Case Number: 3201193/2018

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EMPLOYMENT TRIBUNALS

Claimant: **Ms N Johnson**

Respondent: **London Borough of Newham**

Heard at: **East London Hearing Centre**

On: **12, 13 ,14 and 15 February 2019**
In chambers on 1 April 2019

Before: **Employment Judge A Ross**

Members: **Miss S Campbell**
Mr J Quinlan

Representation

Claimant: In person

Respondent: Mr Moher (solicitor)

JUDGMENT

The unanimous judgment of the Employment Tribunal is:

1. **The complaint of constructive dismissal is not upheld.**

2. **The complaints of direct sex discrimination and direct age discrimination are not upheld.**

3. **The complaint of breach of contract is not upheld.**

4. **The complaint of unlawful deductions from wages is dismissed on withdrawal.**

5. **The Claim is dismissed.**

REASONS

1. By a Claim presented on 10 June 2018, the Claimant complained of constructive unfair dismissal, unlawful deduction from wages and breach of contract. By an application to amend, heard at the Preliminary Hearing on 18 October 2018, the Claimant was permitted to amend her Claim, to pursue complaints of direct sex discrimination and direct age discrimination.

2. Before this Employment Tribunal, during the course of the hearing, the Claimant applied to further amend her Claim. This application was refused for reasons given at the time.

3. This hearing commenced on 12 February 2019, which the Employment Tribunal used for pre-reading and commencing the hearing by starting to hear the evidence of the Claimant. On 13 February 2019, the Claimant failed to attend, having sent an email saying that she was unable to attend due to ill-health. The Employment Tribunal wrote to the Claimant to re-assure her, and the Claimant then attended on 14 February 2019 and the evidence continued. The hearing of the evidence and submissions were concluded on 15 February 2019.

Complaints and Issues

4. The issues between the parties were agreed to be as follows:

Time limits/limitation issues

4.1. Were the Claimant's complaints of direct sex discrimination and direct age discrimination presented within the time limits set out in sections 123(1)(a) & (b) of the Equality Act 2010 ("EQA")? In particular:

4.1.1. Was the Claim presented within three months of each of the complaints relied upon? This requires consideration of whether there was an act and/or conduct extending over a period.

4.1.2. If not, whether time should be extended on a "*just and equitable*" basis.

Given the date the claim form was presented and the dates of early conciliation, any complaint about something that happened before 11 March 2018 is potentially out of time, so that the tribunal may not have jurisdiction to deal with it.

Constructive unfair dismissal

4.2. Did the following conduct by the Respondent take place?

4.2.1. The failure to address/support the Claimant to carry out the contracted work (of casework support) in the role of Operations Support Worker;

4.2.2. The failure to recruit to the role vacated by Ms. Kawa, the job-share post for the Claimant's role of Operations Support Worker, despite what had been indicated to the Claimant in the advertisement and at interview;

4.2.3. The failure to give adequate notice of the termination of the Operations Manager role, which terminated in October 2017. The Respondent contends that it terminated on 20 October 2017; the Claimant contends that it was terminated on or about 28 October 2017;

4.2.4. The failure to deal with the Claimant's grievance promptly or at all;

4.2.5. The failure to follow the Council's Sickness Procedure on 24 June 2017;

4.2.6. The failure to protect the Claimant from discrimination;

4.2.7. The failure to ensure that the Claimant was not exposed to unreasonable psychological stress. In particular:

4.2.7.1. Milind Perkar and Tim Barrit did not familiarise themselves with the Respondent's processes, procedures, and business systems;

4.2.7.2. Milind Perkar and Tim Barrit failed to deal with the issue of payments;

4.2.7.3. Milind Perkar undermining and dismissing the Claimant;

4.2.7.4. The Claimant's managers failing to support her in supervision and overall in her role.

4.2.8. Excluding the Claimant from Team Meetings following Ms. Simpkins' return from Maternity Leave;

4.2.9. The failure to allow the Claimant to carry out casework support duties;

4.2.10. The failure to deal with the honorarium overpayment adequately.

4.3. If so, was the Respondent in repudiatory breach of the Claimant's contract of employment by each of the above taken individually, or by the above taken in whole or in part as a sequence of events? The Claimant relies on breach of the implied term of trust and confidence i.e. did the Respondent, without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously to damage the relationship of trust and confidence between it and the Claimant?

4.4. Whether there is a sufficient "last straw" event? The Claimant contends that after mediation was requested in June 2017, it did not take place until January 2018. During the mediation, Milind Perkar's treatment of her was not what she was entitled to expect.

4.5. If so, did the Claimant affirm the contract of employment before resigning?

4.6. If not, did the Claimant resign in response to any breach of contract found proved? To put it another way, was the Respondent's conduct a reason for the Claimant's resignation (it need not be the reason)? The Respondent contends that the Claimant did not resign in response to the alleged breaches. The Respondent pleads that the Claimant's reason for resignation was the grudge that she harboured after her employer had lawfully asked her, on 1 August 2017, to re-pay sums that she was overpaid, and financial issues.

4.7. If the Claimant was constructively dismissed, the Respondent admits that the dismissal was unfair.

Section 13 EQA: direct discrimination because of sex

4.8. Has the Respondent subjected the Claimant to the following treatment? Her manager, Milind Perkar failed to include or invite the Claimant to meetings including:

4.8.1. meetings about Azeus practice;

4.8.2. meetings with contractors.

4.9. Was that treatment "*less favourable treatment*", i.e. did the Respondent treat the Claimant as alleged less favourably than it treated or would have treated others ("comparators") in not materially different circumstances? The Claimant relies on the other members of her team as comparators. All office-based team members were male.

4.10. If so, was this because of the Claimant's sex and/or because of the protected characteristic of sex more generally? The Claimant's case is that she was the only person in the team excluded from meetings by Mr. Perkar because of her gender.

Section 13 EQA: direct discrimination because of age

4.11. Has the Respondent subjected the Claimant to the following treatment?

4.11.1. Ms. Simpkin, as a woman of child-bearing age was allowed to work from home in a way which disadvantaged the Claimant. Ms. Simpkin was allowed to work from home following the end of the maternity leave and to attend caseload and team meetings by way of remote access which penalised the Claimant because she

had to carry out on her own all the office-based tasks which Ms. Simpkin could not carry out, and to deal with calls from clients and service users on her own.

