice of Occupational Health she would receive no more communication or updates from either him or the claimant as all communication would be through Occupational Health.
20 Ms Taylor acknowledged the text and told Mr McIntosh that she was pleased that the claimant had found a preferred way of communicating with the respondent, which she felt comfortable with.

51. Ms Taylor was surprised that the claimant no longer wished to communicate with her as she considered that she had been supportive of the claimant.
25 However, Ms Taylor did not want to cause the claimant any further upset and therefore did not communicate with the claimant or Mr McIntosh again.

52. The claimant contacted Ms Fowdar on 25 May 2016 for an Occupational Health review by telephone following which Ms Fowdar prepared a case management report (the May OH Report) (production 51/287 to 289). Ms
30 Fowdar noted that the claimant had been worrying about work and has become extremely concerned. The claimant's medical certificate expired on 30 May 2016 but she was scheduled to undergo further surgery on 1 June

2016 therefore it was likely that the medical certificate would be extended. Ms Fowdar considered the claimant remained unfit for work and that she would remain in contact with the claimant throughout her period of absence to be able to provide the necessary support. It was agreed that a review appointment would take place on 13 June 2016 either by face to face or by telephone.

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53. It is unusual practice for Occupational Health to manage an employee's absence. In June 2016 Ms Fowdar contacted Caroline MacKinnon, HR Manager to advise that the claimant and Ms Taylor were no longer in contact. Ms Fowdar had a review appointment with the claimant by telephone on 13 June 2016 following which she prepared a case management report (the June OH Report) (production 53/294 to 302). Ms Fowdar recorded that the claimant's surgery had proceeded on 1 June 2016 as planned but the claimant had been re-admitted and underwent emergency surgery on 4 June 2016 as she was showing signs of infection and sepsis. The claimant was discharged and was on strong antibiotics and mild pain relief. A further scan was arranged on 18 August 2016 to assess the claimant's progress and to determine if further treatment was required. In the meantime, the claimant was visiting her GP to determine if she was fit to travel as she had a pre-arranged two-week holiday at the end of May 2016. During the discussion the claimant remained very upset and did not feel comfortable maintaining further contact with Ms Taylor. Ms Fowdar concluded that the claimant remained fit for work and that a further review appointment was scheduled for 19 July 2016.

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54. Ms MacKinnon received the June OH Report and contacted the claimant to ascertain how she was feeling and agree a new date of contact going forward.

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55. During the conversations that followed the claimant raised concerns about Ms Taylor. The claimant was concerned about the way in which her objectives had been shared via e-mail; she was concerned about a meeting at which Ms Taylor had discussed who would attend the next meeting and the claimant had felt that she was being excluded and that Ms Taylor's contact with her while off work was in a tone that she did not find helpful.

56. There was a further conversation on or around 23 June 2016 during which it was suggested by Ms MacKinnon that it might be helpful to have an all-round discussion with Ms Taylor with a view to resolving any issues. The claimant made it clear that she would not sit in a room with Ms Taylor. Ms MacKinnon also suggested that it might help if the claimant was to write down her concerns and Ms MacKinnon would obtain feedback. The claimant was not willing to do this. There was discussion as to who would support the claimant. The claimant suggested Tony Williams, Iain Stevenson and Ms Callan. Ms MacKinnon did not think that these managers were appropriate given their other commitments. Ms MacKinnon suggested David MacLean but the claimant was not comfortable with this proposal as she did not know him well enough. It was eventually agreed that Ms MacKinnon would provide support.
57. During a telephone discussion on 27 June 2016 Ms MacKinnon and the claimant discussed the claimant's health and potential return to work. The claimant reiterated that under no circumstances would she work with Ms Taylor and wanted to know what were her options. Ms MacKinnon explained that there were not many available given the claimant's relatively high grade. Ms MacKinnon offered to send the claimant a list of vacancies within the business, which she could review and determine.
58. The claimant had an Occupational Health review with Ms Fowdar by telephone on 19 July 2016 following which Ms Fowdar prepared a case management report (the July OH Report) (production 55/305 to 308). Ms Fowdar recorded that the claimant was making slow and steady progress. She was due a hospital scan on 16 August 2016 and was due to attend an MRI scan in October. The claimant said that she was raising a grievance and was advised about counselling. The claimant remained unfit for work and a further review was arranged for 16 August 2016.
59. The claimant sent a letter to Ms MacKinnon dated 20 July 2016 raising a grievance in relation to the treatment she received from Ms Taylor (the Grievance Letter). The claimant's main stated concerns focused on the inconsistent duty of care, lack of sensitivity and empathy and contact by Ms Taylor during the claimant's absence from work (production 86/309 to 311).

- 5 60. The claimant sent a text to Richard Hussey, the Director of Human Resources on 21 July 2016 to seek a “*grown up conversation*” on the matter (production 137/577). Mr Hussey did not contact her. Mr Hussey was copied into an email sent from the claimant to Ms MacKinnon on 24 July 2016 confirming that she had posted a formal grievance (production 120/530).
- 10 61. The respondent has a grievance procedure, which encourages employees to raise concerns at the earliest opportunity with their line manager (the Grievance Procedure) (production 12/167 to 174). Where that is not appropriate the employee may approach their line manager’s line manager, their trade union or other employee representatives or contact HR. All efforts should be made to resolve the issue informally but if that is not possible the employee can put their grievance in writing to their line manager or alternatively HR where following an appropriate investigation a line manager or nominated alternative manager will arrange a hearing. After the hearing the manager will respond to the grievance.
- 15 62. If the matter is not resolved at stage 1 the employee has the right of appeal to raise the grievance with their next in line manager (or nominated alternative manager) using a standard form. A stage 2 hearing is not a full re-hearing of the grievance and will only be heard if the employee appeals and provides reasons why the stage 1 outcome has not resolved the grievance and why they feel a different outcome should have been arrived at. A stage 2 hearing will normally be held within five working days in receipt of the appeal. If matters are not resolved at stage 2 there is a further right of appeal to an appropriate manager to chair the final appeal hearing.
- 20 63. Joanne Wood, Head of Engineering - Combat Systems was approached by Ms Callan to conduct the stage 1 hearing as Ms Wood was of the appropriate seniority to deal with the matter and was female.
- 25 64. Ms Wood wrote to the claimant on 28 July 2016 advising her that the stage 1 hearing would take place on 10 August 2016 and that Donna Cook, HR Adviser would be present to take notes. The claimant was advised of her right to be accompanied (production 57/315). The stage 1 hearing required to be
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re-scheduled and was eventually arranged for 25 August 2016 (the Stage 1 Hearing).

- 5 65. On 16 August 2016 the claimant attended an Occupational Health review with Ms Fowdar following which Ms Fowdar prepared a case management report (the August OH Report) (production 66/337 to 342). Ms Fowdar noted that the claimant had attended hospital that morning and had a review in a further six months. She was also due to have a procedure on 12 October 2016 to assess an underlying medical complication. The claimant was also waiting for a date for an MRI scan due sometime around October 2016. Ms Fowdar reported that she hoped the claimant would be fit to return within the next two to four weeks. A phased return to work was to be discussed in more detail at the next OH review. A copy of that August OH Report was provided to Ms MacKinnon. The claimant also provided a copy to Ms Cook.
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- 15 66. On 23 August 2016 Ms Wood met separately with Ms MacKinnon and Ms Taylor (production 69/349 to 352 and production 70/353 to 360).
67. Ms Wood met with the claimant on 25 August 2016 (the Stage 1 Hearing). Mr Latham accompanied the claimant. Ms Cook took notes (production 78/379 to 388). A copy of the notes was sent to the claimant. She added comments to the notes and then signed them.
- 20 68. On 30 August 2016, the claimant contacted Ms MacKinnon to advise that she was fit to return to work. Due to the ongoing grievance and unresolved issues between the claimant and Ms Taylor it was agreed that the claimant would not return to work until the matter had been resolved. The respondent agreed that the claimant would receive her full salary throughout this period.
- 25 69. Following the Stage 1 Hearing Ms Wood listened to recordings of the voicemail messages, which the claimant had sent to her. Ms Wood considered the tone was upbeat. Ms Wood acknowledged that the claimant's perception of the voicemail messages was that Ms Taylor failed to show empathy and sensitivity during the claimant's period of ill health. Ms Wood considered that Ms Taylor had acted in the claimant's best interests; Ms Taylor only attempted to call the claimant on an ad hoc basis to enquire about
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her welfare. On the occasion where she attempted to telephone the claimant more than once, the initial call was at a mutually agreed time and that was why the initial call was followed up by additional calls. Ms Wood did not consider that this was unreasonable. It was unfortunate that the claimant was unable to take the call and it was due to the claimant being admitted to hospital of which Ms Taylor was unaware therefore could not know that the claimant would not be available at the agreed time.

