



## EMPLOYMENT TRIBUNALS

**Claimant** Mrs C Johnston

**Respondent** Capellas Limited

**Heard at:** Birmingham

**On:** 25 & 26 February 2019  
27 February 2019 (in Chambers)

**Before:** Employment Judge Connolly

### Appearances

For Claimant: Ms A Johnston (the claimant's daughter)

For Respondent: Mr L Hutchings (solicitor)

## RESERVED JUDGMENT

The Judgment of the Tribunal is that:

1. The claimant was not unfairly dismissed. Her claim of unfair dismissal fails and is dismissed.
2. The remedy hearing provisionally fixed for 13 May 2019 is vacated.

## REASONS

1. By a Claim Form presented on 12 June 2018 (after a period of early conciliation from 16 April 2018 to 16 May 2018), the claimant brought a single claim of unfair dismissal. She contended that, when she resigned from her position as a Room Leader in the respondent's nursery, she had been unfairly dismissed. She claimed the respondent had breached trust and confidence in a sequence of events going back to June 2017 which led to her decision to resign on 18 January 2018. She worked her notice and her effective date of termination was 6 March 2018.

2. The respondent denied that there had been any breach of contract, still less, any fundamental breach or that its actions caused the claimant to resign.

## THE ISSUES

3. The issues were discussed and agreed by all parties at the outset of the hearing. For the respondent, Mr Hutchings accepted that, if the resignation should be construed as a dismissal, it was unfair. In that event, he indicated he would argue that the claimant had conducted herself in a culpable manner that had contributed to her dismissal and/or such that it would be just and equitable to reduce any award.

4. In the circumstances, the issues were identified as follows:

- 4.1 Did the respondent conduct itself as follows:

- (a) failed to train the claimant in the role of Deputy Manager ('DM')
- (b) in June 2017, Ms Cornish informed the claimant she could return to her role as Room Leader instead of DM
- (c) through the actions of Ms Cross excluded the claimant from her role as DM from 12 July 17 to 23 November 17 (when the claimant stepped down from the role)
- (d) in / about October 2017, in comments made by Ms Cross, strongly hinted that the claimant would be at risk of redundancy
- (e) on 23 November 2017, Ms Cornish and Ms Cross asked the claimant to attend a meeting during which they told her it seemed that she had 'issues' with Ms Cornish and that staff in her room felt that she would not allow them to undertake any activities without her permission when such allegations were false
- (f) on 23 November 2017, Ms Cornish told the claimant that if she had a grievance she would have to go down the disciplinary route and would be 'basically out the door'
- (g) on 27 November 17, advertised the claimant's position on a recruitment website which demonstrated that they wanted her to leave her employment
- (h) on 4 January 2018 asked the claimant to return the nursery key
- (i) on 9 January 2018, Dr Wallbank relayed Ms Cross's fabricated accusations that the claimant had been behaving in a difficult way to a third party by email

- 4.2 If the respondent did conduct itself as alleged, did any proven conduct individually or cumulatively amount to a breach of the implied term of 'trust and confidence'?

- 4.3 If so, was any fundamental breach of contract a reason for the claimant's resignation?
  - 4.4 If so, had the claimant nevertheless lost the right to resign because of that breach by affirming the contract by delay or otherwise?
  - 4.5 If the claimant was unfairly dismissed, did she contribute to her dismissal by culpable conduct and, if so, should any award be reduced by a percentage to reflect that and, if so, by what percentage?
5. It was agreed that, if the claimant were successful, issues as to the appropriate level of award would be determined at a separate hearing if necessary.

## EVIDENCE

6. The parties had agreed a bundle of documents which ran to approximately 160 pages. Any reference in these reasons to page numbers is a reference to that bundle unless otherwise indicated. The claimant added some half a dozen photographs without any objection by the respondent and the respondent added some 16 pages without any objection by the claimant.
7. The claimant gave evidence herself. She also relied on 3 written witness statements: one from a parent of children who attended the nursery and two from co-workers, none of whom attended the hearing. Only one statement was signed. I did not find the statements directly relevant to the issues that I had to determine and only attached weight to them in respect of general issues that were undisputed.
8. The respondent called 3 witnesses: Dr S Wallbank, the owner and Managing Director of the business; Mr Wallbank, her husband, who worked as the Operations Director and Ms Cross, Nursery Manager. Ms Cornish, referred to above, had left the business and was not called as a witness.

## RELEVANT LEGAL PRINCIPLES

9. Self-evidently, in order to succeed in an unfair dismissal claim, an employee must first establish that they have been dismissed. The circumstances in which an employee is dismissed are defined by section 95 of the Employment Rights Act 1996. The relevant part is section 95(1)(c) which provides that an employee is dismissed by his employer if:
- “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.”*
10. The principles applicable to this form of dismissal, often referred to as ‘constructive’ dismissal, were set out by the Court of Appeal in **Western Excavating (ECC) Limited v Sharp [1978] IRLR 27**, in particular, the employee is entitled to treat himself as constructively dismissed only if the employer is guilty of conduct which is a significant breach of contract 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.