4.12. Was that treatment "*less favourable treatment*"? The Claimant relies on the following comparator: Ms. Simpkin.

4.13. If so, was this because of the Claimant's age and/or because of the protected characteristic of age more generally?

4.14. If so, has the Respondent shown that the treatment was a proportionate means of achieving a legitimate aim?

Breach of contract

4.15. To how much notice was the Claimant entitled to in respect of the termination of her acting up role of Operations Support Manager? The Claimant alleges that she should have received one weeks' notice and is entitled to one weeks' notice pay.

Remedy

4.16. If the Claimant succeeds, in whole or part, the Tribunal will be concerned with issues of remedy and, if the Claimant is awarded compensation and/or damages, will decide how much should be awarded.

4.17. In respect of unfair dismissal, did the Respondent unreasonably fail to comply with a relevant ACAS Code of Practice, if so, would it be just and equitable in all the circumstances to increase any compensatory award, and if so, by what percentage, up to a maximum of 25%, pursuant to section 207A of the Trade Union & Labour Relations (Consolidation) Act 1992?

Evidence

5. There was a bundle of documents produced by the Respondent (helpfully in seven sections). There was no objection from the Claimant in respect of this bundle. Page references in these set of Reasons refer to pages in that bundle. The Employment Tribunal read witness statements and heard oral evidence from the following witnesses:

5.1. The Claimant;

5.2. Sarah Forshaw, Occupational Therapy Professional Lead for Adult Social Care;

6. The Employment Tribunal also read the witness statement of Milind Perkar, Team Manager of the Claimant from May 2017 until 23 February 2018.

7. The Tribunal found Ms Forshaw to be honest and reliable as a witness, and her evidence was corroborated by the witness statement of Mr Perkar and/or by contemporaneous documents.

8. The Employment Tribunal attached such weight to the witness statement of Mr Perkar as it thought fit in view of the absence of cross-examination. In particular, we were prepared to give this statement weight where it was corroborated by the witness statement of Ms Forshaw and/or documentary evidence.

9. The Tribunal found the Claimant to be an unreliable and inconsistent witness, who was at times evasive. The Claimant lacked self-awareness and insight. The Claimant's case was based very much on her perception of events and her evidence gave the impression that she was prepared to either bolster her case or refuse to make admissions because she lacked no understanding of the steps taken by and the limitations on her managers. Examples of this are given in the Findings of Fact below. For example, we refer to the unreasonable and uncompromising approach of the Claimant to the way Mr Perkar dealt with her Return to Work meeting after one week of absence in June 2017.

10. In respect of the matter of the overpayment of the honorarium, we found that the Claimant was not dishonest in not raising the overpayment, accepting that she did not know what had happened in between the period when she agreed the figure with Ms Forshaw and subsequently received a letter at C99, and that the employer was slow to react. But the Claimant lacked insight to see that her failure to tell managers of an overpayment of more than £1,000 gave them some grounds for their honest belief that the Claimant had been dishonest and that they could have taken disciplinary action rather than demanded repayment.

The Law

Constructive Dismissal

11. Section 95(1)(c) ERA provides that there is a dismissal when the employee terminates the contract with or without notice, in circumstances such that she is entitled to terminate it without notice by reason of the employer's conduct.

12. Where there is a complaint of constructive dismissal, the burden is on the employee to prove the following:

12.1. That there was a fundamental breach of contract on the part of the employer;

12.2. That the employer's breach caused the employee to resign;

12.3. The employee did not affirm the contract and lose the right to resign and claim constructive dismissal.

13. The propositions of law which can be derived from the authorities concerning constructive unfair dismissal are as follows:

13.1 The test for constructive dismissal is whether the employer's actions or conduct amounted to a repudiatory breach of the contract of employment: see *Western Excavation Limited v Sharp*.

13.2 It is an implied term of any contract of employment that the employer shall not without reasonable and proper cause conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between employer and employee: see *Malik v Bank of Credit and Commerce International* [1998] AC20 34h-35d and 45c-46e.

13.3 Any breach of the implied term of trust and confidence will amount to a repudiation of the contract: see, for example, Browne-Wilkinson J in *Woods v Wm Car services (Peterborough) Limited* [1981] ICR 666 at 672a; *Morrow v Safeway Stores* [2002] IRLR 9.

13.4 The test of whether there has been a breach of the implied term of trust and confidence is objective as Lord Nicholls said in *Malik* at page 35c. The conduct relied on as constituting the breach must impinge on the relationship in the sense that, looked at objectively, it is likely to destroy or seriously damage the degree of trust and confidence that the employee is reasonably entitled to have in her employer.

13.5 A breach occurs when the proscribed conduct takes place: see *Malik*.

13.6 Reasonableness is one of the tools in the employment tribunal's factual analysis kit for deciding whether there has been a fundamental breach; but it is not a legal requirement: see *Bournemouth University v Buckland* [2010] ICR 908 at para 28.

13.7 In terms of causation, the Claimant must show that she resigned in response to this breach, not for some other reason. But the breach need only be an effective cause, not the sole or primary cause, of the resignation.

14. In *Kaur v Leeds Teaching Hospital NHS Trust* [2018] IRLR, the Court of Appeal approved the guidance given in *Waltham Forest LBC v Omilaju* (at paragraph 15-16). Reading those authorities, the following comprehensive guidance is given on the "last straw" doctrine:

14.1. The repudiatory conduct may consist of a series of acts or incidents, some of them perhaps quite trivial, which cumulatively amount to a repudiatory breach of the implied term of trust and confidence: *Lewis v Motorworld Garages Ltd* [1986] ICR 157, per Neill LJ (p 167C).

14.2. In particular, in such a case the last action of the employer which leads to the employee leaving need not itself be a breach of contract; the question is, does the cumulative series of acts taken together amount to a breach of the implied term? (Glidewell LJ at p 169F).

14.3. Although the final straw may be relatively insignificant, it must not be utterly trivial: the principle that the law is not concerned with very small things is of general application.