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70. With regards Ms Taylor speaking to Mr McIntosh, Ms Wood considered that Ms Taylor did not know either the claimant or Mr McIntosh well. Ms Taylor did however contact Mr McIntosh after he spoke to the Case Coaching team and left a voicemail for him. Ms Taylor then received a text from Mr McIntosh to the effect that she was not to contact the claimant or her husband again. Ms Wood did not consider that Ms Taylor ignored requests by Mr McIntosh. For the avoidance of doubt Ms Wood confirmed that there was no suggestion that the claimant was absent for a genuine reason.

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71. Ms Wood wrote to the claimant on 14 September 2016 to advise that her grievance had not been upheld (the Outcome Letter Stage 1) (production 79/389 to 392). Ms Wood acknowledged that the claimant and Ms Taylor needed to repair their relationship and before returning to work it was suggested that mediation be arranged. The claimant was advised that she had a right to appeal the decision.

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72. Around 19 September 2016 Ms MacKinnon telephoned the claimant. The claimant was unable to take Ms MacKinnon's call. The claimant sent an e-mail to explaining that she was not in a great frame of mind and was focussing on her response to the Outcome Letter Stage 1. The claimant could not at that time meet with Ms MacKinnon or Ms Fowdar at the work place. As Mr McIntosh was away the following week the claimant did not want to receive any contact (i.e. no letters, no text, no e-mails etc.) from the respondent between 28 to 30 September 2016 (production 162/653). Ms MacKinnon acknowledged the e-mail and confirmed that the claimant could meet her and Ms Fowdar when she was ready. Ms MacKinnon clarified that the meeting

with Ms Fowdar would be a confidential discussion and Ms MacKinnon would not be present (production 162/649 to 654).

5 73. On 21 September 2016, the claimant emailed Claire Gavaghan, which was copied to Ms Cook, Ms MacKinnon and Mr Hussey. The subject matter of the e-mail was "Appeal to Outcome of Grievance" (the Appeal Stage 1 E-mail) (production 81/397 to 398). The claimant did not accept the Stage 1 outcome and wished to appeal. She disagreed with the statement in the Outcome Letter Stage 1 that there was no evidence to support that Ms Taylor acted in a way, which could be construed, as unreasonable, unprofessional or harmful
10 in the claimant's recuperation. The claimant said that she had evidence and wanted to further investigate the concerns raised to resolve them as soon as possible. The claimant asked for the stage 2 hearing to be held on neutral ground as she was uncomfortable about entering her workplace. The claimant said that she was taking guidance from ACAS, Equality and Advisory Support and the Information Commissioner in addition to appointing legal
15 representation."

74. On 22 September 2016 Ms MacKinnon e-mailed the claimant advising that the respondent would be happy to accommodate the claimant's return to work while the appeal was ongoing or continue to be supported with full pay until
20 the full grievance procedure is concluded (production 162/649). If the claimant chose to remain off work, once the grievance procedure was concluded she was expected to return to work. The claimant advised that she would continue to be supported with full pay until the grievance procedure was fully concluded.

25 75. On 3 October 2016 Ms Cook emailed the claimant offering a stage 2 hearing on Thursday 6 October 2016 at Scottish Engineering, West George Street, Glasgow. Ms Cook advised that Mark Durning, Combat Air Quality Director (MAI) would be available to conduct the hearing and would be travelling from Warton the night before (production 82/399). The claimant acknowledged the
30 e-mail and advised that she would review this with the colleague who would be accompanying her.

76. On 4 October 2016 Ms Cook sent an e-mail to the claimant enquiring whether she could confirm if the hearing on 6 October was suitable. The claimant replied later that day as follows: (production 83/401):

5 *“ACAS at the moment are in correspondence with HR (Caroline Haffey – Caroline.Haffey@BAEsystems.com) as part of the early conciliation process.*

I suggest you may wish to have a conversation with Caroline to confirm if Tuesday’s meeting is required at this point in time.

Paul Bond is my representative through early conciliation (ACAS) and he can be contacted on [] if you wish to discuss my case directly with him”.

10 77. On 5 October 2016 Ms Cook sent an e-mail to the claimant advising that she had spoken to Ms Haffey. Ms Cook understood that the respondent would be contacting ACAS shortly and that the claimant would hear from her ACAS contact. Meantime the respondent wanted to continue with the stage 2 hearing but given the short time frame the hearing on 6 October was
15 postponed until Tuesday 11 October 2016. Attached to the e-mail was the formal invite (production 83/405). The claimant responded to that e-mail advising that she was reviewing all the options.

78. The formal invite erroneously referred to the stage 2 hearing taking place on Tuesday 10 October 2016. It confirmed that it would take place at Scottish
20 Engineering, 105 West George Street, Glasgow. A copy of the grievance procedure was enclosed with contact numbers for Mr Durning and Ms Cook. The formal invite also stated that if the claimant was unable to make this day and time she was to let Mr Durning know as soon as possible so that the hearing could be re-scheduled.

25 79. Ms Haffey was speaking to the ACAS conciliation officer on the morning of 11 October 2016. She asked if the claimant was attending the hearing later that day. The ACAS officer did not know.

80. Ms Cook and Mr Durning attended the offices of Scottish Engineering as arranged on 11 October 2016 (the Stage 2 Hearing). The claimant did not
30 attend. The Stage 2 Hearing did not proceed. Ms Cook emailed the claimant

on 11 October 2016 at 17.33 attaching a letter which included (production 85/407 to 409):

“Unfortunately the hearing was not able to go ahead without you.

Nonetheless we remain committed to investigating the concerns you have raised in your grievance appeal and so I have asked Mark Durning to review your appeal, the documentation gathered at the grievance stage and conduct any further investigation he considers suitable before sending his written decision to you. If you would like to submit any further representations for Mark to review then can I ask you to do this by 12pm on Friday, 14 October 2016 by e-mail to myself.”

81. At 12:58 on 12 October 2016 Mr McIntosh responded to Ms Cook from his email account (production 87/411):

“Unfortunately Anne is not in a position to reply to your e-mail as she underwent surgery this morning and is currently in recovery and will return home later this afternoon.

For your information I have taken over all correspondence with ACAS on Anne’s behalf and I suggest prior to issuing any correspondence to Anne on the BAE grievance process, it is probably best that you firstly correspond with the ACAS representative, Grant Cowburn who will happily update you on the current status of Anne’s case.

This therefore allows alignment of all correspondence regarding Anne’s case and avoids any potential confusing that may arise.

Grant can be contacted on [] and is more than happy to discuss this with you if required.”

25 82. Ms Cook forwarded Mr McIntosh’s e-mail to Ms Haffey. Ms Haffey advised Ms Cook that ACAS’s role was in relation to the pre-conciliation claim only.