11. The term of the contract upon which the claimant relied in this case was the implied term of trust and confidence. It is important to set out that term in full in order to properly understand it and assess whether it has been breached. In **Malik and Mahmud v Bank of Credit and Commerce International SA [1997] ICR 606** the House of Lords formulated the term thus:

*“an employer shall not without reasonable and proper cause, conduct itself in a manner calculated [or] likely to destroy or seriously damage the relationship of confidence and trust between employer and employee.”*

12. It is clear from the **Malik** decision that the test of whether the term has been breached is an objective one (**p611A**). The subjective perception of the employee can be relevant but it is not determinative.

13. Not every action by an employer which can properly give rise to complaint by an employee amounts to a breach of trust and confidence. The conduct must be likely to destroy or seriously damage the relationship of confidence and trust. In **Frenkel Topping Limited v King UKEAT/0106/15/LA** 21 July 2015 the EAT chaired by Langstaff P summarised what this means in a way that I consider particularly helpful (paragraphs 12-14):

*“12. We would emphasise that this is a demanding test. It has been held (see, for instance, the case of BG plc v O’Brien [2001] IRLR 496 at paragraph 27) that simply acting in an unreasonable manner is not sufficient. The word qualifying “damage” is “seriously”. This is a word of significant emphasis. The purpose of such a term was identified by Lord Steyn in Malik v BCCI [1997] UKHL 23 as being:*

*“... apt to cover the great diversity of situations in which a balance has to be struck between an employer’s interest in managing his business as he sees fit and the employee’s interest in not being unfairly and improperly exploited.”*

*13. Those last four words are again strong words. Too often we see in this Tribunal a failure to recognise the stringency of the test. The finding of such a breach is inevitably a finding of a breach which is repudiatory: see the analysis of the Appeal Tribunal, presided over by Cox J in Morrow v Safeway Stores [2002] IRLR 9.*

*14. The test of what is repudiatory in contract has been expressed in different words at different times. They are, however, to the same effect. In Woods v W M Car Services (Peterborough) Ltd [1981] IRLR 347 it was “conduct with which an employee could not be expected to put up”. In the more modern formulation, adopted in Tullett Prebon plc v BGC Brokers LP & Ors [2011] IRLR 420, is that the employer (in that case, but the same applies to an employee) must demonstrate objectively by its behaviour that it is abandoning and altogether refusing to perform the contract. These again are words which indicate the strength of the term.*

14. The breach of trust and confidence may be established by a succession of events culminating in the “last straw” which triggers the resignation. In such cases the decision of the Court of Appeal in **London Borough of Waltham Forest v Omilaju [2005] IRLR**

**35** demonstrates that the last straw itself need not be a repudiatory breach as long as it adds something to what has gone before, so that when viewed cumulatively a repudiatory breach of contract is established. However, the last straw cannot be an entirely innocuous act or be something which is utterly trivial. A last straw can have the effect of reviving the right to resign in respect of earlier breaches in the series **Kaur v Leeds Teaching Hospitals NHS Trust 2019 ICR 1, CA**.

15. In order to claim that a resignation amounts to a dismissal, it is enough if the employee resigned in response, at least in part, to the employer's fundamental breach of contract **Meikle v Nottinghamshire County Council 2005 ICR 1, CA**, applied in **Wright v North Ayrshire Council 2014 ICR 77, EAT**.

## **RELEVANT FACTS**

### The Respondent

16. The respondent is a company with approximately 55 employees which provides childcare services. It operates in 4 locations: 2 school clubs and 2 nurseries. It runs a nursery in Balsall Common which has capacity for 70 children and at which 25 staff are employed and a nursery in Solihull which has capacity for 55 children and at which some 12 staff are employed. The Solihull nursery opened in 2013. The respondent also has office premises in Berkswell.

### The Claimant

17. The claimant was employed by the respondent from 3 April 2009 as a nursery nurse at the Balsall Common nursery. She was promoted to the role of Room Leader on 1 October 2010. She moved from Balsall Common to the Solihull nursery in February 2015. It is agreed by both parties that she formed a good relationship with the manager at the Solihull nursery at that time (a Ms Stephens). In/about October 2016, Ms Stephens moved internally in the respondent's organisation and a Ms Cornish was appointed as manager of the Solihull nursery. The claimant formed a good working relationship with her and, on 24 January 2017, she was appointed 'Senior Practitioner' with an increase in salary. This was an acknowledgment that she was the most senior person working in her 'room' and was acting as something of a mentor and reference point for other staff. The claimant was working with children between approximately 19 months and 3 years in a room known as the 'Moon Room'.