14.4. The quality that the final straw must have is that it should be an act in a series whose cumulative effect is to amount to a breach of the implied term. The act does not have to be of the same character as the earlier acts. Its essential quality is that, when taken in conjunction with the earlier acts on which the employee relies, it amounts to a breach of the implied term of trust and confidence. It must contribute something to that breach, although what it adds may be relatively insignificant.

14.5. The final straw need not be characterised as 'unreasonable' or 'blameworthy' conduct, even if it usually will be unreasonable and, perhaps, even blameworthy. But, viewed in isolation, the final straw may not always be unreasonable, still less blameworthy.

14.6. The last straw must contribute, however slightly, to the breach of the implied term of trust and confidence. Some unreasonable behaviour may be so unrelated to the obligation of trust and confidence that it lacks the essential quality referred to.

14.7. If the final straw is not capable of contributing to a series of earlier acts which cumulatively amount to a breach of the implied term of trust and confidence, there is no need to examine the earlier history to see whether the alleged final straw does in fact have that effect.

14.8. If an employer has committed a series of acts which amount to a breach of the implied term of trust and confidence, but the employee does not resign, soldiers on and affirms the contract, she cannot subsequently rely on these acts to justify a constructive dismissal unless she can point to a later act which enables her to do so. If the later act on which she seeks to rely is entirely innocuous, it is not necessary to examine the earlier conduct in order to determine that the later act does not permit the employee to invoke the final straw principle.

14.9. The issue of affirmation may arise in the context of a cumulative breach because in many such cases the employer's conduct will have crossed the *Malik* threshold at some earlier point than that at which the employee finally resigns; and, on ordinary principles, if he or she does not resign promptly at that point but "soldiers on" they will be held to have affirmed the contract. However, if the conduct in question is continued by a further act or acts, in response to which the employee does resign, he or she can still rely on the totality of the conduct in order to establish a breach of the *Malik* term.

14.10. Even when correctly used in the context of a cumulative breach, there are two theoretically distinct legal effects to which the "last straw" label can be applied. The first is where the legal significance of the final act in the series is that the employer's conduct had not previously crossed

the *Malik* threshold: in such a case the breaking of the camel's back consists in the repudiation of the contract. In the second situation, the employer's conduct has already crossed that threshold at an earlier stage, but the employee has soldiered on until the later act which triggers his resignation: in this case, by contrast, the breaking of the camel's back consists in the employee's decision to accept, the legal significance of the last straw being that it revives his or her right to do so.

14.11. The affirmation point discussed in *Omilaju* will not arise in every cumulative breach case:

> "*There will in such a case always, by definition, be a final act which causes the employee to resign, but it will not necessarily be trivial: it may be a whole extra bale of straw. Indeed in some cases it may be heavy enough to break the camel's back by itself (i.e. to constitute a repudiation in its own right), in which case the fact that there were previous breaches may be irrelevant, even though the claimant seeks to rely on them just in case (or for their prejudicial effect).*" (per Underhill LJ).

15. We note that a breach of trust and confidence has two limbs:

15.1. the employer must have conducted itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee; and

15.2. that there be no reasonable or proper cause for the conduct.

Direct Discrimination

16. For convenience, all section references in this set of reasons are to the Equality Act 2010.

17. Section 13 provides:

> "A person (A) treats another person (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others."

18. The required comparison must be by reference to circumstances. Section 23(1) provides:

> "On a comparison of cases for the purposes of section 13,14 or 19 there must be no material difference between the circumstances relating to each case."

19. Whether the comparison is sufficiently similar will be a question of fact and degree for the tribunal, see *Hewage v Grampian Heath Board [2012] ICR 1054*.

20. In *Shamoon*, at 9-11, Lord Nicholls gave guidance as to how an employment tribunal may approach a complaint of direct discrimination and explained that it was sometimes unnecessary to identify a comparator:

> "…*employment tribunals may sometimes be able to avoid arid and confusing disputes about the identification of the appropriate comparator by concentrating primarily on why the claimant was treated as she was. Was it on the proscribed ground which is the foundation of the application? That will call for an examination of all the facts of the case. Or was it for some other reason? If the latter, the application fails. If the former, there will be usually be no difficulty in deciding whether the treatment, afforded to the claimant on the proscribed ground, was less favourable than was or would have been afforded to others*."

Less favourable treatment and "detriment"

21. The proper test as to whether a detriment has been suffered is set out in *Shamoon* at paragraphs 34-35. In short:

> "*Is the treatment of such a kind that a reasonable worker would or might take the view that in all the circumstances it was to his detriment? An unjustified sense of grievance cannot amount to "detriment".*"

22. A worker who over-reacts or who is hyper-sensitive cannot succeed in proving less favourable treatment.

23. In directing itself to the conclusions above, the Tribunal reminded itself that section 13(1) requires the Tribunal to ask whether the "treatment", not its consequences, was less favourable.

Causation

24. If the tribunal is satisfied that the prohibited ground is one of the reasons for the treatment, that is sufficient to establish discrimination. It need not be the only or even the main reason: see the observations of Lord Nicholls in *Nagarajan* (p 576) as explained by Peter Gibson LJ in *Igen v Wong,* paragraph 37.

25. In *Igen v Wong*, at paragraph (11) of the Appendix, it is pointed out that, if the burden of proof shifts, it is necessary for an employer to prove that the treatment was in no sense whatsoever on the grounds of the protected characteristic, because "no discrimination whatsoever" is compatible with the Burden of Proof Directive. The guidance in *Igen v Wong* was approved by the Supreme Court in *Hewage v Grampian Health Board*.

Burden of proof in discrimination cases

26. We reminded ourselves of the reversal of the burden of proof provisions within section 136(2) EA 2010, as explained in *Igen v Wong* [2005] EWCA Civ 142 and *Madarassy v Nomura* [2007] ICR 867.

27. Section 136 provides:

> "(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.
>
> (3) But subsection (2) does not apply if A shows that A did not contravene the provision."

28. It is important, however, not to make too much of the role of the burden of proof provisions at section 136. They will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. But they do not apply where the tribunal is in a position to make positive findings on the evidence one way or the other: *Hewage v Grampian Health Board* [2013] UKSC 37.