83. Ms Cook responded to Mr McIntosh advising that she was sorry to hear that the claimant had been in hospital and that she hoped the procedure went well and the claimant recovered swiftly. Ms Cook explained that the respondent

had been in touch with ACAS and would continue to do so. The grievance process was separate and was initiated between the claimant and the respondent in which ACAS was not involved. Accordingly, if the claimant wished any further representation to be considered as part of the Stage 2 Hearing or any other discussion about the Stage 2 Hearing Ms Cook should be contacted.

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84. Except for the Appeal Stage 1 E-mail Mr Durning had no new information from the claimant before him when making the Stage 1 hearing decision beyond the information previously provided by the claimant to Ms Wood for the Stage 1 hearing. Mr Durning made the decision as set out in a letter to the claimant dated 21 October 2016 (the Outcome Letter Stage 2) (production 88/415 to 10 418).

85. Mr Durning did not uphold the appeal. He advised was keen to resolve issues and appreciated that it had been a difficult process for the claimant. Mr Durning advised he would be happy to discuss the findings face to face if she 15 wished. If so the claimant was to contact Ms MacKinnon to arrange a meeting. The claimant was also advised that she had a further right of appeal.

86. Around 26 October 2016 Ms MacKinnon telephoned the claimant and left a voicemail message. The claimant responded by e-mail on 27 October 2016 20 saying that her procedure on 12 October 2016 went to plan. The claimant said that she had reached out to Occupational Health for support in September via e-mail but had not had any contact (production 89/420). Ms MacKinnon followed this up and left a voicemail message for the claimant. Ms MacKinnon sent an e-mail on 28 October 2016 which included (production 89/419):

25 *"In relation to the OH support, I was concerned to note your feedback regarding contact you made with Occupational Health. I have spoken to Brinda today and she has reviewed her e-mails and confirmed you had e-mailed her on 21 September and with Brinda's annual leave in October this follow up action did not happen. Brinda has apologised for this omission and 30 I agreed with Brinda for you to have an appointment with her on Wednesday 2 [November] 2016 at 2.30pm in our Govan site. I would be grateful if you would confirm to me that this date/time is suitable for you."*

87. The claimant replied by e-mail on 31 October 2016 in that she felt very uncomfortable coming on site. She would therefore not be attending the meeting with Ms Fowdar on 2 November 2016. She did not require additional support now as she was getting support required external to the respondent. She had received the Outcome Letter Stage 2 which, she was not in attendance as “*previously advised by Grant Cockburn ACAS.*”

88. The claimant did not submit a further appeal. The claimant e-mailed Ms Gavaghan on 1 November 2016 to inform her that she was resigning with immediate effect (the Resignation E-mail) (production 142/586). The Resignation E-mail stated:

“I have received the outcome of the grievance on Tuesday 11 October 2016. I was surprised and disappointed to receive this as BAE Systems had been advised through ACAS that I was unable to attend the meeting.

Upon reviewing the outcome from this grievance I feel that I have completely lost all faith and trust in BAE Systems and I can no longer face any further correspondence with the organisation, never mind attend a follow up grievance. This is the final straw in a series of events and I can no longer carry on as an employee of BAE systems.

Therefore in order to protect myself from any further emotional stress and upset I would like to advise you that after seventeen and a half years I have decided to resign with immediate effect from BAE Systems.”

89. By e-mail sent on 2 November 2016 Ms MacKinnon acknowledged receipt of the Resignation E-mail (production 142/585). Ms MacKinnon expressed her disappointment that the claimant had chosen to resign. Ms MacKinnon reiterated that in relation to the comments about ACAS, ACAS did not tell the respondent that the claimant was not intending to attend the Stage 2 Hearing.

Observations on Witnesses and Conflict of Evidence

90. The Tribunal considered that the claimant gave her evidence honestly based on how she recalled events. The Tribunal had no doubt that the claimant genuinely felt angry and upset about the incidents to which she referred. The

Tribunal at times felt that she had a heightened sensitivity and did not appear to be willing to acknowledge that any of her colleagues or managers might similarly find the process and allegations stressful and challenging to deal with.

5 91. Mr McIntosh was in the Tribunal's view very supportive of the claimant and
understandably concerned about how she felt the respondent treated her. The
Tribunal felt that his evidence was filter through the claimant's perspective of
events. The Tribunal had no doubt that he considered that the claimant should
focus on her health and family. The Tribunal's impression was that this was a
10 a source of tension as the claimant was incredibly conscientious and insisted
on being contactable by her colleagues. From the evidence before the
Tribunal before 18 May 2016 the claimant initiated this rather than her
colleagues. The Tribunal also considered that at times the claimant was under
the impression that Mr McIntosh was liaising with the respondent when this
15 was not the position.

92. The evidence provided by Ms Haffey was restricted to the procedures adopted
by the respondent when liaising with ACAS and her discussion with an ACAS
officer regarding whether ACAS knew if the claimant was attending the stage
2 hearing later that day. The Tribunal found that Ms Haffey gave her evidence
20 in a professional and straight-forward manner. The Tribunal had no hesitation
in accepting her evidence about her telephone conversation with the ACAS
officer. The Tribunal also considered that Ms Haffey's evidence about her
discussion with Ms Cook on 11 October 2016 was credible and reliable.

93. The Tribunal considered that Ms Cook was a credible and reliable witness.
25 She gave her evidence candidly. Ms Cook said that she did not know that the
claimant was attending hospital on 12 October 2016 but accepted in cross-
examination that she received a copy of the August OH Report from the
claimant on 25 August 2016 although Ms Cook could not remember doing so
(production 71/361). The Tribunal noted that the email to which the August
30 OH Report was attached was sent around the time the claimant sent emails
to Ms Cook by attaching the voicemail messages. The Tribunal noted that Ms
Cook acknowledge the voicemail attachment. On 26 August 2016 Ms Cook

emailed the claimant explaining that Ms MacKinnon was dealing with the claimant's long-term sick absence. The Tribunal therefore considered that it was more likely that Ms Cook did not pay attention to the August OH Report as she was dealing with the grievance not the claimant's sick absence.

5 94. Ms Taylor was in the Tribunal's view a credible and reliable witness. The Tribunal's impression was that Ms Taylor could still not comprehend the situation in which she found herself. Ms Taylor is a professional woman who has worked for the respondent in various locations. There was no evidence to suggest Ms Taylor had any animosity to the claimant. Other than a brief
10 encounter before Ms Taylor went on maternity leave they did not know each other. Ms Taylor applied for her current role on return from maternity leave and was unaware whether the claimant had also applied for the role. The Tribunal considered that having returned following maternity leave to a promoted role in a new location with a new team it was highly unlikely that Ms
15 Taylor would have the time let alone the inclination to exclude the claimant. If anything, the Tribunal considered that Ms Taylor was probably preoccupied with meeting all her direct reports, getting up to speed and ensuring that the team met its objectives. While the Tribunal appreciated that during this period the claimant had significant health issues she did not appear consider that
20 there could be any alternative perspective of events.

95. Ms Wood was in the Tribunal's view an impressive witness who gave her evidence honesty. The Tribunal had no hesitation in finding her evidence credible and reliable. While Ms Wood candidly acknowledged that she has attended meetings at which Ms Taylor along with numerous other people was
25 present, the Tribunal did not consider that Ms Wood had predetermined the grievance. To the contrary the Tribunal felt that Ms Wood's investigation and conduct of the stage 1 hearing was thorough and professional.

96. The Tribunal considered that Ms MacKinnon was a credible and reliable witness who endeavoured to be supportive of the claimant returning to work.
30 There was no acrimony between Ms MacKinnon and the claimant. The Tribunal considered that as an HR professional Ms MacKinnon would have had experience people participating in the Grievance Procedure. The Tribunal

therefore thought it most unlikely that Ms MacKinnon would have had any interest in forcing the claimant to resolve formally if alternative options were available.

5 97. There was conflicting evidence about the Senior Directors' Meeting. The claimant said that Ms Taylor was very dismissive about everything the claimant said at the meeting. She felt that Ms Taylor was pressuring her to volunteer not to attend future meetings. Ms Taylor's evidence was that the claimant attended only part of the six-hour meeting. Ms Taylor said that she asked the group who wished to be part of the meeting going forward. This was not directed at the claimant. She was however surprised when the claimant volunteered.