### The Claimant's Appointment as DM and Surrounding Comments

18. In the period 2014 to 2017, the claimant applied for the role of DM on some 3 occasions but was not successful. In June 2017 she was, in effect, carrying out the role after the departure of the previous DM. At this time, the respondent was planning a change in their structure. Ms Cornish was to remain in the role of General Manager but it was now intended that she would work over all 4 sites and 2 new Associate Managers were to be appointed and based at each of the nurseries.

19. In their documents, the respondent demonstrated a tendency to refer to the new roles sometimes as Associate Managers and sometimes as Deputy Managers. This caused some confusion. I accept the claimant's evidence that, at some point in June 2017, she asked Ms Cornish what it would mean for her if there were 2 deputies. I accept that Ms Cornish said something to the effect that there could be 2 managers or the claimant could return to the Room Leader role. The claimant accepted in cross examination that

the upshot of the conversation was that she was clear there could be two roles i.e. that there was a role for her. In addition, as the claimant set out in her own statement (§28), thereafter, Dr Wallbank spoke to her and explained that the new role was an Associate Manager role and her role as DM was safe. I accept that the claimant inferred from Ms Cornish's comments that she may not be needed or wanted in the DM role. I do not, however, accept that this inference was a reasonable one because of the reassurances the claimant was given by the end of the conversation and by Dr Wallbank that there were 2 different roles available.

20. On 15 June 2017 the situation was formalised, in that, the claimant was offered and accepted the DM role. This did not involve increase in salary. The the new structure, namely, a 'roving' General Manager, an Associate Manager and a Deputy Manager was made clear to the staff and parents as demonstrated by the terms of the letter to parents (p67). Ms Cross was identified as the individual who would be appointed to the Associate Manager role. Unfortunately, and perhaps surprisingly given that the respondent says it was a statutory requirement to have a DM role, there was no job description for this role. Broadly speaking, it was room based; the holder was expected to undertake the Associate Manager's work when the manager was on rostered off, on holiday or or away from the premises and generally support the managerial role.

### Training

21. After the claimant's appointment to DM was confirmed and, having been encouraged to do so by the respondent in the letter confirming her appointment (p66), she identified that she would like further training on computer software known as Genie. It was not in dispute that the respondent arranged this training for the claimant at the same time as Miss Cross received the training i.e. 12 July (as noted on p69). The claimant said her training was interrupted by demands from her room and it was on this basis that she did not feel adequately trained. In her witness statement the claimant did not not assert that she raised this perceived shortfall in her training with Ms Cornish (or Ms Cross). There was no note in her August supervision with Ms Cross (p80), signed by her, that she raised this as an issue nor in the claimant's own notes for her September appraisal with Ms Cornish (p85). I noted that she had been provided with the telephone number for the respondent's advisor at Genie at the end of June / in early July (p69).

### The Relationship Between the Claimant and Ms Cross

22. Ms Cross started at Solihull nursery on 12 July 2017. This was her first role at a more senior level than DM. She was new to this level of role, new to the business and nervous. She was identified as 'Associate Manager in training' for the first 3 months of her role and needed assistance from the claimant. The claimant, however, was feeling unsettled by the changes in manager and structure and had a growing, genuine but inaccurate feeling that she was being pushed out.
23. I accept Ms Cross's evidence that her working relationship with the claimant was 'rocky'. I accept the claimant's evidence that she felt Ms Cross was raising petty things with her from the outset (§86). One of the examples given by both was in relation to child-led learning: Ms Cross felt that it was best practice if the children were not given templates to use and the displays focussed on the children's work (no matter the quality); the claimant felt there was a benefit in using templates and mixed displays with her work and that of the children. When they discussed such issues, I accept that the claimant could be tense, brusque and not always as professional as she should

have been in some of her interactions with Ms Cross. I do so on the basis of Ms Cross's evidence and the claimant's own evidence that she had adopted the view that Ms Cross was being petty. Viewed objectively, Ms Cross was reasonably entitled to take this approach and to expect the claimant to respect it or, at least, discuss it in a manner that did not betray her view that Ms Cross was being petty.