Findings of Facts

29. The Claimant, who was aged 56 at the time of her resignation, joined the Home Adaptions for Independent Living ("HAIL") team as an Operations Support Worker from 20 June 2016. This was a job-share in which she was to work 18 hours per week. The other Operations Support Worker was absent-sick; it was understood by all when the Claimant began in this post that the employee who was off sick would return to work. In fact, this other employee, Ms Kawa, did not return to work and left employment with the council in June 2017. By then there was a recruitment freeze at the Respondent.

30. The Claimant had understood that her role would include some casework. That is some Customer Service role. In the event, it became apparent to the Claimant as soon as she started in this role that the needs of the service required her to perform administrative duties to support the HAIL team.

31. In addition, on 20 June 2016, because the Operations Support Manager (PO1 role) in the HAIL team was on maternity absence, the Claimant was appointed to cover the role held by Ms Simpkin. This acting up position was expected to end on 20 June 2017 when Ms Simpkin was expected to return to work.

The Claimant's relationship with her managers

32. We find that the Claimant was stretched by the amount of work that she had to do, given her acting-up Operations Manager role, her own 0.5 Operations Support Worker position and the absence of the other Operations Support Worker who was off sick. There was a significant impact on the Claimant's role due to this 0.5 vacancy, which meant that there was no time for her to perform casework support.

33. Tim Barritt was Team Manager when the Claimant joined the HAIL team until he left in about April 2017. The Claimant made no complaint that he was guilty of any misconduct but the Claimant was very intolerant and impatient with his mistakes and lack of knowledge of the Respondent's processes.

34. Although, we do not find that Ms Barritt was "incompetent" (as the Claimant alleges in her letter of 11 April 2018), we did find it likely that he was challenged in his

role as Team Manager, and his performance was probably poor, as recognised by Tony Dalide, who heard the Claimant's grievance (informal resolution): see C456c.

35. However, Ms Forshaw supported the Claimant well throughout her time in the HAIL team. Ms Forshaw arranged three-way meetings in October, November, and December 2016. In addition, there was some external support to the Claimant (from Mr Luxford) to cover the Adaptations Panel work. There was nothing which pointed to conduct by managers likely to destroy or seriously damage the relationship of trust and confidence between employer and employee.

36. The Claimant recognised that Ms Forshaw supported her and enjoyed her work throughout Mr Barritt's time as Team Manager: see the email of the Claimant of 23 March 2017 at C207.

37. A good example of Ms Forshaw's support is that she agreed that the Claimant would receive an honorarium (backdated to 20 June 2016) to reflect the additional work that the Claimant had, had to undertake as Temporary Operations Support Manager. Ms Forshaw agreed to pay a higher rate for the Operations Support Manager post to the Claimant for the additional 7 hours per work. The Claimant put this proposal in writing via email on 7 September 2016 (C77-78) and then Ms Forshaw presented the business case to the Respondent (C89-90).

38. In addition, further support was provided by Camila Simpkin, who had left a detailed folder of process for reference by the Temporary Operations Support Manager, who was the Claimant, and also made herself available whilst on maternity leave for the Claimant, and came into the office to give the Claimant guidance in producing reports. The fact was that the Claimant struggled with the PO1 Operations Support Manager Role, as explained in paragraph 11 of the witness statement of Ms Forshaw.

39. Further support for the Claimant is demonstrated by the fact that the honorarium was continued in June 2017 to reflect a full 25 hours per week, worked in the role by the Claimant (C139).

40. It is also apparent the Claimant was permitted to work flexibly as shown by the email of 24 April 2017 (C219). This was in part because the Claimant wanted to attend Tai Chi classes during the day on Fridays for her wellbeing.

41. The email exchange between the Claimant and Ms Forshaw on 23 March 2017 (C209) demonstrates the Claimant's unhappiness at her position and a belief that she was not valued sufficiently by the Respondent given the work that was done by her, nor that she was paid enough. The Tribunal found the Claimant's perception was that she was working at a PO1 role throughout work in the HAIL and found it difficult to differentiate between the work she was doing at Scale 6 from the work she was doing at Scale PO1 (in the Operations Support Manager role).

42. Mr Perkar supported the Claimant in his actions. The Claimant's perception was that this support was not adequate because she was disgruntled already when Mr Perkar started as Team Manager. This has to be seen in the context of a strained relationship between the two, in large part caused by the Claimant's intolerant

attitude to Mr Perkar and her tone. For example, the Claimant was abrupt and direct in her first meeting with Mr Perkar on 30 May 2017 (causing her to apologise: C299). We noted that Mr Perkar permitted the Claimant to attend Tai Chi classes on Friday afternoon and work at home on the rest of that day.

43. In terms of supervision, we did not find that the Claimant was unsupported. Although, the Claimant complained that Mr Perkar and Mr Barritt worked from home on two days per week, there were no particulars of why this made any difference to her. We accepted that there was no formal supervision agreement, which was contrary to the Respondent's supervision policy. We found it likely that Mr Perkar did not have a strong grasp of the Council's policies and processes when he commenced employment, because he was an agency worker who was engaged for the Respondent for only about 9 months in total. In substance, however, we found that either Mr Perkar carried out supervision and did address both the Claimant's support and wellbeing, or Ms Forshaw would supervise the Claimant's support and payment requirements. The fact was the Claimant did not seek support from Mr Perkar because she was receiving it from Mr Luxford, Ms Simpkin or Ms Forshaw.

44. The Claimant's characteristic of taking a negative view of Mr Perkar was evidenced by the fact she refused to attribute any support provided to his actions. Her expectation when she began in the Operations Support worker role was that there would be increased support for her over time, which we found likely to be an unrealistic expectation.

Alleged failure to ensure the Claimant was not exposed to unreasonable psychological stress

45. The Employment Tribunal saw and heard no medical evidence that the Claimant suffered any psychological damage or stress due to the matters complained of. The Claimant has a number of family members with problems outside work. We found that this had an impact on her psychological state. The balance of probabilities suggests all the issues alleged to be causing stress were merely part of organisational working, and were all matters dealing with the function of a large public organisation.

