



EMPLOYMENT TRIBUNALS

Claimant: Miss S Powell

Respondent: Marks and Spencer Financial Services Plc

Heard at: Liverpool **On:** 6 December 2018 & 21, 27 February 2019

Before Employment Judge Wardle

Representation

Claimant: In person

Respondent: Ms L Gould - Counsel

RESERVED JUDGMENT

The judgment of the Tribunal is that the claimant's complaint of unfair constructive dismissal is not well founded.

REASONS

1. By her claim form the claimant has brought a complaint of unfair constructive dismissal within the meaning of section 95(1)(c) of the Employment Rights Act 1996 ("ERA") contending that since a change of team leader in December 2017 she had been bullied and pressured more than others in her team and had missed many opportunities for training and bonus amounts such as to cause her to lose trust and confidence in her employer.

2. The respondent by its response denies that its management or treatment of the claimant, including in respect of the management of her by her team leader, amounted to a breach of the implied term of mutual trust and confidence between them.

3. It further contends that if, which is denied, the tribunal were to find that there was such a breach that it was not sufficiently serious as to constitute a repudiatory breach giving rise to an entitlement to treat the contract as terminated with immediate effect. It also contends that in the event of a finding of a repudiatory breach that the claimant by her conduct waived such breach and was not entitled to terminate the contract without notice and to the extent that the claimant seeks to rely upon the last straw doctrine it submits that the acts referenced in the claim form are innocuous or trivial and therefore insufficient to

support a claim of constructive dismissal. Finally, it contends that the claimant failed to comply with the ACAS Code of Practice on Disciplinary and Grievance Procedures by failing to raise a formal grievance in respect of the allegations that she now makes against the respondent and that any award of compensation should, therefore, be reduced by 25%.

4. The Tribunal heard evidence from the claimant and on behalf of the respondent from Ms Victoria Livingstone, Team Leader, and Ms Claire Doherty, Section Manager, which was given by written statements and was supplemented by responses to questions posed. It also had before it a bundle of documents, which it marked as "R1".

5. Having only concluded the hearing late on the second day the parties were informed that judgment would be reserved. The Tribunal has since had time to sit in chambers on 27 February 2019 to consider the evidence, the submissions and the applicable law in order to reach conclusions on the matters requiring determination by it.

6. Having heard and considered the evidence the Tribunal found the following material facts.

Facts

7. The claimant, who began working for the respondent on 9 November 2015 was employed by it as a Customer Services Adviser in its head office in Chester in a call centre, as part of a team of around 8 people dealing with telephone banking queries from the respondent's customers. Her employment terminated on 28 June 2018 by reason of her resignation.

8. The respondent is a retail bank delivering a range of banking products to customers.

9. The events which gave rise to this claim as relied upon by the claimant began in December 2017 following a change in her team leader from Mr Duncan Bailey to Ms Victoria Livingstone, who was promoted into the role for a temporary secondment for a period of six months.

10. In advance of Ms Livingstone taking over as the claimant's Team Leader Mr Bailey had met with the claimant on or about 8 November 2017 to discuss her absence record. She had had a long period of absence (119 hours) in February due to Labrynthitis and had since been experiencing issues with migraines leading to sickness alongside multiple flu instances as a result of which her absence percentage had increased to 28% for the rolling year, which saw her being referred to Occupational Health (OH), who had advised a 2% uplift on an earlier set absence target of 4% for a period of three months to accommodate the above-mentioned underlying medical conditions. At this meeting she was issued with an informal warning and given an absence target of 6% (the equivalent of 26 hours) for the following twelve weeks, at the expiry of which matters would be reviewed.

11. Mr Bailey also met with her on 21 December 2017 to conduct a manager review of her performance for the year, which is documented at pages 42-46 of the bundle. This review had a number of criteria against which the claimant was assessed. The first of these was her ability to lead or hold meaningful

conversations with customers that would be in their best interests and be of potential benefit to them. In respect of this criterion it is recorded that the claimant had not got on top of the approach rate though it was 8 months since she had started and that she had to quickly get on top of this. The second was her ability to proactively engage with new and existing customers around the range of channels through which they could access products and services. In this respect it is recorded that she was very slow to get into digital engagement and that while the last two months had seen better results her performance was still not in line with expectation. The third was her ability to discover customers' needs by having meaningful conversations and matching appropriate solutions that were in the best interests of customers. In this respect it is recorded that she had performed poorly in successful referrals with only 4 for the whole year and that as her approach rate was so low she was not helping herself in successful referrals such that she needed to get on top of both immediately. The fourth was her ability to take responsibility for discussing the most appropriate solutions available to meet the needs of customers both short and long term. In this respect it is recorded that she had escalated very few calls to Mr Bailey, which he believed was due to the honest relationship she created with customers over the course of her call but that she needed to put a big focus on her own development, coming prepared for coaching sessions and working to improve her MI, in relation to which it is further recorded that she was still not showing consistency in MI and that despite it being discussed in all weekly and monthly meetings there had not been a great improvement and expectations were not being met.