10 98. The Tribunal considered that little turned on how long the claimant attended the Senior Directors' Meeting. The Tribunal considered that it was curious that the claimant e-mailed before of the meeting enquiring if she should attend some or all of it. From this the Tribunal wondered about the claimant's enthusiasm about attending a six-hour meeting in the first place and felt this might have more to do with the claimant volunteering not to attend in future than any perceived pressure by Ms Taylor. As Ms Taylor was not asked about being dismissive of the claimant at that meeting the Tribunal considered that while that may have been how the claimant felt it was not Ms Taylor's intention. The Tribunal considered that given this was the first Senior Directors' Meeting that Ms Taylor was attending in her new role and it lasted 15 six-hours it was likely that her focus was on issues rather than the claimant.

20 99. There was conflicting evidence about the Objectives Email. The claimant's said that she was extremely upset at receiving the Objectives Email, which was also sent to others in the team. The objectives had not been discussed with her and were in her view low level and did not relate to her job profile. Ms Taylor's evidence was that she intended to meet with team members on a one to one to discuss their personal objectives. In advance she shared the overall business objectives so that this could be used as a basis to develop 25 personal objectives. Ms Taylor was surprised to receive the claimant's email asking if there was a change to her current role. Ms MacKinnon's evidence 30

was that it was not unusual for team members to see others objectives. It was a matter of personal style for managers. It was not prescriptive.

5 100. The Tribunal had no doubt that considering her response the claimant was upset when she received the Objectives Email. The Tribunal also thought that it was therefore highly likely that previously the claimant's PDR had been discussed and agreed with her before being shared with other team member. The Tribunal also thought that it was highly likely that while PDRs had to be agreed the method of reaching that agreement would vary depending on the manager's style, location to and number of direct reports. It was in the
10 Tribunal's view apparent from the Objectives Email that Ms Taylor's methodology was to cascade the business plan, team plan and ensure that these objectives were included as part of the personal objectives. She giving an opportunity to discuss matters and indeed that it was happened. The Tribunal was satisfied that the projects in which the claimant was asked to be
15 involved were important projects to the business, if not the claimant. The Tribunal also considered that the claimant accepted that there were part of her job description as following a discussion with Ms Taylor the claimant confirmed that she was more comfortable and they were aligned on the way forward.

20 101. There was conflicting evidence about the tone of Ms Taylor's voicemails on 24/25 May 2016. The claimant said that she felt the tone was inappropriate; Ms Taylor did not ask after her well-being. Ms Taylor had the opportunity to listen to the voicemail recordings during the Hearing. She described the tone as upbeat.

25 102. The Tribunal also had an opportunity to listen to the voicemail messages which in the Tribunal's view were in an appropriate tone. The Tribunal felt that they were polite and informal bearing in mind that Ms Taylor was the claimant's line manager and the claimant was absent from work on sick leave.

30 103. There was conflicting evidence about the claimant's telephone discussions with Ms MacKinnon in June 2016. The claimant's evidence was that she was considering returning to work but could not work for Ms Taylor. Ms MacKinnon suggested mediation but the claimant could not be in the same room as Ms

Taylor. The claimant asked for the matter to be escalated to Ms Callan but Ms MacKinnon said that she was too busy. The claimant spoke to Mr Hussey's PA and then sent him a text. Ms MacKinnon would not consider a change of role.

5 104. Ms MacKinnon's evidence was the Absence Procedure was not normally managed through HR. Given the contents of the June OH Report Ms MacKinnon contacted the claimant around 15 June 2016. During this discussion the claimant mentioned the Senior Directors Meeting; the Objectives Email; the voicemail messages; and the challenges of her illness.
10 Ms MacKinnon spoke to Ms Taylor and it was decided that meantime Ms MacKinnon should be the claimant's contact. Around 23 June 2016 the claimant and Ms MacKinnon spoke again. Ms MacKinnon suggested a round the table discussion but the claimant made clear that she would not sit in the same room as Ms Taylor. Ms MacKinnon judged that it was not the best timing. She suggested that the claimant should write down her concerns. Ms MacKinnon said that and there was discussion about could support the claimant. The claimant was not comfortable with the managers that were suggested. Ms MacKinnon therefore said she continued to support the claimant until the claimant was in a place where she could sit down with Ms Taylor. On 27 June 2016 the claimant and Ms MacKinnon had a further discussion. The claimant did not want to work for Ms Taylor. She wanted to know her options. There were no vacancies at the claimant's level. The claimant mentioned that she had talked to Mr McIntosh and wanted to raise a formal grievance; she did not want to exhaust the informal route. She had drafted a letter. Ms MacKinnon was really surprised. Ms MacKinnon felt that there was a misunderstanding that could be resolved informally; the claimant was clearly upset and Ms Taylor was confused.

105. The Tribunal noted that Ms MacKinnon first became involved around 15 June 2016. This was unusual as the Absence Procedure envisaged employee support being provided by line management rather than HR. The Tribunal therefore considered that it was highly plausible that Ms MacKinnon was approaching the situation by managing the claimant's absence with a view to her returning to work. To that end the Tribunal thought it likely that she would

want to encourage contact between the claimant and Ms Taylor. It was understandable in that context that Ms MacKinnon would propose a round the table discussion. The Tribunal also considered that it was likely that on realising that the claimant was unwilling to do so Ms MacKinnon would propose that the claimant write down her concerns so that Ms MacKinnon could understand why the claimant was adopting the position that she did. The Tribunal felt that at this stage Ms MacKinnon believed that given time the claimant would be willing to speak to Ms Taylor and the issues could be resolved. The Tribunal considered that Ms MacKinnon continued to approach the issues from an absent management perspective rather than understanding that the claimant was raising a grievance.

106. The Tribunal considered that the claimant's evidence suggested that she conflated her recollection of the telephone discussions with Ms MacKinnon. By contrast Ms MacKinnon's recollection was of separate telephone conversations where specific matters were discussed. The Tribunal therefore considered that was more likely that the discussion about which managers would support the claimant was in the context of absence management rather than an informal grievance.

107. The Tribunal accepted Ms MacKinnon's evidence that she was surprised that the claimant wanted to raise a formal grievance. The Tribunal considered that it was more likely than not that given Ms MacKinnon's experience in HR that she would encourage exhausting the informal route before raising a formal grievance particularly when she believed that issue arose out of a misunderstanding and was capable of being resolved.

108. There was conflicting evidence about the respondent's awareness of why the claimant did not attend the Stage 2 Hearing. The claimant's evidence was that she had spoken to Ms Cook by telephone and told her that she has to undergo a procedure on 12 October 2016. Mr McIntosh's evidence was that he thought the respondent was aware of the procedure on 12 October 2016 and in cross examination said he told ACAS that the claimant would not be attending the Stage 2 Hearing and he understood that ACAS had told the respondent.

109. Ms Cook's evidence was that she did not have a telephone conversation with the claimant during which the claimant told her that she was undergoing a procedure on 12 October 2016. Ms Haffey's evidence was that she was the point of contact for ACAS. She was not told that the claimant was not attending; she asked the ACAS officer and was told that ACAS did not know.

110. The Tribunal found the claimant's evidence on this point unconvincing. It seemed to the Tribunal most unlikely that had Ms Cook received a call from the claimant to the effect that 11 October 2016 was unsuitable that she would have ignore it. There was in the Tribunal's view no benefit in Ms Cook doing so given that she was already willing to schedule the Stage 2 Hearing on a date convenient to the claimant and there was little point in Mr Durning travelling to Scotland and incurring the expense of an external venue if the claimant was not going to attend. While the Tribunal appreciated that Mr McIntosh thought that the respondent had the August OH Report referring to a procedure on 12 October 2016 the Tribunal found his evidence about believing ACAS would inform the respondent unconvincing. The Tribunal considered that it was more likely that had an ACAS officer been told that the claimant was not attending the Stage 2 Hearing for whatever reason there would have been a note of that and this would have been communicated to Ms Haffey when she asked on 11 October 2016.