46. The Claimant alleged that Mr Perkar and Mr Barritt did not familiarise themselves with the Respondent's processes, procedures and business systems. The evidence we heard showed that Mr Perkar and Mr Barritt were likely to be aware of the core business systems, albeit not all of those which fell within the Claimant's duties.

47. The breaches of the supervision policies and sickness procedure relied upon by the Claimant were minor when objectively viewed, albeit they were perceived to be important by the Claimant. We had no particulars of any serious failings nor credible evidence to explain how any such failing were affecting the Claimant. For example, the Claimant alleged that Mr Perkar failed to follow the sickness procedure on or about 24 June 2017. The Claimant went off sick about one week after Mr Perkar became her Line Manager. At the Return to Work meeting the Claimant did not raise with Mr Perkar any of the failures she alleged before us. In cross-examination, the

Claimant's actual complaints about this alleged failure looked quite minor or trivial, because these were:

47.1. Mr. Perkar did not address Section C of the Return to Work form.

47.2. The Claimant did not feel welcomed back.

47.3. The Claimant was not asked if she had fully recovered.

47.4. That she was not asked what support might be needed.

48. We found the Claimant was well able to be an advocate for herself and could have raised these with Mr Perkar, if they were significant.

49. The Claimant alleged Mr Perkar and Mr Barritt failed to deal with the issue of payments to contractors, which she alleged were being delayed. The Employment Tribunal found this was a systematic problem with the payment system (including others, such as the Finance department, C178), not the HAIL managers themselves. Moreover, this was not personal to the Claimant: it affected the whole team so there was nothing to indicate it was calculated or likely to destroy the trust and confidence necessary between employer and employee. The Claimant did not face any action or blame because of these payment delay problems.

50. We found that Mr Perkar was likely to have raised this payment problem at Head of Service Level, as he claimed in his witness statement. Mr Perkar also attended a meeting in June 2018, with Brokerage and Payments, to resolve these issues. In any event, by the time of the Claimant's resignation the payments issue had improved: see 13 March 2018 team meeting, C596. The Claimant admitted that it had improved after the team had training on Azeus, which again is evidence of the Respondent providing support to her.

51. Moreover, the Claimant did know how the system worked so the fact that Mr Barritt did not know how it worked made no difference to her.

52. The Tribunal found Mr Perkar did not undermine or dismiss the Claimant in his dealings with her. The Claimant's perception was that she was at PO1 grade but was not valued as such. The Claimant disagreed with management's approach or direction of the Team Manager. It is likely that Mr Perkar was tactless in stating that she had to have an administrative focus, and did not appreciate that she wanted to do casework. Further, we rely on other findings to show why the Respondent was not undermined or dismissed by Mr Perkar including that he had agreed to her working from home request, that he continued her flexible working and that he provided Azeus training.

Failure to recruit to the role vacated by Ms Kawa (job-share post for Operations Support Worker Role).

53. When the Claimant commenced her job share Operations Support Worker role, Ms Kawa was absent sick. It was not known when she would return to work. The Claimant admitted in evidence that the Respondent could not fill this post until July

2017 at the earliest, after Ms Kawa's contract of employment ended. Also, the Claimant admitted that the Respondent did not deliberately fail to recruit to the role. The team meeting notes of 14 August 2017 (C327) show that Mr Perkar did raise staffing support required, so that he could make the business case for support. There was a recruitment freeze at the time (from August 2017).

54. The Claimant could not explain why the Respondent had not recruited to the job share Operations Support Worker post. In the absence of any positive evidential case being advanced, we accepted the Respondent's evidence that, as well as the recruitment freeze, there was a proposal to merge the Repair Maintenance Service and the HAIL teams. These are the two reasons why no further administrative support could be recruited after Ms Kawa left the service in July 2017. It was difficult to get a business case for recruitment agreed because there was possibly spare capacity within the Repair Maintenance Service. We accepted Ms Forshaw's evidence about why the Respondent could only recruit to the Operations Support Worker role in March 2018.

55. In any event, we found that there was no detriment experienced by the Claimant from the Respondent's failure to recruit to this position, given that the Respondent offered her the opportunity to apply for the 0.5 portion of the Operations Support Worker post. The Claimant rejected the opportunity.

Alleged failure to follow the Council's sickness procedure, 24 June 2017

56. The Claimant was absent sick for one week from 7 to 14 June 2017. This sickness absence was about one week after Mr Perkar began line management of the Claimant. Her Return to Work Certificate cited stress in relation to uncertainty in support in her role, and so the Claimant was not motivated to come to work. The Claimant alleged that Mr Perkar failed to follow the Council's sickness procedure and that this was a breach of contract. This is incorrect.

57. We find the Claimant did have a Return to Work interview with Mr Perkar, albeit she prompted him to hold it. In cross-examination, the Claimant explained her complaints in this respect, set out above at paragraph 47. The Tribunal found these breaches of the Form C process to be minor, particularly given the fact the Claimant had only been absent for one week and, to explain her absence, the Claimant relied on not feeling motivated rather than on any underlying medical conditions.

58. Moreover, the Claimant had not raised any of the above points at the Return to Work meeting. Given Mr Perkar was an agency worker, we find it likely that he overlooked the bullet points in Part C and did not know the Claimant was attaching importance to them.

59. In cross-examination, the Claimant was unable to state that Mr Perkar had intended this to be a breach of contract. In answer to the Employment Judge's questions as to why she thought this was a breach of the implied term of trust and confidence, if Mr Perkar had only been there for one week, the Claimant responded that she assumed that it was part of Council procedures and so it must be part of her contract. This demonstrated again the Claimant's lack of insight and her unrealistic and unreasonable approach in perceiving mistakes by her managers.

60. Moreover, in cross-examination the Claimant admitted that she had not been distressed by Mr Perkar's failure in respect of Part C of the form, and nor was it part of her grievance.

61. We formed the view that this complaint had been added into the Claim in an attempt to bolster the Claimant's case, even though it had no effect on her relationship with her employer nor on the term of trust and confidence.