24. In the minutes of a supervision meeting between Dr Wallbank and Ms Cornish dated 27 July 2017 (p79A), it is recorded that Ms Cornish had formed the view the claimant was creating a difficult atmosphere in the nursery since Ms Cross had started and that Ms Cross was concerned whether the claimant was using her management time effectively when Ms Cross was not working in the nursery and the claimant was acting as DM. Ms Cornish was charged with monitoring the situation in respect of the claimant and to discuss with Ms Cross in supervision how she could change the issue about which she was concerned.
25. There was however another set of longer minutes (p77) in which these observations did not appear. I found Dr Wallbank's explanation of the reason why there were two sets of minutes confusing and contradictory at times. In her statement she said it was because there were separate minutes for each of the 2 nurseries. This did not seem to me to explain why the longer minutes referred to both sites but omitted any reference to the claimant entirely. When it was pointed out that the longer minutes apparently referred to a Solihull employee who did not appear in the 'Solihull' minutes, Dr Wallbank said that was because the Solihull minutes were limited to action points for Ms Cornish which would be passed on to Ms Cross. This was not in her witness statement and, to my mind, did not satisfactorily explain why Ms Cross would not need to be aware of the situation with the other Solihull employee.
26. In the circumstances, I felt unable to place any significant weight on the minutes but, nonetheless, I accepted from the evidence of the claimant herself and Ms Cross that each perceived difficulties in the relationship from the outset, not continuously but from time to time.
27. On 1 August 2017, less than 3 weeks after Ms Cross had started, she undertook a supervision meeting with the claimant (p80). There it is recorded that the claimant did not feel like a deputy manager, that she felt there was no communication from management and she did not feel part of the management team. Ms Cross asked the claimant what she would like to do more of. There is no evidence that the claimant was able to articulate this. Ms Cross undertook to raise the issue with Ms Cornish. In evidence, Ms Cross could not specifically remember raising the issue with Ms Cornish nor what Ms Cornish had said or done about it, if anything.
28. There is no evidence that Ms Cornish addressed the claimant's perception that she was not part of the management team. There is no evidence as to whether Ms Cornish monitored the sometimes difficult atmosphere between the claimant and Ms Cross or discussed with Ms Cross how to deal with her perception that the claimant was not working effectively as DM, as apparently required on p79A. There is no record of any further supervisions (whether between Ms Cornish and Dr Wallbank, Ms Cornish and the claimant or Ms Cornish and Ms Cross) in the bundle.
29. It seems both were left to their own devices presumably in the hope any problems would resolve themselves.

### The Claimant's Alleged Exclusion from the DM Role

30. The next contemporaneous record in relation to the claimant's position are her notes for her appraisal with Ms Cornish in September 2017 (p85). In those notes the claimant acknowledges that she is filling in for Ms Cross on her days off (Ms Cross had a rostered day off on a Monday; the claimant on a Wednesday) or whenever she is out of the nursery. There is no record that the claimant raised her feeling that she was being excluded from or not performing the DM role.
31. When the claimant was asked in evidence about the way in which she was excluded, she was unable to identify with any particularity or detail what it was she felt she should have been doing which she was prevented from doing or felt unable to do. She said Ms Cross tended to work in the office with the door shut and that she did not feel welcome in the office, that the office door was closed and the lights turned off when Ms Cross left because there did not seem to be any expectation the claimant would use it and that she felt she was expected to do any DM work from her room. I noted that, in the same breath, the claimant also volunteered that "the deputy manager under Jo (Stephens) did not do a lot."

### Redundancy Comments

32. The issues between the claimant and Ms Cross did not resolve themselves. Instead they persisted and were compounded by what I find were a number of misunderstandings on the claimant's part. Firstly, I accept the claimant's evidence that on a date that cannot now be identified with any certainty, somewhere in the period July to October 2017 there was a conversation between Ms Cross and the claimant about the possibility of needing less staff. This is referred to in operations meeting notes for 3 July (p75). It is also referred to in a subsequent meeting on 23 November 2017 (p95 §3).
33. The claimant inferred from this conversation that she may be the target of any redundancies. She did not or could not, however, explain with any specificity what it was that Ms Cross said which led her to this conclusion. Secondly, the claimant was upset when she learned on 15 November 2017 that a Christmas meal was being arranged for "managers of the settings, directors and admin team" (p94). The list of invitees included Associate Managers but did not include her as DM. She genuinely but erroneously perceived this to be more evidence that the respondent no longer wanted her as DM. I have little doubt that this perception detrimentally affected the way in which she dealt with Ms Cross in terms of her tone and manner, particularly if she perceived anything Ms Cross said as critical of her or her practice.

### Meeting 23 November 2017

34. Matters came to something of a head in November 2017. Ms Cornish asked the claimant to attend a meeting with her and Ms Cross. The notes by Ms Cornish are at p95. I am satisfied that the notes are an accurate record of the meeting not least because there was nothing in them with which the claimant said she disagreed.