12. The claimant's overall rating in this review was given as a 'Good Performer', which in the respondent's Performance Rating Scale ranks third out of four ratings and is defined as someone who achieves performance expectations. However, Mr Bailey's comments alongside this rating state that the year had presented the claimant with a clear path for development but that she had not taken the opportunity fully and her performance had not changed a lot in the second half of the year and further that looking back on 2017 whilst there had been occasional months where her performance had been reflective of her expert status these had not been consistent.

13. Aside from an alleged incident in December 2017 involving both Mr Bailey and Ms Livingstone when the claimant says that they were extremely short with her when she approached them for help with a call involving the processing of a foreign payment, which was a team leader procedure and took amusement out of her getting upset as the customer became angry with her, which was not put to Ms Livingstone in cross-examination and was denied by her in her evidence-in-chief pointing out that she had not taken over management of the team at this time as she was shadowing Mr Bailey and was not trained herself in processing foreign payments, the course of conduct upon which the claimant relies as being in repudiatory breach of her contract began in February 2018.

14. The first of the incidents that the claimant alleges to have occurred from February 2018 onwards related to Ms Livingstone commenting in front of the office on her appearance in terms of 'your face is so orange, what have you been doing – you look like you have been sat in a bath of fake tan all night' before laughing with the group, with whom she was stood.

15. The second on 22 February 2018 related to the issuing of letters regarding company bonuses, in respect of which the claimant says that Ms Livingstone

despite running around the office showing off that she had them refused to hand out her letter when she asked for it and that it was four days after everyone else that she received hers.

16. The third incident on 26 February 2018 related to the claimant's purchase of a new car, which saw Ms Livingstone starting to ask questions in front of the whole team as to how she could afford to have done so and what she was doing having a car like that, which she claims was designed to embarrass her.

17. Following these incidents the claimant says that her grandad fell extremely ill while in hospital and that during March she asked to speak to Ms Livingstone regarding his deterioration to explain that she may not be herself and that she may need to leave the office one day if called into hospital, in response to which she stated that she did not really care if what she was telling her was outside of work.

18. As with the alleged incident in December referred to at paragraph 12 above these incidents were not put to Ms Livingstone in cross-examination and they were denied by her in her evidence-in-chief.

19. She also says that on 12 March 2018 she received negative feedback from Ms Livingstone at a one to one with her to review her performance for February 2018 and that she was twice threatened with a Performance Improvement Plan (PIP). The review document at pages 73-76 confirms that references were made to a PIP being implemented but in the context of her having come to the one to one unprepared, according to Ms Livingstone's comments, which resulted in them having to spend the designated half-hour completing the form and their being unable to discuss her month at all, despite her being sent a document beforehand on how to fill out her one to one form. In addition reference was made to a PIP being implemented in the event of the claimant not achieving a significant increase in her performance in reducing her wrap time and increasing her overall outcomes. In relation to her absence rate this had reduced from 26% to 21.39% but was still considerably above the target of 6%, which had been set in November 2017. In this connection the claimant's case had been raised by Ms Livingstone with HR on or about 13 February 2018 upon expiry of the 12-week review period in circumstances where she had considerably exceeded her target absence rate by having 86 hours of absence over the period as against her target of 26.

20. Following the receipt of this feedback the claimant emailed Mr Lee Mason, another Team Leader the same day asking if she could have a few minutes to have a chat with him about how she had been feeling within her team. They subsequently met on 14 March 2018 when she handed him a document setting out her issues with Ms Livingstone at pages 113-116. In this she made a number of accusations against her beginning with an allegation that on an occasion when she had left work because the hospital had called to say that her grandad had had a bad turn and had rung to say that he wasn't very well Ms Livingstone had replied 'Oh, just tell me when his funeral is when you are next in'. The documents at pages 60A-60B comprising a transcript of the call, which was also played in the hearing, showed that this conversation had occurred on 5 January 2018 and that the claimant gave Ms Livingstone to understand that it looked like the end for her grandad, which led her to say that if the worse came to the worst she was to keep her updated and let her know when the funeral was so that she could be keyed out. The claimant's account of what Ms Livingstone said on this occasion

was not therefore strictly accurate and rather than any callousness on her part as implied by the claimant Ms Livingstone dealt with matters sympathetically and empathetically.