The alleged exclusion of the Claimant from team meetings after Ms Simpkin's return from maternity leave

62. This complaint demonstrates the Claimant's misinterpretation of events due to the negative interpretations placed on her manager's actions. The Claimant admitted in cross-examination that she had not been aware that Mr Perkar was trying to accommodate to staff members with flexible working arrangement, namely the Claimant and Ms Simpkin. In any event, we found the Claimant was evasive in her evidence in this respect because the team minutes of 15 November 2017 (C465) clearly explain that in future team meetings will alternate between Wednesday and Thursday and the minutes show that the Claimant was working Monday to Wednesday: Ms Simpkin was working days including Thursday.

Alleged failure to allow the Claimant to carry out casework support duties

63. Once again, in respect of this matter, the Claimant had misinterpreted events, by placing a negative interpretation on certain facts. Moreover, the Claimant has attempted to bolster her Claim with this complaint even though it was not raised in her grievance of 6 October 2017, and the first written mention of casework duties by the Claimant was on 30 October 2017 (C441). We find this was likely to be the first time the Claimant raised this as an issue, because this email does not refer to any earlier correspondence or conversation. Moreover, up to Ms Simpkin's return to work, in about October 2017, the Claimant had not been doing any casework duties because she was needed to support the HAIL team with administration duties.

64. The Claimant's evidence was that her complaint was two-fold: first, that if the 0.5 vacant Operations Support Worker post was recruited, and if Ms Simpkin did not work from home after her return from maternity leave, administrative duties would have been split and she would have been able to do more casework.

65. After her grievance, the Claimant's request to do casework support was addressed by Mr Perkar at a supervision meeting with the Claimant on 6 February 2018. From the Claimant's own record, it is apparent that Mr Perkar stated most of the duties on the job description did not involve casework support and that the needs of the service required her to work on other parts of her role. This is confirmed by Mr Perkar's email at C551. This shows that the Claimant was offered half a day, per fortnight, to do casework duties; and that this limited amount of casework was due to the needs of the service, the main need being for her to concentrate on administrative support.

66. The Claimant accepted that the needs of the service were pressing in respect of administrative work. Her argument was that the Respondent needed to recruit for the other 0.5 of the Operations Support Worker role, made vacant by the termination of Ms Kawa's employment. The Claimant admitted that she had not applied for the other half of the Operations Support Worker role when it was offered to her (twice). Eventually, the Claimant conceded in cross-examination that accommodations had been made for her by offering her the other half of the role, which would have meant that it was likely that she could have done more casework duties.

67. We found the Claimant had believed when Ms Simpkin resumed work the needs of the service would allow her to do more casework. The Claimant believed Mr Perkar should have allowed her to do at least half a day casework per week; but she accepted his reason for not doing this was because he was putting the needs of the service first. Her evidence in this respect pointed away from there being any breach of the duty of trust and confidence by the Respondent.

Alleged failure to deal with the honorarium payment adequately

68. The Claimant had initially calculated how much the honorarium payment should be: C77. Subsequently, the Claimant received a letter from the Respondent stating the honorarium was to be £237.75 per month (pro rota). Even though the Claimant knew that this was not the figure that had been agreed with the Respondent, she did not raise this with Ms Forshaw or Mr Perkar. As a result, the Claimant was overpaid for several months (C299- C300 are the calculations of what the overpayment was, as prepared by the Claimant. These show that she was paid £237.75 per month in honorarium whereas she should have been paid £106.45 per month.

69. After some delay, Ms Forshaw investigated the financial discrepancy and learnt that the Claimant was being paid more than had been agreed, due to a mistake by the Payroll team. Ms Forshaw arranged a meeting with the Claimant to understand why she had not raised the overpayment with her managers. At the meeting, Ms Forshaw found the Claimant to be evasive in her answers. Ms Forshaw formed the honest belief, with an evidential basis, that the Claimant had been dishonest in not raising this overpayment with her managers. We found that the Claimant was not "*attacked*" at that meeting on 1 August 2017, contrary to what the Claimant alleged. The content of that meeting and the preparation for it by Ms Forshaw was done thoroughly. The outcome of that meeting was that there was no disciplinary action, but an agreement for the Claimant to repay the amount overpaid by way of instalments over time.

70. The Claimant accepted in cross examination that this was a reasonable approach. The Employment Tribunal found this was a very reasonable approach, with a repayment of £50.00 per month.

71. From the Claimant's email response to the meeting at C309 (which refers to "*a possible overpayment*" when there obviously had been an overpayment in fact) and having seen the Claimant give evidence, it is apparent the Claimant had no insight that what she had done could be seen as dishonest. The Claimant did not accept that she had done anything wrong, nor that she should have to pay back the

overpayment. We found that the Claimant knew to the nearest pound what she should have received in her monthly pay.

The Claimant's grievance

72. The Respondent's grievance policy is called the "Resolution procedure". The Claimant's grievance is at page C390 (a-c). The grievance was sent to Tony Dalide on 6 October 2017. Mr Dalide is director of Adult Social Care and was the appropriate manager as Line Manager of Ms Forshaw.

73. It is apparent that Mr Dalide dealt with the Claimant's grievance promptly, demonstrated by the following:

73.1. The email of 9 October 2017 from Mr Dalide acknowledging the receipt of the grievance and explaining that there would be a resolution assessment meeting and that his PA would arrange it.

73.2. A resolution meeting was arranged and took place on 16 October 2017. The Claimant's email at C417 shows that the Claimant's grievance was properly addressed by Mr Dalide: "*I would like to thank you for what I thought was a positive initial resolution meeting yesterday*".

73.3. On 8 November 2017 (C458a) the email from Mr Dalide to the Claimant's trade union representative sets out his proposed conclusions. Mr Dalide asked for the representative observations on his purposed conclusions.

73.4. A further meeting took place between Mr Dalide, the Claimant and her representative on 10 November 2017. Mr Dalide's conclusions on the grievance to be delivered. It was agreed that mediation with Mr Perkar could be arranged.

73.5. After the meeting on 10 November 2017, the Claimant was offered three dates for mediation.

74. On the basis of the evidence we saw and heard, the Claimant's grievance was dealt with promptly and properly. The claimant alleged in cross-examination that she wanted to escalate the grievance and go to mediation. In fact, the resignation letter shows the Claimant did not apply to escalate the grievance.