The Law

111. Section 95(1)(c) of the ERA provides that and employee is dismissed by an employer if the employee terminates the contract under which she is employed (with or without notice) in circumstances in which she is entitled to terminate it without notice by reason of the employer's conduct."

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

113. Case law has established that the following elements are needed to establish constructive dismissal:

- 5 a. Repudiatory breach on the part of the employer. This must be sufficiently serious to justify the employee resigning. However, it is now well established that an employee can resign in response to a series of breaches of contract or a course of conduct by their employer which, taken cumulatively, amounts to a breach of the implied term of trust and confidence (the so-called “last straw” doctrine). The test for establishing whether there is a repudiatory breach is objective.
- 10 b. An election by the employee to accept the breach and treat the contract as at an end. In other words, the employee must resign in response to the breach. It is sufficient that the breach is one of the reasons for the employee’s resignation.
- 15 c. The employee must not delay too long in accepting the breach so that she has waived the breach.

114. In *Waltham Forest v Omilaju* [2004] EWCA Civ 1493, the Court of Appeal held that the final straw must contribute something to the breach, although what it adds might be relatively insignificant. It is not necessary to characterise the final straw as “unreasonable” or “blameworthy” conduct in isolation (although it is unlikely to be trivial).

115. The Tribunal was referred to the following cases:

25 *Woods v WM Car Services (Peterborough) Ltd* 1981 ICR 666, EAT ‘[T]he tribunal's function is to look at the employer's conduct as a whole and determine whether it is such that its effect, judged reasonably and sensibly, is such that the employee cannot be expected to put up with it'

30 *Malik v Bank of Credit and Commerce International SA (In compulsory liquidation)* 1997 ICR 606 Lord Steyn emphasised that there is a breach of trust and confidence where there is: “no reasonable and proper cause, for the employer’s conduct, and where the conduct is calculated and likely to destroy or seriously damage the relationship of trust and confidence”. The word “and”

referred to above was held to be an error by Lord Steyn in the EAT case of *Baldwin v Brighton and Hove City Council [2007] ICR 680* and the relevant test is satisfied if either of the requirements are met i.e. it should be “calculated or likely”

5 *BG plc v O’Brien [2001] IRLR 496*, stated that in every case: “the question is whether, objectively speaking, the employer has conducted itself in a manner likely to destroy or seriously damage the relationship of confidence and trust between the employer and employee”

Brown v Merchant Ferries Ltd [1998] IRLR 682 The Court of Appeal stated:
10 “For our part, we do not think that such a course is necessary. Accepting in full as we must the findings of fact of the tribunal, recognising that the applicant was unsettled and concerned about his future and annoyed at being insulted on 11 July 1995, nevertheless when he returned from leave to find that the MTS plan was not proceeding and having received no indication that
15 his position was insecure, the impact of the appellant’s conduct upon him fell fall short, in our judgment, of justifying his or anyone’s conclusion that the company had repudiated his contract. We do not consider that a reasonable tribunal, properly directed, could reach that conclusion, and therefore we would reverse the decision and would not direct a fresh hearing.”

20 *Sharfudeen v TJ Morris t/a Home Bargains UKEAT/0272/16/LA*, the EAT stated that the Tribunal must be satisfied that the employee has lost that trust and confidence as a result of conduct on the part of the employer that was without reasonable and proper cause; a question that is to be answered by the Tribunal objectively, not simply by applying a range of reasonable
25 responses test

Sawar v SKF (UK) Ltd UKEAT/0355/09 held that a Tribunal was entitled to find that poor handling of a grievance, including failing to give an explanation for rejecting an appeal and disclosing the existence and gist of a grievance to colleagues, did not constitute a repudiatory breach. It was stressed that the
30 particular facts in each case must be considered.

Blackburn v Aldi Stores Ltd 2013 ICR D37, The EAT held that it is for the tribunal to assess in each particular case whether what occurred was a breach of the term, since a failure to comply with a grievance procedure will take different forms. For example, the EAT considered that a failure to adhere to a short timetable would not necessarily contribute to a breach of the implied term, whereas a wholesale failure to respond to a grievance could amount, or contribute, to such a breach.

Bournemouth University Higher Education Corporation v Buckland [UKEAT/185/12] It was found that the claimant should have awaited the outcome of the grievance process before resigning.

Nottingham County Council v Meikle [2004] IRLR 703: "Once a repudiation of the contract by the employer has been established, the proper approach is to ask whether the employee has accepted that repudiation by treating the contract of employment as at an end. It must be in response to the repudiation, but the fact that the employee also objected to the other actions or inactions of the employer, not amounting to a breach of contract, would not vitiate the acceptance of the repudiation. It is enough that the employee resigned in response, at least in part, to fundamental breaches by the employer."

W.E. Cox Toner v Crook 1981 ICR 823: "To stay at work for a period of one month to 'look around' starting from the initial breach of contract might well not have been fatal: but to work for a further month, six months already having elapsed, seems to us inconsistent with saying he had not affirmed the contract".

116. Once dismissal has been established, the Tribunal must consider whether or not the dismissal was fair having regard to Section 98(4) of the ERA: "Where the employer has fulfilled the requirements of sub-section (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and (b) shall be determined in accordance with equity and the substantial merits of the case."

117. The test as to reasonableness in section 98(4) is an objective one. The Tribunal must decide whether, in the circumstances, the employer's decision to dismiss the employee fell within the range of reasonable responses that a reasonable employer might have adopted.

5 **Submissions**

118. The representatives helpfully provided outline written submission to which they referred at the Hearing. The following is a summary.

The Claimant

10 119. The Tribunal was invited to find the facts set out in paragraphs 13 to 20 of the paper apart the claim form. It was submitted that the claimant's evidence was reliable and credible.

15 120. The repudiatory breach of contract relied upon by the claimant is the breach of the implied duty of trust and confidence. The breaches relied upon individually and jointly so as to establish repudiatory breach are set out in paragraph 2 above. It was confirmed that the claimant no longer relied upon the breach at paragraph 2c (the meeting between the claimant and Ms Taylor to discuss objectives) and the breaches at paragraphs 2e and 2f (the failure to deal with the claimant's request to move departments and instead to go through the grievance procedure and the failure to consider the points made by the claimant during the grievance procedure were considered together.

20 121. *The Senior Directors' Meeting:* The claimant's evidence of her treatment by Ms Taylor at the Senior Directors' Meeting was summarised. It was submitted that Ms Taylor did not treat the claimant appropriately or professionally and this contributed to the breach of the implied duty of trust and confidence.

25 122. *The Objectives Email:* The claimant received low level objectives which were not SMART and inappropriate to her level. The claimant was extremely upset and emailed Ms Taylor asking if there had been a change to her role as there had been no prior discussion and the objectives did not relate to her role profile. The claimant spoke to Mr Miller, Head of Operational Planning. She then spoke to Ms Taylor about feeling dismissed at the Senior Directors'

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Meeting and the Objectives Email. Although a way forward was agreed, Ms Taylor's actions were inappropriate and contributed to the implied breach of trust and confidence.

5 123. *The frequency and tone of the May voicemail messages:* On 23 May 2016 the claimant received a voicemail from Ms Taylor stating that she had tried to call her on numerous occasions. The claimant immediately returned the call and left a voicemail. The claimant felt vulnerable and nervous because she had missed the calls. She checked her telephone and had only one voicemail and no record of missed calls. The claimant felt Ms Taylor's voicemail was unfair. 10 The claimant had been very ill and had turned off her mobile telephone for three days. She was very distressed that there was no message of concern. It was agreed that there would be dedicated times for contact. The claimant underwent further surgery on 24 May 2016. When she returned home she listened to three voicemail messages left by Ms Taylor who did not enquire 15 about the claimant's health and well being. The claimant felt as if she was being checked up on. She was upset by the tone of the voicemail messages, which were inappropriate and contributed to the breach of trust and confidence.