21. Her other issues with Ms Livingstone were that (i) she is not approachable and when in on overtime refuses to help people and that she shouts you down if you try to speak in general, which she did to everyone but will chat away and sit laughing with other team leaders and friends (ii) she slates other staff members to her (iii) she belittled her in front of the team when she asked if she could have her bonus letter earlier because she was off work for three days (iv) she called her randomly to her desk 5 minutes before she left to say that if she didn't reduce her wrap she was going on a PIP even though her wrap had not been mentioned before (v) she embarrassed her in front of the overnight team stating that she had been sat in fake tan all night because she was orange (vi) she had told other team members of personal business confided in her (vii) she is only bothered how she looks not how she is making the team feel (viii) she had made her look stupid in front of other members of the team countless times (ix) she had shouted about a call dealt with by the claimant saying that she was basically rubbish (x) she queried what the claimant's medicals were for despite her explaining the reason which she did not want the team to know (xi) she threatened her with a PIP in front of the whole team on 12 March 2018 and had shouted across the team about her actions as soon as she walked in telling her that what she had written was not good enough (xii) she had said in buzz that all of the team would be on a PIP if one to ones were not up to standard and (xiii) her having her one to ones a few days apart and struggling to write more, which when explained saw her being threatened with a PIP again.

22. The document was provided to Ms Claire Doherty, the claimant's Section Manager, by Mr Mason in circumstances where according to her evidence the claimant was happy to keep matters informal at that stage. As a first step she moved desk to sit next to the team to observe their behavior and claimed not to have seen anything out of the ordinary or witnessed anything that raised any alarms or concerns about Ms Livingstone's managerial approach.

23. Following these observations Ms Doherty decided to speak with Ms Livingstone, which she did on 23 March 2018. On her evidence she discussed with her the allegations in detail and she provided her with constructive feedback on the changes that she could make to help the claimant feel more comfortable and in particular they addressed her tendency to call out over desks, which some might view as brash and had been flagged by the claimant. She informed Ms Livingstone that it was very important that she discussed these issues with the claimant so that they could reconcile and move on amicably and that she would speak to the claimant and look to arrange a meeting for the three of them, with which Ms Livingstone agreed. Ms Doherty then met with the claimant on 28 March 2018 when an informal discussion was held, which she says was in line with the respondent's standard approach to the handling of grievances of addressing them informally before progressing to a formal stage should this prove necessary. It was her further evidence that whilst she acknowledged one of the points that the claimant had raised about Ms Livingstone discussing performance issues publicly in the team the claimant was unable to pin point specific occasions when her more generic allegations had occurred. She also says that she took the opportunity to raise with the claimant comments that she had been making about Ms Livingstone to other members of the team, which had been brought to her attention by other customer services officers and made

known to her the inappropriateness of this acknowledging that she spoke about the claimant starting a witch-hunt, whilst offering at the same time to mediate in a meeting between them to resolve matters and to move forward, in response to which the claimant made it clear that she did not want to meet with Ms Livingstone but also that she did not wish to take the matter further. At the meeting's end Ms Doherty says that she told the claimant if she had any future issues she should come to her directly.

24. Ms Doherty also stated that she then arranged for a team meeting to obtain feedback about Ms Livingstone's performance as team leader to establish whether the claimant's allegations were part of wider concerns within the team which resulted in a positive picture being painted with just one member of staff bringing up an issue about her directness and its possible intimidating effect, which saw her speaking further with Ms Livingstone to give her feedback and identify some small changes that she could make to her management style.

25. A further alleged incident upon which the claimant relies was the rejection of a request on an unspecified day in March 2018 by Ms Livingstone to take a holiday to attend a meeting in hospital with her family concerning her grandad having been diagnosed with pneumonia, which decision she accepted only to find out that she had allowed another member of staff to take holiday that day. As with the earlier incidents referred to above in paragraphs 13 to 17 this one was not put to Ms Livingstone in cross-examination and was one in her evidence-in-chief she said she could not recall or check not having the date in question.

26. Sadly, the claimant's grandad passed away on Sunday 8 April 2018. She returned to work on 11 April 2018. On this date she says that she was taken into a private meeting room by Ms Livingstone and was asked by her 'why do you even care that your grandad has died, I did not care when my grandad died, which she says severely upset her and made her feel like she should not have come back to work. She also claims that sometime between 11 and 16 April 2018 Ms Livingstone approached her at her desk in front of everybody asking what two medical appointments were for from previous months and questioning if they were in relation to depression and further that on 16 April 2018 after becoming upset at her desk by a call from an aggressive customer Ms Livingstone told her that she was attention-seeking in front of everybody. Also, on 23 April 2018 she claims that Ms Livingstone had shouted in front of everyone that she was not making any effort with the company and that when she responded to say that she had with having only one day off when her grandad died and having no extra day off for his funeral, which was arranged for her rota day Ms Livingstone replied that 'she didn't care about her days in or her grandad dying' leaving her crying at her desk before walking off with another manger laughing. These allegations were denied by Ms Livingstone in her evidence-in-chief, although she did acknowledge that she had raised concerns with the claimant regarding her absences as there was a pattern emerging of her taking time off for medical appointments even though she had weekdays off every few weeks when she could have booked appointments but claims that this was discussed in their monthly one to one meeting for March 2018 as documented at page 96, where it is recorded that they discussed medicals and their ideally being taken outside of shift time. She also says that she was totally unaware as at the alleged date of her questioning the claimant over the reasons for her medical appointments that the claimant was suffering from any sort of stress or depression and that it was only at the end of April that she was signed off for any stress related condition.