Alleged failure to give adequate notice of termination of Operations Support Manager acting-up role

75. When Ms Simpkin's returned to work, the Claimant's earnings went down from full time earnings (with half being paid at scale PO1, with an honorarium) to scale 6 (based on 18 hours per week). We found that this drop in income lead to the Claimant's perception that she had had inadequate notice of termination of her role acting up as Operations Support Manager. We rejected her case on this point. We accepted Ms Forshaw's evidence that she presented the business case for the extension of the Claimant covering the Operations Manager role for a

> "*further four months*", evidenced by the document at C245. This meant that the Claimant's maternity cover role ended on 20 October 2017. In the light of this, we find that there is no basis for the Claimant to have any notice of termination of this temporary acting- up to the role because the Claimant knew when it would end. It is important to recognise the Claimant was acting-up in this role; there was no requirement to give her contractual notice that the acting up arrangement was due to end.

Alleged exclusion of the Claimant from team meetings following Ms Simpkin's return from maternity leave

76. The Claimant accepted in cross-examination that her perception was based on a misinterpretation due to the negative way she was feeling. Therefore, we find as a fact that there was no factual basis for this allegation and that it could not have contributed, nor have amounted, to the breach of the alleged term of trust and confidence.

Last straw?

77. The Claimant alleged that the last straw was the mediation meeting with Mr Perkar.

78. Mediation was not requested in June 2017 contrary to the Claimant's allegation. In the Claimant's email at C274a of 25 June 2017, it can be seen that the Claimant was not requesting mediation at this point. Secondly, the Claimant was offered mediation with dates being offered in December 2017, even though it did not take place until January 2018. The delay from December to January was because the Claimant and Mr Perkar were only both working in the office on Tuesdays.

79. The Claimant's case was that Mr Perkar's treatment of her in the mediation meeting was not what she was entitled to expect. In her evidence, the Claimant stated she had explained something about the past in the mediation. Her complaint was that Mr Perkar was dismissive of what she had said instead. The Tribunal was concerned that this could be a sensitive personal comment about her health or treatment in the past so, it offered the Claimant the opportunity to write down the comments alleged to have been made. The Claimant said that there was no need to do so. In her oral evidence, when the Claimant was pressed on what exactly had been said to her, at the mediation. She explained a run of the mill work matter, which was not a sensitive personal matter. In cross-examination, the Claimant's evidence was that:

> "*it is about the way he speaks to me: I could feel he held me in contempt*".

We found that this showed this part of the Claimant's case was based on her perception not on the facts. The Employment Tribunal found it inconsistent that if this was the treatment complained of that the Claimant did not resign when the contractor meeting took place or when the comments were subsequently made to her in email by Mr Perkar.

80. Further the evidence tends to confirm this was the Claimant's retrospective perception of events. Her resignation letter at C613-C615 states that the mediation was somewhat helpful in addressing communication difficulties.

81. In addition, immediately after the mediation held on 16 January 2018, in the presence of Mr Perkar, the Claimant emailed to thank Catherin Anderson, HR and copies to Mr Perkar. The email was in the following terms:

> "*I would like to say a big thank you to yourself and Cynthia for your help in making this a good and worthwhile experience. I am sure that it will go some way to restoring better communication between us both*."

82. These sentiments contradict the Claimant's claim as to how Mr Perkar treated her at the mediation, and undermine her claim that this treatment was sufficient to be a last straw in the formulation of a breach of the implied term of trust and confidence. In particular, we note that the email of 17 January 2018 (C541) was copied to Mr Perkar and we found that there would be no point and no reason to do so, unless that communication would improve that working relationship.

83. The Claimant resigned on 12 March 2018 by notice, which is at C593.

84. By letter dated 11 April 2018, the Claimant set out her alleged reasons for leaving the Respondent's employment. The Employment Tribunal found that, contrary to her evidence, the Claimant did not resign because of the matters stated in that letter.

85. By October 2017, the Claimant had a grudge against the Respondent over a number of things. Moreover, in October 2017, the Claimant had suffered the loss of the Operations Support Manager acting-up role. From the evidence we saw and heard, from this point the Claimant was looking for another role.

86. We found that the reason the Claimant resigned was because she found another job with the London Brough of Waltham Forest. This job offer was what led to the resignation letter at C593. We found that the Claimant was looking for other jobs from at least January 2018; the application history for jobs with the Respondent shows the Claimant applied in January or February 2018 for three roles within the Respondent. Moreover, the Claimant admitted in evidence that the new role that she had secured at the London Borough of Waltham Forest was at scale PO1, in which she would be earning more money than in her role with the Respondent at the time of dismissal.

Sex discrimination allegations

87. In cross-examination the Claimant accepted that the allegation that the Respondent had failed to include or invite the Claimant to meetings about Azeus practice was not because of her sex. We accepted the Respondent's case on this in any event.

88. In respect of the allegation at Issue 8.2 that Mr Perkar failed to invite the Claimant to the meeting with contractors, nor to notify her about it, we accepted the Respondent's evidence in rebuttal of this allegation.

89. On 23 June 2017, Mr Perkar sent the Claimant an email with management directions, which is at C271:

> *"Hi Nicolette, just wanted to bring to your attention that I was middle of an important conversation yesterday with Trinity contractors when you decided to interrupt this meeting to introduce yourself. I would appreciate if you could avoid this in future. I have no reservation of you meeting contractor but I do not that was not professional. You could have waited for the meeting to be concluded to have a quick catch up. I would appreciate that you would understand*".

90. This was not an offensive email and it gave a rational explanation for its content. When the Claimant was asked why this was treatment because of her sex, the Claimant was evasive. We found the Claimant lacked insight: she said it was because all those at the meeting were men, only to accept in evidence that all the contractors she dealt with whilst working for the Respondent were men.

91. We found that the Claimant was complaining about a management judgment, which the Claimant did not accept. This was not less favourable treatment; and if it was, it was certainly not because of sex.