20 124. *The respondent's failure to deal with the claimant's request to move departments and telling her she had to go through a grievance and the respondent's failure to consider matters during the grievance process:* The claimant went through the grievance process. Following surgery on 4 June 2016 the claimant had a telephone conversation with Ms MacKinnon in late June 2016. Ms MacKinnon discussed mediation with Ms Taylor. The claimant 25 did not consider that this would resolve the matter. The claimant suggested escalating the matter to Ms Callan. Ms MacKinnon to not considered this appropriate nor were the other managers proposed by the claimant for this purpose appropriate. This was contrary to the Grievance Policy. The claimant felt that she had no option but to raise a formal grievance. She did so on 30 July 2016. The stage 1 hearing was held on 25 August 2016. The claimant received the Outcome Letter Stage 1 on 15 September 2016. The claimant was distressed and disappointed to note that none of her grievances had been upheld. The refusal to uphold any of the points raised in the Grievance Letter

contributed to the breach of trust and confidence. On the basis of the information provided by the claimant to Ms Wood there was sufficient evidence to establish inappropriate behaviour by Ms Taylor. Ms Wood said that she had had a previous working relationship with Ms Taylor and had attended meeting with her. This should have been disclosed to the claimant.

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125. *Continuing with the stage 2 hearing on 11 October 2016 in the claimant's absence:* The claimant appealed against the Outcome Letter Stage 1. The stage 2 hearing was mooted for 6 October 2016. ACAS discussions were ongoing. The formal invite referred to the stage 2 hearing on 10 October 2016. Mr McIntosh said that he informed ACAs that the claimant was unable to attend and he thought that ASAS had informed the respondent. Ms Cook said that no attempts were made to ascertain the claimant whereabouts when she did not attend despite the OH Report saying that she had a procedure on 12 October 2016 which had been sent to Ms Cook and Ms MacKinnon. Ms Cook sent a letter to the claimant on 11 October 2016 expressing concerns about the claimant not attending. The claimant was not given an opportunity to attend another hearing but instead was told that any further representations should be submitted in writing. The timescale was short and not altered when the respondent was informed that the claimant had undergone surgery on 12 October 2016. The claimant received the Outcome Letter Stage 2. The respondent's actions by continuing with the stage 2 hearing in the claimant's absence after giving the claimant an opportunity to make written representations is a breach of the implied duty of trust and confidence. The claimant had worked for the claimant for 17 years. She had not previously failed to attend meeting concerning her grievance. The respondent knew that the claimant took her grievance seriously. There was no good reason for the stage 2 hearing being rescheduled to give the claimant an opportunity to attend.

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126. *Resignation in response to breach:* The claimant resigned on 1 November 2016. She said that she resigned in relation to her treatment. The claimant managed to obtain an alternative position shortly afterwards. She did not resign to start this position but rather it was her treatment by the respondent that led to her resignation.

127. *Unfair Dismissal*: the respondent has not argued that if it is found that it was in repudiatory breach of contract that the claimant's dismissal was fair. In the circumstances the Tribunal should find that the claimant's dismissal was unfair.

5 *The Respondent*

128. While the respondent acknowledged that it was for the Tribunal to make findings in fact, the respondent set out the finding that it invited the Tribunal to make.

10 129. *The Senior Directors' Meeting*: The Tribunal was invited to prefer the respondent's evidence that the claimant attended only part of the meeting. Also that Ms Taylor asked the group as a whole, not just the claimant, who wished to be part of the meeting going forward. The Senior Directors' Meeting was not mentioned in the Grievance Letter or Resignation email. This is no a breach of contract; the claimant did not resign in response to it and the delay
15 is too long for there to be a causal connection.

130. *The Objectives Email*: The Tribunal was asked to look at the context of the Objectives Email and prefer the respondent's evidence about the methods of sending objectives. The issue was not raised in the Grievance Letter or the Resignation Email. In the telephone calls in June/July the claimant had moved
20 on from the issue and it was of no particular concern. It was not a breach of contract. The claimant did not resign in response to it. The delay is too long for there to be a causal connection.

131. *The frequency and tone of the May voicemail messages*: the Tribunal was asked to consider the context of the voicemails. Ms Taylor required under the absence Procedure to keep in touch with the claimant. She had an operation
25 on 9 May 2016 and her sick leave expired on 30 May 2016. Ms Fowler had attempted unsuccessfully to contact the claimant. It was in that context that Ms Taylor contacted the claimant and it was she who suggested when it was suitable to talk. Given the number of communication barriers put up by the
30 claimant this was a significant step. In that context the voicemails on 24 May 2016 were entirely supportive and helpful and the call on 25 May 2016 was a

follow up. All were supportive, helpful and reasonable in the context. Ms Taylor had no way of knowing that the claimant had had medical complications on 24 May 2016. The calls were upbeat and chatty. This was not a breach of contract. The claimant did not resign in response to them. There was a long delay between the voicemail messages and the Resignation Email for there to be a causal connection.

132. *The respondent's failure to deal with the claimant's request to move departments and telling her she had to go through a grievance and the respondent's failure to consider matters during the grievance process:* the Tribunal was invited to prefer Ms MacKinnon's evidence. The claimant did not want a face-to-face meeting with Ms Taylor and refused to set out her concerns in writing. Has she done so Ms MacKinnon could have considered the best way forward. Ms MacKinnon explained the options available to resolve the matter informally. The claimant was not forced to raise a formal grievance. The claimant took an unreasonable stance. Ms MacKinnon was surprised in early July 2016 that the claimant had started to draft a formal grievance. Even at this stage the claimant was asked to reconsider. There were no vacancies at the claimant's level. The claimant was asked if she wanted to see the list of vacancies but she refused saying that she could see them on line. These issues were not mentioned in the Grievance Letter or Resignation Email. This is neither a breach of contract nor did the claimant resign in response to it. In any event there was too long a delay for there to be a casual connection. Ms Wood's investigations were thorough. The notes of the stage 1 hearing were extensive. The claimant recorded that she was happy with the way it had been conducted. The Outcome Letter Stage 1 is comprehensive, balanced, structured and fair. It was an entirely reasonable outcome. The claimant never provided specification of what she considered was unreasonable only that she disagreed with it. The claimant was offered the right to make representation of direct Mr Durning to carry out further investigations. This was an opportunity for a further stage 2 hearing with Mr Durning. The right of a stage 3 hearing was mentioned but not taken up by the claimant. This was consistent with her having put up barriers. It is contradictory for the claimant to suggest that the grievance was not properly

considered when she provided neither specification at the time and failed to exhaust the procedure. In the Resignation Email, she appears annoyed with the procedure but she did not mention that the grievance had been dealt with incorrectly or unreasonably nor did she provide specification of the basis of such. This is neither a breach of contract nor did the claimant resign in response to it. In any event there was too long a delay for there to be a casual connection.

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133. *Continuing with the stage 1 hearing on 11 October 2016 in the claimant's absence despite knowing she was undergoing a procedure the next day and the respondent being notified by ACAS that the date was not suitable for that reason:* The factual context is paramount. The tribunal as invited to prefer the evidence of the respondent's witnesses. The OH Report dated 16 August 2016 was very vague and could be suggesting a minor check up. The appointment could have been altered or changed. The Tribunal was referred to the emails set setting up the stage 2 hearing. In the absence of confirmation of the suitability of the proposed date of 6 October 2016 it was reasonably postponed. It was not reasonable to suggest that Ms Cook contact the claimant on her mobile telephone. The claimant knew the date and had not indicated that it was problematic. The claimant had not answered her mobile telephone for months. She had raised a grievance in relation to voicemail messages. In terms of the Grievance Policy if there was no reason for the non-attendance it was going beyond the call for Ms Cook to invite further representations. There is not basis in policy or employment law for the hearing to be rescheduled. The claimant/Mr McIntosh received the email from Ms Cook. Mr McIntosh's reply is consistent with the respondent not knowing that the claimant was could not attend. Mr McIntosh understood that the claimant could make representations but told the claimant to ignore it. No further information was provided. This is not a breach of contract and the claimant did not resign in response to it. To the contrary the claimant did not appeal. She resigned because she was offered a new job with more pay. She had decided by 31 October 2016 not to attend a further Occupation Health meeting. The Resignation Email does not mention any of the seven alleged material breaches of contract.