27. In her ET1 the claimant also says that Ms Livingstone arranged behind her back on 25 April 2018 to have a member of staff sit with her to review her work claiming that she could have chosen anyone for this and that when she asked why she had chosen her when she had just lost a family member Ms Livingstone replied 'I do not care who has died, this is your job remember that and that outside life does not matter'. The documents show however at page 96 that this arrangement, which was in the form of extra coaching from Ms Stephanie Poole-Jones (Product Coach) was discussed with the claimant at her 1:1 for March 2018 and that the claimant was informed that she would be receiving additional coaching around her customer engagement piece and that on the back of it there was an expectation of a healthy increase in her MI figures, most significantly approach rate and overall outcomes. They also show at pages 124-125 and 128-129 that the coaching took place on 17, 18 and 23 April 2018.

28. According to a document at page 131 headed 'Coaching - 24 April 2018' the coaching was deemed to be unsuccessful and the claimant was unhappy about having this finding pinned to her record as she felt that the feedback which she had received was unfair.

29. The claimant also claims that on 25 April 2018 Ms Doherty accused her of lying about how she had been treated and told her that she was starting a witch hunt, which scared her from wanting to speak to a manager again. It appeared, however, that there was some confusion here by the claimant as in her ET1 she speaks in relation to this date about her writing in bullet point form about what Ms Livingstone had been doing to her in the form of bullying and causing her severe stress and embarrassment and of Ms Doherty approaching her and telling her that she had sat with Ms Livingstone for a week and seen no signs of bullying. These events quite clearly took place in March 2018 as described above and it was Ms Doherty's unchallenged evidence that there was no further discussion between her and the claimant beyond 28 March 2018.

30. On 25 April the claimant says in her witness statement that she left work early due to having a doctor's appointment as she kept having panic attacks and severe upset and that she was encouraged to take at least one week off, which saw a doctor's note being taken into work the same day. The documentary evidence, however, at page 132 shows that the claimant was absent on 26 April 2018 with a migraine and was then signed off from 30 April to 8 May 2018 with work-related stress albeit that she worked for part of 30 April 2018 as her absence record at page 137 shows that she missed four hours only of work that day. This pattern of absence is also supported by her ET1 in which she refers to having an informal conversation with a Team Leader named Ms Rachel Beddow on 30 April 2018 as she was upset upon being told that Ms Livingstone had been speaking about her to numerous people in the department, which she claims was reported to Ms Doherty that day and her leaving work early due to her not being able to stay in the environment.

31. The claimant also claims that on 25 April 2018 Ms Doherty emailed all the section managers stating that if she approached them and asked for some time to explain how she had been feeling or to make any further reports about Ms Livingstone they were to decline and to direct her to her. The email in question at page 133 is, for the record, dated 27 April 2018 and merely asks that if the claimant requests some time they should decline and direct her to Ms Doherty. On the respondent's evidence the request was prompted by the degree to which the claimant was leaving work due to health issues and there is a further general

email at page 141 sent by Ms Livingstone on 12 May 2018, which states that if the claimant approached anyone to go home then they were to send her to speak to her or Ms Doherty, which was consistent with the respondent's case.

32. The claimant returned to work on 9 May 2018 when she says that she was taken into a room by Ms Livingstone where she said to her that she was not there to support her and that she didn't care if she had had time off with stress and that she had nothing to be stressed about and that she found it pathetic that she had got signed off with stress, which was for weak people and that she was clearly not fit to be in a grown-up role. Once again this alleged conversation was not put to Ms Livingstone in cross-examination and it was her evidence that whilst she had a return to work meeting with the claimant on this date in line with the respondent's standard process the comments attributed to her were completely untrue. At this time the claimant's year to date absence was running at 20.98%, which was in breach of the respondent's benchmark of 4% and on this date a record of absence management was issued at pages 136-138. This made reference to the claimant having recently been signed off with work related stress after suffering a family bereavement, which was to be referred to OH for further guidance. It also stated that the claimant would now be part of an absence management plan, which would be in place for 3 months with the expectation that she would achieve an absence level of 4% or under, which would be breached if she was absent for more than 3 days and in the event of which the next stage of absence management would be activated.