35. The meeting was called to discuss the DM role and how it was working. Ms Cornish expressed her view that there were instances where the claimant did not seem to be supporting Ms Cross in the way that would be expected and that she had a negative approach to new ideas. It was said that Ms Cross felt she was treading on egg shells. Ms Cornish also raised that staff in the Moon Room were not happy and had spoken to Ms Cross. A number of other issues were also raised by the respondent but it is these two that are the focus of the claimant's allegation.
36. For her part, the claimant raised her feeling that she was not part of the management team, that she had been excluded from the Christmas meal and queried whether she might be made redundant. In relation to the Christmas meal, Ms Cross recorded that she sought to explain that the invitation did not include DM's but only Associate Managers (who I have found were sometimes referred to as DMs). Ms Cornish noted that she felt the claimant was misunderstanding her explanation as, in effect, a denial that there was a DM position. In relation to redundancy, Ms Cornish explained that the staffing numbers matched the attendance numbers, there wouldn't be any need for redundancies and sought to reassure the claimant that the respondent would not want her to leave given her level of experience. Ms Cornish, Ms Cross and the claimant had what was described as their third conversation about templates and child-led displays. Ms Cornish sought to explain that she and Ms Cross were not seeking to be difficult but were conforming to Ofsted expectations and standards in this regard.
37. Ms Cornish put forward 3 options: to review the areas where the claimant was struggling as DM and set up an action plan, for the claimant to return to her role as Room Leader where she excelled or to move to the other nursery if the claimant felt she needed a change. The claimant was offered time to think about things. The claimant's reaction was to say she would step down as DM with immediate effect and that she would not therefore be covering, answering the phone or doing show arounds. There was a discussion about whether the claimant would be required to work for some period equivalent to notice before stepping down. The claimant asked how much notice she would need to give if she wanted to leave completely. Ms Cross asked if the claimant was sure she wanted to step down; she said that an action plan could be put in place if she wanted to continue in the role. The claimant declined that option and the meeting ended.
38. In evidence, the claimant accepted that it was not unfair that she be called to this meeting if there were concerns but that she felt that she was 'sat there with the two of them having a go at me'.
39. Ms Cornish and Ms Cross reconvened the meeting after lunch. Ms Cornish informed the claimant that she would have to work for 4 weeks before stepping down from the DM role. This would take them to the Christmas break and the claimant could then return as Room Leader after the break. As there was no salary increase when she took on the DM role, there was no salary loss when she relinquished it.
40. There was then an apparently difficult discussion where it was put to the claimant that she had immediately left the earlier meeting and gone to the various childcare rooms to tell the staff that she would no longer be DM and that she had asked the staff on her room whether they had raised issues with Ms Cross. The claimant denied the former behaviour but maintained, in respect of the latter, that she wanted to know what had been said. Ms Cross said this was unprofessional and put the team in an uncomfortable situation. The meeting concluded with Ms Cornish asking how it was

going to be moving forward, that everyone would have to draw a line in the sand and move on. The claimant agreed to move forward.

41. The claimant alleges that, at this reconvened meeting and in the presence of Ms Cross, Ms Cornish told her that if she had a grievance and wanted to go down the disciplinary route, she would be basically 'out the door'. There was no note of any such discussion. Ms Cross said in evidence that she did not recall any such comment or conversation in her presence.
42. The claimant said in her witness statement that she telephoned Dr Wallbank that day on more than one occasion but her calls were ignored. In evidence she said she "was not sure it was that day...in my head, in my head I was going to make a call". In questions to Dr Wallbank it was suggested that the claimant had left a message. Dr Wallbank was adamant that she had not missed or ignored any calls or messages from the claimant that day.
43. On balance, I cannot be satisfied that the claimant did telephone Dr Wallbank or that Ms Cornish made the comment alleged. I do not accept the calls were made in light of Dr Wallbank's evidence and the uncertainty of the claimant's evidence in cross examination. I do not find that the claimant is being deliberately untruthful. I am not persuaded the comment was made by Ms Cornish at this time in light of (a) the very full nature of Ms Cornish's note and the complete absence of any mention of grievance procedure or anything akin to it, (b) Ms Cross's evidence (c) my findings that the claimant has misunderstood what has happened or been said on more than one occasion and (d) the fact that the claimant was obviously upset at the time in question which may have clouded her perception of anything that was said to her.

#### Advertisement 27 November 2017

44. The claimant was unable to draw the proverbial line in the sand. She now saw everything through the lens of her conviction that the respondent and Ms Cross, in particular, did not want her. On 27 November an advertisement was placed for a room based DM. The ad referred to the position specialising in the under 3's. The claimant wrongly perceived this to be an ad for her role. As all the rooms had room leaders, she felt that a room based DM for under 3's could only mean she was to be replaced. In fact, the respondent saw the role as being one which worked across all 3 rooms, covering for each room leader on their day off and providing more of an overall view of the nursery. I accept Ms Cross's evidence that, when the claimant saw this ad, she sought out Ms Cross, that she was obviously angry and she accused her of advertising her role. The claimant was not persuaded by Ms Cross's explanation this was to be a replacement DM which the nursery were required to have in place.