Deliberations

134. The Tribunal referred to the statutory provisions. Section 94 of the ERA provides that employees have the right not to be unfairly dismissed. Section 95(1)(c) states that a dismissal can include a constructive dismissal where:
- 5 *“The employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer’s conduct.”*
135. The test for what is commonly known as constructive dismissal is whether the employer’s conduct constitutes a significant breach, going to the root of the
- 10 contract, or shows an intention no longer to be bound by an essential term of the contract. Furthermore, the employer’s conduct must be serious enough to entitle the employee to resign with or without notice.
136. To claim constructive dismissal the Tribunal considered that claimant must establish that:
- 15 a. There was a fundamental breach of contract on the part of the respondent;
- b. The respondent’s breach caused the claimant to resign; and
- c. The claimant did not delay too long before resigning thus affirming the contract and losing the right to claim constructive dismissal.
- 20 137. The claimant’s position was that she resigned following a *“last straw”* and relied upon a series of acts by the respondent which she said amounted to a fundamental breach of contract: a breach of the implied term of trust and confidence.
- 25 138. The Tribunal considered that a course of conduct could cumulatively amount to a fundamental breach of contract entitling an employee to resign and claim constructive dismissal following a *“last straw”* incident even though the *“last straw”* by itself did not amount to a breach of contract (see *Lewis v Motorworld Garages Limited [1986] ICR 157, CA*).
- 30 139. The claimant relied upon the implied term of mutual trust and confidence which is found in every contract of employment. The Tribunal referred to the

House of Lords Judgment in *Malik & Another v Bank of Credit and Commerce International SA (in compulsory liquidation)* [1997] ICR 606, HL where their Lordships concluded that there was an implied contractual term that an employer “will not, without reasonable and proper cause, conduct his business in a manner likely to destroy or seriously damage the relationship of trust and confidence between the employer and employee.”

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140. The Tribunal also referred to *Omilaju v Waltham Forest London Borough Council* 2005 ICR 197, where the Court of Appeal explained that an act constituting the last straw does not have to be of the same character as the earlier acts, and nor must it constitute reasonable or blameworthy conduct, although in most cases it will do so. But the last straw must contribute, however slightly, to the breach of the implied term of trust and confidence. An entirely innocuous act on the part of the employer cannot be a final straw, even if the employee genuinely, but mistakenly, interprets the act as hurtful and destructive of his or her trust and confidence in the employer. The test of whether the employee’s trust and confidence has been undermined is objective.

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141. The claimant submitted that her resignation was prompted by a last straw. The Tribunal referred to the Resignation Email. It stated that the last straw was receiving the Outcome Letter Stage 2 when the respondent had been advised through ACAS that she was unable to attend.

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142. The Tribunal noted that the essential quality of the last straw was that when taken with the earlier acts upon which the claimant relied it amounted to the breach of the implied term of trust and confidence. When viewed in isolation the last straw may not always be unreasonable, still less blameworthy. An entirely innocuous act on the part of the employer cannot be a last straw.

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143. The Tribunal considered whether continuing with the Stage 2 Hearing despite knowing that the claimant was unable to attend was a last straw. The Tribunal found that ACAS did not know if the claimant would be attending the Stage 2 Hearing. It also found that Ms MacKinnon and Ms Cook had a copy of the August OH Report that referred to claimant undergoing a procedure on 12 October 2016. This was also confirmed to Ms Cook on 12 October 2016 when

Mr McIntosh emailed Ms Cook and said that the claimant was not able to reply to the email as she had undergone surgery. Mr McIntosh said that he had taken over all correspondence with ACAS. Ms Cook replied saying that if the claimant wished to make further representations to be considered as part of the Stage 2 Hearing or have any further discussion about the grievance appeal process she should contact Ms Cook.

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144. The Stage 2 Hearing did not take place in the claimant's absence on 11 October 2016. This was clear from the Ms Cook's letter of 11 October 2016. Ms Cook invited further representations or discussion by 12pm on 14 October 2016. Ms Cook knew on 12 October 2016 that the claimant was in hospital but expected home that afternoon. She also knew that Mr McIntosh was taking over "all correspondence with ACAS". In her response to Mr McIntosh the Tribunal considered that Ms Cook endeavoured to clarify that the internal grievance process was separate to the ACAS conciliation. Ms Cook referred to the letter of 11 October 2016 and invited the claimant to contact her to make further representations or other discussion about the grievance process. Ms Cook did not extend the timescale for doing so. The Tribunal accepted that neither the claimant or Mr McIntosh requested this. While the Tribunal appreciated that the Outcome Letter Stage 2 was not issued until 21 October 2016 the Tribunal considered that the respondent knew that the claimant had intended to be present at the Stage 2 Hearing; the claimant was recovering from surgery; there appeared to be confusion on the over the different processes and Mr McIntosh was involved with correspondence with ACAS but it was not clear if he was now also dealing with the grievance process led the Tribunal to conclude that this was not an entirely innocuous act by the respondent. The Tribunal concluded that this was capable of being a final straw.

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145. Having reached this conclusion, the Tribunal went on to consider the earlier acts. The final straw principle did not allow the claimant to rely on all the respondent's historical acts in support of her claim. Accordingly, any conduct by the respondent which did not play a part in her decision to resign was in the Tribunal's view not relevant.

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146. From the evidence, the Tribunal was of the view that respondent's conduct which played a part in the claimant's decision to resign started with the May voicemail messages. The Tribunal appreciated that the claimant felt that Ms Taylor did not treat her the same as other colleagues at the Senior Directors' Meeting and the claimant was upset about the Objectives Email. However, the claimant was willing to move on and confirmed this in an email sent after their meeting on 24 February 2016. The Tribunal considered that while the claimant mentioned these issues during her telephone conversation with Ms MacKinnon in June 2016 it was in the context of explaining her relationship with Ms Taylor and her view of the May voicemail messages. The Tribunal considered that it was significant that the Senior Directors' Meeting and the Objectives Email were not mentioned in the Grievance Letter or Resignation Email. In any event the Tribunal did not consider Ms Taylor's conduct at the Senior Directors' Meeting or issuing the Objectives Email amounted to conduct that was calculated or likely to destroy or seriously damage the relationship between an employee and an employer.

147. The Tribunal then turned to the May voicemail messages. The claimant alleged that the frequency and tone of these messages was a breach of the implied term of trust and confidence. The claimant was on long term sick absence and her medical certificate was due to expire on 30 May 2016. When Ms Fowdar was unable to contact the claimant on 18 May 2016 she contacted Ms Taylor. The Tribunal consider that in these circumstances and in the absence of the claimant being in touch it was appropriate for Mr Taylor to contact the claimant. The claimant proposed a time suitable to talk on the telephone to which Ms Taylor agreed. The Tribunal considered that it was reasonable for Ms Taylor to telephone the claimant on 24 May 2016. The Tribunal also considered that having been unable to make contact at the agreed time it was reasonable for Ms Taylor to leave a message and say that she would call back in a few minutes. There was in the Tribunal's view a distinct possibility that the claimant missed the call and that she would receive the message and be available to speak shortly afterwards. When that did not occur the Tribunal could understand that Ms Taylor might have other commitments and it was therefore reasonable for her to leave a further

message suggesting an alternative time she would be available to speak to the claimant. The Tribunal found that the tone was polite and professional. While the Tribunal acknowledged that Ms Taylor did not ask after the claimant's health in the voicemail messages, that was not unreasonable given that was what they were proposing to discuss when they spoke. The Tribunal appreciated that when the claimant heard the voicemail messages she was very upset. The claimant had just been discharged from the hospital and was extremely unwell. The Tribunal also understood that the claimant may have asked Mr McIntosh to inform Ms Taylor of what had happened but he had not done so. Ms Taylor had no way of knowing any of this. Objectively, the Tribunal did not consider that Ms Taylor's conduct amounted to conduct that was calculated or likely to destroy or seriously damage the relationship between an employee and an employer.