33. Also on 9 May 2018 it appears that a discussion took place between the claimant and Ms Livingstone regarding the events of 25 April 2018 when the claimant had gone home early, which is documented at pages 139-140 in what is described by her as an unacceptable behaviour report. This sets out that on 25 April 2018 the claimant was asked by Ms Livingstone to pin the feedback on the back of Ms Poole Jones' coaching sessions and that she became distressed and upset that the second rating was unsatisfactory, which saw Ms Livingstone explaining that she had been rated as such because she had implemented very little of the feedback or the 'even better ifs' given by Ms Poole Jones in the first coaching session despite setting in place her own action that she would implement the feedback before/ during the next coaching session. It goes on to say that Ms Livingstone was with the claimant for an hour going over matters and reassuring her that the coaching was to improve her MI and not to belittle her but to highlight areas of improvement and that a further coaching session was due to take place at 11.30 when the claimant was advised that they would have a sit down together with Ms Poole Jones to discuss further the feedback provided and offer clarity. However, upon returning to her desk the claimant contacted CFM to request emergency holiday, which was denied and when Ms Livingstone left the office she approached another team leader to say that she had been sick three times and had to go home ill. The claimant's explanation for her actions was that the feedback which she had received that morning which seemed different to that she had received face to face previously combined with her having suffered a recent bereavement gave her a severe panic attack and that whilst it looked like she had tried to avoid a situation with Ms Livingstone and Ms Poole Jones this was not the case and that in future she will explain to her team leader the way she is feeling and if she was unwell. As an agreed next step they discussed that the claimant would contact Ms Livingstone directly if she is feeling ill, anxious or sick and that if she was out of the office for a short amount of time she would wait for her return and that if she was off for the day she would approach Ms Doherty and only approach another team leader if neither of them was available.

34. The claimant further claims that on 10 May 2018 Ms Livingstone took her into a meeting room and asked her why she had reported her to higher management because she had now just caused trouble for herself. This allegation was not put to Ms Livingstone in cross-examination and was denied by her in her evidence-in-chief where she points out that she was completely unaware of any report made by the claimant about her other than the complaint to Mr Mason in March 2018.

35. She also drew attention to the email sent by Ms Livingstone to all team leaders on 12 May 2018 at page 141 previously referred to at paragraph 31 above stating that this made her feel victimised and threatened as nobody else had to go through this procedure for time off in regard to illness being able to speak to any team leader. This was in the context of the claimant going home early this day with a headache and not approaching Ms Livingstone as had been agreed that she would only three days earlier. It is also to be noted that neither this email nor the one sent by Ms Doherty on 27 April 2018 were seen by the claimant at the time and could not therefore have had any bearing on her decision to resign.

36. The claimant also says that on 30 May 2018 following her return from holiday having been absent from 12 May 2018 Ms Livingstone took her into a private meeting room and said to her that she had mental problems and that she had forwarded her to speak to a counsellor before adding that she needed to sort her life out and that everything that she did was being watched and with one slip up she would get a disciplinary. She claims, too, in her ET1 that at this meeting she was told that she had been marked for bad behaviour because before she went on leave she left overtime two hours early. These allegations were again not put to Ms Livingstone in cross-examination and they were denied by her in her evidence-in-chief. In relation to the claimant's referral to OH she acknowledged that she had arranged for her to speak with them, which was a step that was made known to the claimant in the absence management report issued on 9 May 2018 and signed by her at pages 136-138. Whilst in relation to the claimant's 'behaviour' on 12 May 2018 she explained that it was arranged that she would work a four-hour shift on this day, which was a Saturday, in exchange for the Monday off, which was beneficial both to the claimant as she was going on holiday and to the respondent as it was keen to have extra people working on the Saturday. However, on the Saturday someone from another team reported that the claimant had told them by doing this deal she had organised a situation whereby she would only need to work four hours rather than the eight hours that were originally scheduled for her Monday shift and then went home after only two hours due to feeling unwell.