#### December 2017

45. In December 2017, Ms Cornish resigned. This prompted another change in the respondent's management structure, in that, it was decided that Ms Cornish would not be replaced as overall / general manager and Ms Cross would become the Solihull Nursery Manager. A Ms Jagatia, was recruited as DM as result of the the 27 November ad. She was due to start in January 2018.

46. The difficulties between Ms Cross and the claimant continued. It would be wrong to overstate them. I take the view that they are accurately recorded in an email from Dr Wallbank to Ms Cross after a meeting between them on 13 December 2017 p101 i.e.

“We discussed Carol’s low level disruptive behaviour...We agreed to revisit this after the Christmas break and will set some goals for Carol to improve”

47. I accept the claimant’s evidence that, in December 2017 and, particularly, during the Christmas break, she considered her position and decided to look for alternative employment. I do not accept the respondent’s contention that the claimant had made up her mind to leave by October 2017. This contention was based on §46 of the claimant’s witness statement which was, in my view, ambiguous. The claimant was offered training in or about October 2017; it was due to take place in January 2018. By *that* date i.e.; January 2018 she was leaving and did not want to do the training. Dr Wallbank’s own statement identifies the date the claimant declined the course to be 20 December 2017 (§34), which is consistent with the claimant’s evidence.

January 2018 - the key, the emails and the decision to resign

48. The claimant identified a suitable role for which she applied in early January. She was interviewed very quickly after her application by telephone and then in person on the same day. She was offered and accepted the job on 15 January 18.

49. In the meantime, she returned to work at the Solihull nursery. On her return, on 4 January 2018, Ms Cross asked her for the nursery keys as she was no longer DM with keyholder responsibilities. In evidence the claimant accepted that this was “not inappropriate” and, if anything, she was ‘probably glad because if anything had happened I would have been at fault”

50. On 5 January 2018, a Ms Larkin, who is employed Hopscotch, the respondent’s Ofsted / best practice advisors, attended for one of her regular visits to observe and report back to the respondents on the standards being achieved. On 9 January 2018, Ms Larkin emailed a copy of her report to Dr Wallbank (p108). In that report which appears at p107 she refers to

“where necessary consider those members of staff who may require performance improvement plan” and

“Roles of Room Leaders

...

Part of SMT and role model expectations to team, including supporting decisions

Mutual respect”

51. It is not explicit that these are references to the claimant nor how far these are based on her observations or what she may have been told, for example, by Ms Cross. Dr Wallbank emailed Ms Larkin within minutes in the following terms:

“...Could I ask your views regarding Carol in Moon Room. You are probably aware that she is behaving in a difficult way currently and I was interested in your independent observations”

52. It is right to say that this is somewhat leading. It is also right to say, however, that Ms Larkin emailed back within minutes to say

“I agree Carol is being very difficult and I felt the room is going backwards. I discussed with Joelle sharing expectations including mutual respect by sharing the staff handbook. I feel she needs to be put on a PIP. In addition, we talked about Carol sharing her strengths with the team perhaps being a language lead.”

53. Dr Wallbank telephoned Ms Larkin on receipt of the email and made a note of their conversation which was in very similar terms to that already set out in the emails. On that date, the claimant herself was in the manager's office. She saw her personnel folder on the desk with these printed e mails which she read and photocopied. On the same day, Dr Wallbank drafted a letter to the claimant inviting her to an informal meeting to discuss her performance, particularly her attitude to management and a drop in the performance of her room. It warned the claimant that, if matters were not resolved by this informal means, the respondent may need to undertake a formal capability process.

54. I accept Ms Cross's evidence that, on 11 January 2018, the claimant came into her office and demanded to see a copy of the letter to her. I assume she anticipated it from the contents of the e mail (and was aware her daughter had been given a similar letter that day). I accept she was angry and raised her voice to Ms Cross accusing her of bullying.

55. The informal meeting took place between the claimant and Mr Wallbank on 15 January 2018. This was the day the claimant accepted the offer of alternative employment. The claimant made it clear from the outset of the case that, before she received the letter inviting her to the performance meeting she had made up her mind to leave, that she accepted the job on the day of the meeting and, in those circumstances, the personal development process had no impact on her decision to resign. It is therefore unnecessary for me to deal with the meeting in any detail save to note that a personal development plan was provided to the claimant and it was to be reviewed in 2 weeks at the end of January.

#### The Reason for the Claimant's Resignation

56. The claimant resigned by letter dated 18 January 2018 (p119). The letter did not give any reason for her resignation but simply stated

“It is with great regret that after many years of dedicated and loyal service with Capella's Nursery I am terminating my contract of employment with immediate effect.”