Ms Simpkin being allowed to work from home

92. We found that even if the arrangement whereby Ms Simpkin was allowed to work from did disadvantage the Claimant, there was no evidence that this arrangement was because of the Claimant's age. Rather the sole reason for it was because Ms Simpkin was returning from maternity leave and had applied formally for flexible working to enable her to work from home.

93. Moreover, the Claimant had a flexible working arrangement herself because she was allowed to work at home on Friday afternoon and on Saturday or Sunday afternoons.

94. The correspondence at C505-C527 shows that the team meetings were arranged so that both the Claimant and Ms Simpkin could attend alternate meetings.

Conclusions

95. Applying our findings of fact and the law set out above to the issues outlined, we have reached the following conclusions.

Jurisdiction

96. In respect of the allegation of age discrimination, the decision to allow Ms Simpkin to work at home, we found that this was a one-off act with continuing alleged consequences. The decision was made in about October 2017.

97. We found that it was not just and equitable to extend time for the Tribunal to hear this allegation because there was no evidence of any reason why the Claimant had delayed in putting in this complaint.

98. In respect of the allegation of sex discrimination, on balance, we have concluded that the allegation was that of a continuing act. Throughout the Claimant's case was that Mr Perkar was undermining and dismissive of her, which suggests a practice existing over a period. We find that the complaints of direct sex discrimination were brought in time.

Constructive unfair dismissal

Issues 4.2 – 4.3: Repudiatory breach of contract?

99. We have set out in our findings of fact that the conduct alleged by the Claimant either did not take place or, if it did, we have explained why it occurred and why it was not a breach of the implied term of trust and confidence, nor any other term. In particular, our findings of fact demonstrate that:

99.1. The Respondent did support the Claimant in her Operations Support Worker role and in her Operations Support Manager role. This included addressing her wish to carry out the casework support part of her Operations Support Worker role.

99.2. The Respondent did not deliberately fail to recruit to the role vacated by Ms. Kawa. The Respondent had no way of knowing that Ms. Kawa would continue to be absent sick for such a long period after the Claimant commenced her job share of the Operations Support Worker role. Moreover, after Ms. Kawa's employment ended, there was a recruitment freeze was in place within the Council, in addition to a proposed merger of RMS. The Claimant did not allege that the recruitment freeze was unjustified. The fact was that the main needs of the service were for the Claimant to do administrative tasks in her Operations Support Worker role, given that she was in this role only 0.5 of the week, and given that Ms. Kawa was absent sick and then could not be replaced. Following her complaint, the Respondent did arrange for the Claimant to do half a day of casework per fortnight. These conclusions are borne out by findings of fact at paragraphs 42-44 and 53-55 above.

99.3. The Respondent did allow the Claimant to carry out casework support duties of the Operations Support Worker role: see the conclusions above and the findings of fact at paragraphs 63-67.

99.4. The Respondent did give adequate notice of termination of the Operations Support Manager role, even though this was not contractually required: see paragraph 75 above.

99.5. The Claimant's grievance was dealt with promptly: see paragraphs 72 - 74 of the findings of fact above.

99.6. The Claimant was not exposed to unreasonable psychological stress by the Respondent: see paragraphs 45-52 of the findings of fact above.

99.7. The Claimant was not discriminated against in any way; there was no evidence that she needed protection from any specific perpetrator or policy in any event.

99.8. The Claimant was not excluded from Team Meetings following Ms. Simpkins return from Maternity Leave: see paragraph 76 above.

99.9. The Respondent dealt with the recovery of the overpaid honorarium in a more than reasonable way: see paragraphs 68-71 above; and

99.10. The Claimant received adequate and reasonable support with her duties as Operations Support worker and Operations Support Manager up to her resignation, as explained above and within the findings of fact.

100. From the findings of fact, including those specified above, we concluded that the Respondent did not breach the Claimant's contract of employment, and certainly did not commit a repudiatory breach. The Respondent did not commit an act, or a series of acts, which was calculated or likely to destroy or seriously damage the relationship of trust and confidence that existed between it and the Claimant.

Issue 4.4: whether there is a sufficient last straw event?

101. In any event, we found that the "last straw" event relied upon was not sufficient to convert what had gone before into a repudiatory breach of contract. We repeat our findings of fact at paragraphs … above.

102. The events at the mediation did not contribute at all to the alleged breach of contract. We found that the behaviour of Mr. Perkar was not unreasonable at the mediation; but, in any event, whatever was said, it lacked the essential quality required to amount to the last straw.

103. Insofar as Mr. Perkar breached the Return to Work process within the sickness absence policy, on one occasion, such breaches were trivial. Furthermore, we had no evidence that this policy was part of the Claimant's contract of employment in any event and we could not understand why the Claimant had not pointed out any failings to him at the time, if they were significant, and asked him to address them.

Causation

104. As we have explained at paragraphs … above, the reason (not one of several reasons) that the Claimant resigned was because she had secured a new job at the

London Borough of Waltham Forest, at Grade PO1, paying her a significantly higher wage than she was receiving at the date of her resignation.

105. In the light of the above conclusions, the complaint of constructive unfair dismissal fails. There is no need to consider the issue of affirmation.

Issues 4.8 – 4.10: direct sex discrimination?

106. We repeat our findings of fact at paragraphs above. The Claimant was not treated less favourably than Mr. Perkar would have treated a male comparator in her position.

107. Further, the Claimant was not "*excluded from meetings*" by Mr. Perkar. He held a meeting with the Contractors without inviting the Claimant because of the subject matter that he wanted to discuss with them, namely the proposed merger of two services. It had nothing to do with her sex.

108. Moreover, the Claimant went to the contractor meeting and introduced herself. She was not stopped nor asked to leave. Later, Mr. Perkar merely explained that she should not have entered the meeting, and gave a management direction for the future.

Issues 4.11- 4.12: direct age discrimination

109. The Claimant was not treated less favourably than Ms Simpkin because of her age. The sole reason why the Claimant was allowed to work from home was because Ms. Simpkin was returning from maternity leave and had made a formal application to work from home, which had been granted. We repeat our findings of fact at paragraphs 92 – 94 above.

Summary

110. The complaints are not upheld. The Claim is dismissed.

Employment Judge Ross

14 May 2019