37. The discussion which was held in respect of the events of 12 May 2018 held on 30 May 2018 is documented at pages 142-143. This records that the claimant despite pinning a document on 9 May 2018 that she would speak to either Ms Livingstone or Ms Doherty if she needed to go home sick approached another team leader on 12 May 2018 when they were both in the office. In addition it is recorded that the claimant failed to mention to the team leader whom she approached that she had struck a deal to work four hours overtime on Saturday 12 May in exchange for holiday, which the respondent would have expected her to have brought to someone's attention before leaving. Company data also showed that the claimant had signed out of her phone 8 times in the two hours that she worked, the longest instance of which was for 8 minutes 45 seconds and that she was also involved in two personal calls totalling 9 minutes. Her

behaviour was deemed to be unacceptable and the document states that as this was the second instance within the month the next instance would result in a PIP. As regards the claimant's explanation for her behaviour as shown in the document she commented that she had woken with a bad migraine and was very nauseous being sick twice whilst in work and had not seen Ms Doherty as she was not at her normal seat and was unsure about approaching Ms Livingstone as she was in on overtime and that although she was very sick she should have behaved differently.

38. The claimant had another period of short-term absence because of migraine related sickness from 4 June 2018 for one day, which saw her returning to work on 6 June 2018, when Ms Livingstone discussed her absence management plan with her. The following day OH carried out an initial telephone consultation with the claimant. In her ET1 she draws attention to the fact that she had to go to her car to ring OH for this purpose but on Ms Livingstone's evidence she offered to book out a room for the consultation but the claimant declined the offer stating that she had spoken to OH previously and had done this from her car. She says that it was her intention to explain to the practitioner how she had been made to feel in work by Ms Livingstone but that when it was mentioned that everything she said would be sent in a report to her she was uncomfortable with this although she did explain that she was stressed in work but could not speak honestly due to the report being sent to her and she feared the outcome. The OH report is at pages 145-146. It confirms the reason for the referral as the claimant's short-term sickness absence and performance deterioration. In terms of clinical information there is limited reference to work and its impact on the claimant other than that she had advised that she had been under a lot of pressure at work but was coping. The management advice was that (i) she was fit to work without any restrictions (ii) to allow for her migraines to be successfully managed it was recommended that the standard absence tolerance of 4% was uplifted by 1% (iii) she may benefit from counselling but this had to remain her decision (iv) it was important that good communications were maintained between her and her manager but she also had a responsibility to raise any new concerns that may impact on her ability to work and (v) it was not believed that there were any further occupational health solutions to the situation and it was recommended that advice now be sought from Employee Relations.

39. The claimant was subsequently absent on 11 June 2018 because of a migraine related issue and a return to work interview was held with her by Ms Livingstone on 12 June 2018 at which it was noted that there was only one more day of sickness permitted to keep her within her sickness absence plan. The claimant was then absent from 13 to 17 June 2018 before returning on 18 June 2018, when a further return to work interview was held with her at which it was discussed that her absence plan had been breached and that this had been raised again with HR.

40. Subsequently by a letter dated 15 June 2018 at page 149A addressed to Ms Doherty the claimant tendered her resignation on 20 June 2018 to take effect on 28 June 2018 even though contractually she was required to give one month's notice stating that she felt that she had been left with no choice but to resign in the light of her recent experiences regarding her team leader, Ms Livingstone, details of which Mr Mason had passed on to her but which had been ignored. In her ET1 she says that the final thing which forced her to leave was the fact that she was one of four members of her team who were trained in every product except credit cards, which carried financial and career ladder benefits but out of

the four of them she was the only one left out of this training by Ms Livingstone and that when she asked why she had been excluded Ms Livingstone stated that she did not think she would want to do it and did not find it appropriate. She says further that this severely upset her as she had been promised by other managers when it became available. In the intervening period the claimant had an offer of employment to her as a Customer Care Adviser confirmed by Brake Bros Ltd by a letter dated 22 June 2018 commencing on 2 July 2018.

41. The claimant then submitted her ET1 on 2 August 2018 claiming that she had been unfairly dismissed, which was responded to by the respondent within the prescribed period on 13 September 2018.

Law

42. The relevant law for the purpose of this claim is to be found in the Employment Rights Act 1996 (ERA). In relation to constructive dismissal section 95(1)(c) ERA states 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 without notice by reason of the employer's conduct'.

43. The conduct of an employer giving rise to a constructive dismissal must involve a repudiatory breach of contract i.e. a serious breach going to the root of the contract which shows an intention no longer to be bound by one or more essential terms of that contract. A breach of contract capable of amounting to a repudiatory one would be a breach of the term of mutual trust and confidence which is implied into all contracts of employment stating that employers will not, without reasonable or proper cause, conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between the employer and employee. It has been judicially stated that 'to constitute a breach of this implied term it is not necessary to show that the employer intended any repudiation of the contract: the tribunal's function is to look at the employer's conduct as a whole and determine whether it is such that its effect, judged reasonably and sensibly, is such that the employee cannot be expected to put up with it.'

44. In order to claim constructive unfair dismissal, an employee must establish that there was a fundamental breach of contract on the part of the employer, that the employer's breach caused the employee to resign and that the employee did not delay too long before resigning so that he did not then affirm the contract and lose the right to claim constructive dismissal.