57. Ms Cross, Mr Wallbank and the claimant met on 1 February 2018 to review the claimant's performance against the PDP. Ms Cross expressed her view that the claimant's performance and attitude had improved and the PDP was no longer required. Afterwards, Mr Wallbank then conducted an exit interview with the claimant. He recorded that she had left because she felt it was time to move on to another nursery (p123).

58. I accept that a significant part of the reason why the claimant resigned was her perception of the events at 4.1(a)-(i) above. Although some had occurred a significant time ago they all related to either the claimant's developing view that she was not

wanted as a DM or, indeed, as an employee and that Ms Cross was fabricating allegations against her. This is a view which I am satisfied she genuinely held (although it was not a reasonable one) and a view which, understandably, would be a source of upset and dissatisfaction in one's job. I do not attach any significant weight to the fact that the claimant did not raise in detail her reasons for leaving either in her resignation letter or exit interview in circumstances where she was seeking a reference from the respondent.

### Conclusion

59. Many of my conclusions will be clear from the factual findings above but I will consider each instance of alleged conduct individually before standing back in order to consider the total picture revealed.

60. I reminded myself of the legal framework above, in particular, that it is for the claimant to satisfy me that the respondent's conduct *judged objectively* amounts to a *sufficiently serious* breach of contract (my emphasis).

61. In relation to,

(a) failed to train the claimant in the role of Deputy Manager ('DM'),

I find that the only training which the claimant felt she needed was in relation to the Genie software. It was arranged, although it may have been interrupted. In light of the fact that the claimant did not ask for any additional training session or raise any shortfall in her training with Ms Cornish or Ms Cross after the arranged training and in light of the fact that she was given a telephone number to access the advisor from Genie, I do not accept that she was inadequately trained in this regard. If she was, it was not the result of the respondent's failure or a breach of contract by them.

62. In relation to,

(b) in June 2017, Ms Cornish informed the claimant she could return to her role as Room Leader instead of DM

I accept there was a discussion which included a reference to the option that the claimant return to the Room Leader role but in the context that the other option of remaining as DM and working with a new Associate / Deputy Manager was made clear to the claimant, first by Ms Cornish and secondly by Dr Wallbank as set out in paragraph 19 above. In context, therefore, I do not find that this comment was inappropriate or, objectively judged, was likely to destroy or seriously damage the relationship of trust and confidence between the claimant and the respondent or to contribute to such a situation.

63. In relation to,

(c) through the actions of Ms Cross excluded the claimant from her role as DM from 12 July 17 to 23 November 17

I accept that the claimant undoubtedly felt excluded and that she expressed this on 1 August 2017. In my view the absence of a job description, the lack of clarity around the role of Associate Manager and the role of DM and the respondent's failure to address the claimant's feelings of exclusion fell well below best practice and contributed to the claimant's feeling that she was not an important part of the team. That said, the claimant's complaint is that she was actually excluded from the role by Ms Cross. Looking at the situation objectively, I am unable to find this to be the case, particularly in the absence of any clear or detailed evidence from the claimant as to what she was excluded from doing. I am further persuaded that I should not find that the claimant was excluded from the role in light of (a) her own September appraisal document where she makes it clear that she is

filling in for Ms Cross on her rostered days off or absences and (b) the claimant's own observation that others in the DM role did not do a lot. In the circumstances, while the respondent should reasonably have taken steps to make the roles clearer and address the claimant's perception, I must focus on her allegation that she was excluded and I do not find it proved. If it is not proved it cannot have caused or contributed to damaging the relationship of trust and confidence between her and the respondent.

64. In relation to,

- (d) in / about October 2017, in comments made by Ms Cross, strongly hinted that the claimant would be at risk of redundancy

In evidence the claimant was unable to clearly identify when this comment was made or precisely what the comment was that led her to believe she specifically would be the one at risk of redundancy. In the circumstances, while I accept that there was a discussion about possible redundancies between the claimant and Ms Cross I do not find that, viewed objectively, it contained any strong hint that the claimant would be the one at risk. Further, this discussion cannot reasonably have caused or contributed to a breakdown in trust and confidence in January 2018 when the claimant resigned. Between those 2 dates, (on 23 November 2017) Ms Cornish made it clear to the claimant that redundancies were not in prospect and that she was valued as an experienced member of staff whom the respondent would not want to lose.

65. In relation to

- (e) on 23 November 2017, Ms Cornish and Ms Cross asked the claimant to attend a meeting during which they told her it seemed that she had 'issues' with Ms Cornish and that staff in her room felt that she would not allow them to undertake any activities without her permission when such allegations were false.