148. The claimant declined to deal with Ms Taylor which resulted in Ms MacKinnon contacting the claimant. The claimant said that the respondent's failure to deal with her request to move departments and being told instead to go through the grievance amounted to a breach of the implied term of trust and confidence.

149. The Tribunal was satisfied that Ms MacKinnon's involvement was initially to manage the claimant under the Absence Procedure. In that context, it came to light that the claimant declined to deal with Ms Taylor at all. The Tribunal considered that it was appropriate for Ms MacKinnon to propose a round the table meeting with Ms Taylor which failing mediation.

150. The claimant did not want to work for Ms Taylor. Given her seniority and the reporting structure the Tribunal could understand that there would be limited, if any options for the claimant to "move departments". The claimant had access to vacancies online. The Tribunal therefore considered that it was reasonable for Ms MacKinnon firstly to explore resolving the conflict through the grievance process.

151. The Tribunal understood that the claimant's position at the Hearing was that she wanted to deal with matters informally but had to do so formally. The Tribunal appreciated that the claimant wished to involve Ms Callan. The

Tribunal considered that to the extent that Ms MacKinnon refused this it was in the context of managing the claimant's sick absence. That was in the Tribunal's view reasonable given Ms Callan's seniority and business commitments. Ms MacKinnon did suggest alternative managers who were peers of Ms Taylor.

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152. The Tribunal was mindful that the claimant was a senior manager who had been employed by the respondent for 17 years. She had worked directly for Ms Callan and felt that able to text Mr Hussey. The Tribunal considered that had the claimant wanted to speak directly to Ms Callan she could have done so without involving Ms MacKinnon. That is what the claimant did when she contacted Mr Hussey. While he did not respond the Tribunal noted that the claimant's email to Ms MacKinnon confirming that she had posted a formal grievance was copied to him.

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153. The Tribunal was not satisfied that Ms MacKinnon's conduct was calculated or likely to destroy or seriously damage the relationship between an employee and an employer.

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154. The claimant also alleged that the respondent's failure to deal with the point raised by the claimant in the Grievance Letter was a breach of the implied terms of trust and confidence.

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155. The Tribunal did not consider that it was appropriate for it to review the evidence before it and reach its own conclusion on the Grievance Letter. The Tribunal considered that Ms Wood carried out a thorough investigation. The Tribunal's impression was that she was impartial and endeavoured to understand and clarify the claimant's concerns. Ms Wood's Outcome Letter Stage 1 was reasoned and she considered all the points that had been raised.

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156. The Tribunal also appreciated that the claimant was disappointed with the outcome and she exercised her right of appeal to which she was entitled to do.

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157. Mr Durning had no new information before him beyond that already provided to Ms Wood when he reached his decision set out in the Outcome Letter Stage

2. He had invited the claimant to make representations before reaching his decision and when none were forthcoming he offered to discuss his findings at a face to face meeting. The claimant did not take up this offer or her right to appeal.

5 158. The Tribunal was not satisfied that Ms Woods failed to consider the points raised by that claimant at the Stage 1 Hearing nor did Mr Durning fail to consider the information before him which reaching his decision at stage 2.

159. The claimant also alleged that the last straw was a breach of the implied term of trust and confidence. While the Tribunal concluded that it was a last straw
10 it was not satisfied that Mr Durning issuing his decision in the claimant's absence was calculated or likely to destroy or seriously damage the relationship of trust and confidence between an employee and employer.

160. Ms MacKinnon was not involved in the grievance process. The claimant provided Ms Cook with the August OH Report. Given that Ms Cook was
15 dealing with the grievance process and not managing the claimant's absence viewed objectively the Tribunal did not consider that it was unreasonable that Ms Cook did not recall that she received the August OH Report and that it referred to a procedure on 12 October 2016. Even if it Ms Cook had recalled the August OH Report and its contents the Tribunal did not consider that it
20 was reasonable for Ms Cook to have assumed that the claimant would be unavailable for a meeting on 11 October 2016 because she had a procedure the following day. In any event The Tribunal found that the Stage 2 Hearing did not proceed on 11 October 2016.

161. Having organised the Stage 2 Hearing at an external venue and a manager
25 travelling from England to conduct it, the Tribunal considered that it was unusual for the employee not to be contacted by telephone when they did not attend. However, given the nature of the grievance that had been raised the Tribunal considered that it was reasonable for Ms Cook to communicate with the claimant by email afterwards.

30 162. The Tribunal considered that the timescale for representations was not unreasonable given that the Stage 2 Hearing was initially proposed for 6

October 2016 and Mr Durning was unaware of the reason the claimant did not attend on 11 October 2016. On being informed that the claimant had been in hospital on the morning of 12 October 2016 and was being discharged that afternoon and knowing that the claimant has wanted to attend the Tribunal considered that the timescale could have been extended. However, there was no suggestion by Mr McIntosh or the claimant that this was necessary and it was not requested. The Tribunal considered that as the Outcome Letter Stage 2 was not issued until 21 October 2016 suggested that it was very likely Mr Durning would have considered any representations from the claimant which might have been received after 14 October 2016 especially as the Outcome Letter Stage 2 indicated Mr Durning's willingness to have a face to face meeting to discuss his findings.

163. The Tribunal did not consider that viewed objectively the conduct of Ms Cook and Mr Durning in relation to Stage 2 Hearing was calculated or likely to destroy or seriously damage the relationship between an employee and an employer.

164. The Tribunal looked at the respondent's conduct as a whole in order to determine whether it was such that its effects, judged reasonably and sensibly were such that the claimant could not be expected to put up with it.

165. In the Tribunal's view, the claimant was a conscientious and loyal employee who unexpectedly had a long-term absence from work due to significant medical conditions. This coincided with Ms Taylor's appointment to a newly created role and changes in the focus of the business and management style. The claimant and Ms Taylor worked together for a short time before the claimant's absence during which the claimant felt undervalued. The claimant was very upset with Ms Taylor's voicemail messages in May 2016. Ms MacKinnon attempted unsuccessfully to resolve matters informally between the claimant and Ms Taylor. The claimant then raised a formal grievance which the respondent treated seriously and endeavoured to investigate thoroughly. Ms Wood acknowledged that there had been a break down in the relationship between the claimant and Ms Taylor and suggested mediation before the claimant return to work. The claimant appealed. While she was

unable to attend the Stage 2 Hearing she was given an opportunity to make representations and had a further right of appeal. There was no evidence to suggest that any of the respondent's witnesses wanted the claimant to leave the respondent. To the contrary the Tribunal's impression was that they
5 recognised that there was a serious breakdown in the relationship between the claimant and Ms Taylor at least so far as the claimant was concerned and this needed to be resolved before the claimant could return to work.

166. The Tribunal was satisfied that the respondent's conduct as a whole was not a breach of the implied term of trust and confidence entitling the claimant to
10 resign.

167. Being satisfied that there was no fundamental breach of contract the Tribunal did not require to consider whether the claimant had affirmed the contract following the breach. The claim of unfair constructive dismissal was
15 dismissed.

Employment Judge: Shona MacLean
Date of Judgment: 22 January 2018
Entered in register: 26 January 2018
20 and copied to parties