Conclusions

45. Applying the law to the facts as found the Tribunal reached the following conclusions. In line with the essential components of an unfair constructive dismissal claim the Tribunal considered first of all whether the respondent had fundamentally breached the claimant's contract of employment. The breach relied upon here was that of the term implied into every employment contract of mutual trust and confidence, arising from the way in which the claimant alleges she was treated following a change in her team leader from Mr Bailey to Ms Livingstone in December 2017. On her case she says that she felt that she had been bullied and pressured more than others in her team and that she had many

missed opportunities for training and bonus amounts due to Ms Livingstone taking over as her team leader.

46. The claimant's first complaint in her ET1, which is not included in her witness statement relates to an alleged incident in December 2017 involving a call from a customer wanting to make a foreign payment when she claims both Mr Bailey and Ms Livingstone were extremely short with her when she approached them for help as the processing of such payments was a team leader function and took amusement out of her getting upset when the customer became angry that the payment could not be processed. As with a lot of her complaints this one was not put to Ms Livingstone as having happened and in the absence of any challenge to her denial of the alleged incident and having regard to her explanation that she was shadowing Mr Bailey at this time and had not taken over management of the team and was not trained herself in processing foreign payments the Tribunal did not consider that this was an incident that it could safely view as being more likely than not to have occurred in the way alleged.

47. The remaining complaints relate to alleged events commencing in February 2018. They range across the claimant being subjected to mocking remarks about her appearance, being asked questions about her ability to purchase a new car, being denied her company bonus letter and being spoken to insensitively and callously in relation to her grandfather, who was hospitalised and whose condition seriously deteriorated during March 2018 causing her to seek out Ms Livingstone to inform her that she may not be herself or may need to leave the office one day if called in to the hospital, which drew the response from Ms Livingstone that she did not really care if what she was telling her was outside of work. As with the incident in December 2017 these alleged events were not put to Ms Livingstone and were denied by her. In her evidence she addresses each of the allegations and says that she did not make derogatory comments about the claimant's tan in front of others adding that she would not say something like that about a team member least of all shout it across a room; that she did not act unprofessionally regarding the issue of the bonus letters explaining that she was given them on 22 February 2018 but was not allowed to share them with staff until the next day and that when the claimant asked for details of her bonus on 22 February 2018 because she was off the next day she did not react well to being told that this information could not be released but that she contacted her via Facebook and agreed to give her a call on 23 February 2018 to inform her of her bonus entitlement meaning that while she did not receive her letter until her return to work, which was after the other team members she learned of her entitlement on the same day as them; that while she did ask the claimant about her new car it was not in the way alleged and she was simply taking an interest as the claimant had been discussing it openly in work for the two weeks prior to getting it and that she did not make the comments attributed to her during the conversation about the claimant's unwell grandfather adding that she had real sympathy as she had also recently lost a grandparent.

48. In regard to this accusation of callousness and insensitivity on the part of Ms Livingstone this is the first incident of its sort referred to in the claimant's ET1 and witness statement but in the complaint that the claimant made to Mr Mason on 14 March 2018 she claimed that when she went home because the hospital had called to say her granddad had had a bad turn and she had rung back to say that he was not very well Ms Livingstone had replied saying 'Oh, just tell me when his funeral is when you are next in'. It was established that this alleged comment was made some time earlier on 5 January 2018 and that having listened to the

conversation during the hearing it did not accurately reflect what Ms Livingstone had said on this occasion, in circumstances where the claimant told her that the hospital had told them that they thought it was the end, which was 'if the worse came to the worst she was to keep her updated and let her know when the funeral was so that they could get it keyed out for her', which was as observed above said sympathetically and empathetically.

49. In relation to these complaints the Tribunal did not consider again that it could safely view them as being more likely than not to have occurred as alleged.

50. The next matter complained about related to the claimant receiving negative feedback from Ms Livingstone on 12 March 2018 and her being threatened twice with a Performance Improvement Plan (PIP), which she suggested was unjustified because she was not sent a document beforehand and areas where she had met expectations were stated to be not good enough. The review document at pages 73-76 confirms that references were made to a PIP being implemented but in the context of the claimant having come to the 1:1 unprepared, according to Ms Livingstone's comments, which resulted in them having to spend the designated half-hour completing the form and their being unable to discuss her month at all, despite, contrary to what the claimant says, her being sent a document beforehand on how to fill out her 1:1 form. In addition reference was made to a PIP being implemented in the event of the claimant not achieving a significant increase in her performance in reducing her wrap time and increasing her overall outcomes. The contemporaneous documentary evidence did not therefore support the claimant's contentions in regard to the non - receipt of pre-meeting documentation or in regard to the meeting of expectations in that it showed that the claimant had only decreased her wrap time by 8 seconds from January and February to 244 seconds against a target of 200 she had set herself in January and that aside from a small increase in her overall outcomes by 0.6% there had been no other improvement looking at her MI. In the light of this evidence the Tribunal was unable to find that these threats of a PIP being implemented were unwarranted.