It is not in dispute that this meeting occurred or that the respondent, broadly, raised the issues the claimant refers to (amongst others). I find, as the claimant indeed accepted, it was reasonable to have this meeting with the claimant to air these issues. I accept that Ms Cross genuinely felt that the claimant was not supporting her as she should and that the staff in the claimant's room were dissatisfied. I do not accept that Ms Cross fabricated allegations against the claimant. As the more senior employee, it was properly part of Ms Cross's role to form a view on aspects of the claimant's performance and to raise any concerns that she had. The claimant may not agree that the concerns are well-founded but that does not mean they were raised maliciously. Ms Cornish was prepared to discuss the claimant's views with her and to agree a development or action plan to address those matters that were outstanding. The claimant, no doubt fuelled by her conviction that this was all false and part of a campaign to pressure her into leaving, chose to step down from the DM part of her role. That was her choice to make but, when viewed objectively, I do not find that the respondent's conduct in holding the meeting or raising these two issues were acting in such a way that the claimant was entitled to consider caused or contributed to the destruction of or serious damage to mutual trust and confidence.

66. In relation to

- (f) on/about 23 November 2017, Ms Cornish told the claimant that if she had a grievance she would have to go down the disciplinary route and would be 'basically out the door'

I have, on balance, not been persuaded that this happened as set out in paragraph 43 above. It cannot therefore have caused or contributed to any breach of the relevant implied term.

67. In relation to

- (g) on 27 November 17 advertised the claimant's position on a recruitment website which demonstrated that they wanted her to leave her employment

As set out in paragraph 44 above, I do not find that this was an ad for the claimant's position (save in respect of the DM aspect from which she had stepped down). The advertisement did not therefore demonstrate the respondent wanted the claimant to leave. This allegation is not proved and cannot therefore have reasonably caused or contributed to the requisite loss of trust and confidence. I feel it is worthwhile observing, however, that, after such a difficult meeting and the claimant's resignation from the DM aspect of her role, it would in my view have been prudent to discuss with the claimant, in advance, that the role was to be advertised with a somewhat different structure. Again lack of clarity in roles and structure has perhaps exacerbated an already difficult situation.

68. In relation to

- (h) on 4 January 2018 asked the claimant to return the nursery key

This happened but, on the claimant's own evidence as recorded at paragraph 49, was not inappropriate and cannot therefore have reasonably caused or contributed to the requisite loss of trust and confidence.

69. In relation to

- (i) on 9 January 2018, Dr Wallbank relayed Ms Cross's fabricated accusations that the claimant was behaving in a difficult way to a third party by email

In the weeks prior to this e mail, during a supervision meeting, Ms Cross had raised with Dr Wallbank her view that the claimant was continuing in her low level disruptive behaviour. I accept that this view was genuinely held. I accept that the claimant's behaviour and interactions with Ms Cross were affected detrimentally by her belief that she was fabricating allegations against her and singling her out for criticism. Dr Wallbank had concluded that the issue could wait a few weeks until after a break and be re-assessed. In the circumstances it was appropriate for her to raise concerns about the claimant's conduct towards Ms Cross with the Ofsted advisor in order to discuss whether they were well-founded and how they might be addressed. It *might* have been better if the advisor had simply been asked for her opinion on the interactions between Ms Cross and the claimant in an open and non-leading way but Dr Wallbank made it plain that she was keen to hear the advisor's independent observations. Whether it was done in a more or less leading way is a matter of fine tuning rather than something which, when viewed objectively, could be considered sufficiently serious to destroy or seriously damage trust and confidence. It is not, in any event, the thrust of the claimant's complaint: her complaint is that "she could see by these e mails that Joelle (Ms Cross) had been fabricating things about me". I do not accept that Ms Cross was fabricating things.

70. This is a case about perception: in the claimant's view Ms Cross was unnecessarily critical of the claimant's practices which the claimant felt were good and had not been the subject of criticism before; in Ms Cross's view, it was the claimant who was hostile and resistant to appropriate management advice. The claimant sought to persuade me that, if there had been no problems in her employment before, the problem must lie with Ms Cross. I accept that the claimant had an unblemished record and that, for example, she had been referred to as someone who excelled in the role of room leader in November 2017 (p95). I am not, however, prepared to draw the inference that the problem must lie with Ms Cross. I find that the situation arose because of a combination of the the claimant taking on new DM responsibilities and doing so at the

same time as there was a change in the claimant's line management structure and personnel. The new appointee brought with them new ways of doing things with which the claimant did not always agree. No doubt it was upsetting and distressing for the claimant to have such problems at work particularly when she had been there for a substantial period. The legal test is, however, an objective test and, on that test, I am satisfied that neither Ms Cross, Ms Cornish nor Dr Wallbank (whether in individual instances or taken cumulatively) conducted themselves in such a way as to amount to fundamental breach of the contractual term as formulated in **Malik**.

71. The claimant's resignation was not a dismissal under section 95(1)(c), and therefore the unfair dismissal complaint fails and is dismissed.

**Employment Judge Connolly**

Signed: 28 February 2019