51. On the face of the claimant's evidence this feedback seemed to be catalyst for the written complaint that she made to Mr Mason on 14 March 2018. The respondent's handling of this complaint by Ms Doherty did not in the Tribunal's view constitute best practice as it clearly amounted to the raising of a formal grievance, which was not handled in accordance with the ACAS Code of Practice on discipline and grievance in that in line with the key steps she ought as a first step to have arranged a formal meeting with her without unreasonable delay with a companion if so desired in order to have allowed her to explain her grievance and how she thought it should be resolved. This did not happen as Ms Doherty, believing that the claimant was happy to keep matters informal at that stage, chose after a short period of observation of the team's dynamic to speak with Ms Livingstone first before meeting with the claimant on 28 March 2018, without making any written record of the meetings as advised by the Code of Practice because she did not feel it was a formal grievance. In addition there is no suggestion that the claimant was alerted to a right of appeal against the outcome of her grievance although it was Ms Doherty's unchallenged evidence that after meeting with the claimant and proposing a mediation meeting between her and Ms Livingstone' which was declined she did not wish to take any further action.

52. However, whilst the claimant makes later reference to her complaint to Mr Mason about her experiences with Ms Livingstone and its ignoring as being

behind her decision to resign this was almost three months down the line, which gave rise to the problem for her of affirmation of her contract in circumstances where her subsequent conduct suggested an intention to remain in employment rather than to resign.

53. The matters that the claimant relies upon beyond the end of March 2018 as being in breach of her contract are dealt with in detail in the tribunal's findings of fact at paragraphs 36-40 above and essentially contain accusations of further insensitivity and callousness on the part of Ms Livingstone and complaints about the way in which her performance and absences continued to be managed. In regard to the further alleged remarks made by Ms Livingstone, which are uncorroborated the Tribunal found these to have been undermined by the sympathetic manner in which Ms Livingstone dealt with the claimant on 5 January 2018 when her grandad's life was in the balance and the distorted manner in which the claimant portrayed her reaction to the news that she had relayed to her in the complaint she made to Mr Mason. In regard to Ms Livingstone's handling of the performance issues the Tribunal considered that Ms Livingstone's actions in arranging coaching for the claimant, which it did not find had been done behind her back, was a justified step for her to have taken in the light of concern around the claimant's customer engagement and that the issuing of an unacceptable behaviour report by her in respect of the claimant going home sick on 25 April 2018 and missing a further scheduled coaching session without informing her was a reasonable and proportionate action. The Tribunal also considered that the issuing of the second unacceptable behaviour report on 30 May 2018 was reasonable and proportionate in the light of the claimant's conduct on 12 May 2018 when she again avoided speaking to either Ms Doherty or Ms Livingstone to tell them that she was going home sick despite having only three days earlier agreed to make sure that she did so. In regard to Ms Livingstone's handling of the claimant's absence this was a fairly long-standing issue, which had seen her being issued with an informal warning in November 2017 by Mr Bailey and given her continuing level of absence through 2018, which was significantly above the tolerance level the Tribunal considered that the steps she took in relation to putting the claimant on an absence management plan with effect from 9 May 2018 and putting in place an OH referral were reasonable and that it was the claimant's choice to conduct the OH consultation from her car.

54. Finally in terms of what the claimant says in her ET1 was the final thing that forced her to leave her role namely her exclusion from the credit card training that was given to three of her colleagues it was not made clear when this happened and it was not something that she referred to in her letter of resignation, which one would have expected to find had it truly been the final straw for her.

55. Thus whilst there were some failings by the respondent over the relevant period of Ms Livingstone's management of the claimant in the way in which it dealt with the grievance that she lodged on 14 March 2018 the time lag between this coupled with her conduct thereafter which was consistent with an intention to continue working rather than resign caused the Tribunal to take the view that there was an affirmation of her contract by her and to find that there was nothing beyond this, either individually or cumulatively, sufficiently serious to satisfy the test for determining whether the respondent was in fundamental breach of the implied term of mutual trust and confidence, which requires the employee to show that the employer has without reasonable and proper cause conducted itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between them. This is a very high threshold,

which has not been met in this case. The Tribunal therefore finds that the claimant was not constructively dismissed and that her complaint of unfair dismissal is not well-founded.

Employment Judge Wardle
7 March 2019

JUDGMENT & REASONS SENT TO THE PARTIES ON

..18 March 2019
FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS