EMPLOYMENT TRIBUNALS

Claimant: **Mrs K Buckley**

Respondent: **Releasing Potential Limited**

Heard at: **Southampton** **On:** **16 – 17 January 2019**

Before: **Employment Judge Emerton (sitting alone)**

Representation
Claimant: **In Person**
Respondent: **Dr C Brennan (Senior Executive Officer)**

JUDGMENT having been sent to the parties on 29 January 2019 and written reasons having been requested by the respondent in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Summary of Decision

1. The respondent is a charity providing alternative education for children who do not thrive in mainstream schools, most of whom have emotional or behavioural vulnerability, and the claimant was employed in a role called "Near to School – Project Leader", and latterly also conducted mediations. The claimant resigned from the charity, claiming constructive dismissal and also asserting that she had been underpaid for some of the work she had been carrying out.

2. The constructive dismissal claim relied upon the implied contractual term of mutual trust and confidence, but the claimant failed to discharge the burden of showing that she was constructively dismissed. Indeed, the tribunal found that the events relied fell some considerable way below what would be required to establish that there had been a fundamental breach of contract.

3. The claimant also failed to establish that on any specific occasion the wages actually paid to her were less than the wages properly payable to her. The claimant was paid her contractual basic pay, and on certain occasions overtime was authorised, and the appropriate additional wages were paid to the claimant. The claimant suggested that she worked additional hours on some other occasions, but her claim was vague and unclear and she failed to establish any proper evidential basis from which the tribunal could conclude that she was entitled to receive additional remuneration. Indeed, the basis of the claim was somewhat unrealistic, and appeared to be based on the claimant's own belief as to the value of her work, rather than any proper contractual basis for additional wages.

Background to the hearing

4. On 6 May 2018 the claimant presented a claim form, having been employed for over six years by the respondent, and having resigned with effect from 31 December 2017. Early conciliation commenced 23 March 2018 and a certificate was issued on 23 April 2018. The claims would appear to be in time.

5. The claimant ticked the boxes for unfair dismissal and for being owed notice pay, holiday pay, arrears of pay, and other payments. The claim form explained that the claimant was "looking to be paid for the work I did as mediator", expressed to be £45,000. The attached text set out a narrative account of her employment and of various matters to which she objected, but without explaining the basis of her claims, or indeed setting out what the claims were. The wording of the claim form implied that the claimant had resigned, but did not expressly state that this was a claim for constructive dismissal, or set out the reasons why the claimant had resigned, if that was the case. The claimant was subsequently directed to present a schedule of loss, which was also somewhat unclear, save that this time it asked for loss of pay of £25,000, as well as other unspecified sums.

6. The respondent resisted the claim, dealing in tabular form with the various factual allegations made by the claimant. It did not set out the respondent's defence to the claims, no doubt because it was not clear what those claims were.

7. The standard directions were given to the parties in respect of case management, albeit it would appear the parties had difficulty in complying, and difficulty in agreeing the contents of the bundle. The directions specified that all directions, including exchange of witness statements, be complied with by 24 July 2018, with a view to a two-day hearing, which was listed for 5 and 6 November 2018. In the event, the hearing needed to be postponed. It was rescheduled for 16 and 17 January 2019. This gave an additional two months for the parties to ensure that they were ready in all respects for the hearing, and to alert the tribunal if there were any difficulties.

<u>The Hearing</u>

8. The start of the hearing was delayed by the claimant's late arrival at the Employment Tribunals. In dealing with the initial administrative formalities, it became clear that the bundle was not agreed. The bundle had been prepared by the respondent, but the claimant wished to include two additional documents, albeit she had not brought spare copies of these. The matter was resolved by the tribunal making additional copies and these papers for the claimant, and these being inserted into the bundle. The claimant did not request that any other documents were placed in the bundle and did not attempt to adduce any other documentary evidence.

9. The parties provided witness statements, and the claimant provided a statement from a Ms Rea Forbes, who would not be attending the hearing. The tribunal confirmed that it was prepared to accept this witness statement, but it was explained that if the contents of the statement were in dispute, then it would be a matter for the tribunal to decide what weight if any to give to this evidence, noting that the witness was not available to give sworn evidence and be crossed examined. Dr Brennan, for the respondent, confirmed that her view was that this evidence was largely irrelevant, and was opinion evidence, but insofar as the statement referred to relevant primary facts, there was little that the respondent would take a point on.

10. The tribunal confirmed the issues in the case, noting that the claim form was extremely unclear, and then went on to timetable the case. It was agreed that all the oral evidence, and closing submissions, would be completed during the afternoon on the first day. In the event, neither party had any difficulty in keeping to this time limit. The tribunal would deal initially only with liability, but would leave sufficient time on the second day to go on to deal with any remedy issues which needed to be addressed. The tribunal briefly adjourned to complete reading of the witness statements and key documents. It was agreed that the claimant would give evidence first, noting that the initial burden of proof was upon her. The claimant's evidence having completed, the tribunal then heard evidence from Dr Catherine Brennan, who as well as acting as representative was the Senior Executive Officer at the respondent charity, whose responsibilities included HR related management (and she was the claimant's line manager). After the lunch

adjournment, the tribunal then heard the evidence of Mr Michael King, Chief Executive Officer of the respondent charity.

11. After an adjournment, the tribunal then heard closing submissions from each party.

12. Having adjourned to consider its judgment on liability overnight, the tribunal called the parties back in to hear oral judgments and reasons, before lunch on the second day. Having found that the claims were not well founded, there was no need to go on and deal with remedy.

13. The judge explained that a written judgment would be sent to the parties and explained the arrangements for requesting written reasons, with the further explanation that unless rule 50 applied (for which there appeared to be no basis in this case) the Judgment and any written reasons would be placed upon the public register, and any party wishing to consider a request for written reasons would be well advised to wait until they had received the judgment, noting that they had fourteen days from when the Judgment was sent to the parties to request written reasons. If there were any conclusions to which they took exception, they should bear in mind that these conclusions would be set out in a document available to any member of the public to read.

14. The claimant did not request written reasons. The respondent made an in-time emailed request for reasons. Detailed oral reasons having been provided, the tribunal queried whether, as the winning party, the respondent wished to proceed with their request, explaining the limited resources for the production of reasons, and the possible disadvantages in the entth apologies, explaining that there were important internal reasons why the respondent charity did wish to proceed with their request for reasons, so as to have a copy available for their records, but it was evident that this was not an urgent matter. Owing to limited judicial resources available at Southampton, and other more pressing priorities, it has not been possible to complete the written reasons earlier.

The Issues

15. Despite the claimant having ticked a number of boxes on the claim form, a number of these matters were no pursued. At the start of the hearing, the claimant confirmed that her claim was restricted to two matters:

    (1) **Unfair constructive dismissal**; and

    (2) **Unauthorised deduction of wages,** in relation to additional work she carried out as a mediator.

16. The tribunal spent some time clarifying the issues with the parties, and on the facts of this particular case, it would be helpful to set out that analysis below, with some reference also to the evidence which the tribunal heard. However, these reasons should be read as a whole. This will also enable a more focussed analysis of closing submissions, and the tribunal's conclusions.

17. In relation to the **deduction of wages**, having previous given various figures in the past, as to the amount she was claiming, she now asserted that she was owed £15,000. The judge pointed out that although the tribunal would be dealing with liability first, this was a claim under section 13(3) of the Employment Rights Act 1996, and it was for the claimant to establish not just some generalised contractual entitlement to receive additional wages in some circumstances. The claimant would need to establish, with sufficiently clear evidence, that on specific occasions she had carried out specific additional work, for which she was contractually entitled to additional payment, but had not received payment for that work. Because there was no suggestion of the respondent making unauthorised deductions as such, and it was common ground that the claimant received the monthly wages specified in her contract of employment, and from time to time was paid overtime, the claim was clearly under section 13(3) of the 1996 Act, which specifies that "*where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purpose of this part as a deduction made by the employer from the worker's wages on that occasion*".

18. The claimant's case is that as well as her main contractual role, she carried out additional duties as a mediator, and believes that she should have been paid extra money for carrying out this role. She did not specify, either at the start of the hearing, nor in her oral evidence, exactly when she carried out this role, why this was not covered by her basic income, nor the amount of any shortfall in her wages. She initially asserted, when the Judge was clarifying the issues, that at the relevant time she was on a "term-time only" contract, and carried out mediation both in term-time (for which she was not paid extra) and during the school vacation. She asserted that she was *never* paid any overtime for mediation, and was certainly never paid for mediation carried out outside term.

19. The respondent's case was that any mediation during term was part of the claimant's normal remuneration package, and it was for the claimant to organise her working hours to accommodate her duties. The respondent accepted that there was also a provision in the contract of employment for overtime to be paid, if (and only if) it had been arranged with the employer in advance. It was the respondent's case that when the claimant was on a term-time only contract, and was asked to carry out a mediation outside term-time, she was in fact paid overtime. This was worked out by the respondent, on a pro-rata basis calculated from the claimant's normal hourly rate (noting that she had an annual salary paid by twelve equal instalments at the end of each month). Dr Brennan subsequently gave evidence confirming the position she had set out at the start of the hearing. In fact the claimant accepted in cross-examination that she had been paid overtime when she had carried out mediations outside term, when subject to a term-time only contract, despite having denied this at the start of the hearing.

20. The claimant's case in respect of the amount of her wages was somewhat unclear, and despite the judge's best endeavours to enable the claimant to set out her case with clarity, such clarity remained elusive. The claimant. However, appeared to believe that she was carrying out two separate roles

for the respondent, and should have been paid separately for each. The out-of-date or inaccurate job description in the written contract of employment did not particularly assist in explaining developments in the claimant's role. The respondent's case was that even if the paperwork had not perhaps kept up with the reality, it was quite clear that the claimant was paid a salary, and was in return expected to carry out her duties as an employee. When her duties included mediation, this was covered by her annual salary.

21. There was evidence before the tribunal that from time to time an independent contractor, who was not employed by the respondent, was used to carry out mediations. The claimant believed that she should be paid the claimant should be paid the same lump sum as that person, was in the view of the respondent a mistaken argument. The claimant was and remained an employee, and it was orally agreed with her that she would take on the occasional mediation duties, and indeed the claimant was keen to do so.

22. The Judge confirmed that this was a matter of evidence, and of the legal construction of the contract, pointing out that a contract of employment need not be reflected in writing, in order to have legal force. It was pointed out to the claimant that she would need to ensure that she laid the evidential foundation for showing that she was entitled to additional money, in circumstances where she had not made arrangements in advance for overtime to be paid.

23. It appeared to the judge that issues of **time jurisdiction** might arise, in relation to the wages claim. The judge raised with the parties the question of whether the claim of unauthorised deduction of wages was, or was not, in time. He queried when the last time was that mediation work was carried out, and when wages relating to that period of time were, or should have been, paid. There was some confusion between the parties, although it was agreed that the claimant was paid her salary on the last working day of each month. Dr Brennan in any event conceded that if any wages were outstanding, they would have been paid on the claimant's last pay day of 31 December 2017. The respondent did not take a point on jurisdiction, noting that the claimant had carried out mediations in 2017, and in the circumstances the tribunal did not need to consider this point further.

24. There is no dispute that 31 December 2017 was the effective date of termination. There is no suggestion that any sums of money were outstanding at this point, save for any issues relating to additional wages for work carried out as a mediator.

25. In relation to the claim of **unfair constructive dismissal**, the claimant appeared somewhat confused as to the basis of the claim, despite having elected to pursue the matter to final hearing. The judge spent some time explaining the legal basis of a constructive dismissal, confirming that the claimant understood, and clarifying exactly what the claimant's argued case was.

26. The claimant was not expressly dismissed. It is not in dispute that the claimant resigned by email of 19 December 2017 stating, giving notice and stating that her final date would be 31 December 2017. The claimant

confirmed that she was relying only upon breach of the implied contractual duty not to undermine mutual trust and confidence.

27. The judge made it clear that it was necessary to confirm the matters said, individually or cumulatively, to amount to fundamental or repudiatory breach of contract and took the claimant through this in some detail. The claimant eventually confirmed that only the following matters were the said to amount to fundamental breach of contract. The judge took a careful note, and reminded the parties that these were the matters that would be considered by the tribunal determining whether the respondent was in repudiatory breach of contract, entitling the claimant to resign and claim constructive dismissal. The matters which the claimant states amounted, individually or cumulatively, to fundamental breach of contract are as follows:

    a. Changes in her annual leave entitlement, in a succession of new contracts during the course of her employment.

    b. Different job titles, salary, and job role imposed on her, to which she did not agree (save for agreement in 2011 and 2014). The claimant relies in particular, also characterising this as a "last straw," on changes made in December 2017, where she took objection to what she described as reduced pay, her hours, a difficult job role, and what initially looked like a pay rise but in fact was less advantageous.

    c. The claimant's hours. She was required to work extra hours almost every day, "when the mediation workload became intense". She did not specify when this was.

    d. A disciplinary investigation in late 2017 relating to holiday the claimant wished to take in February 2018, when she was told she would be disciplined if she took holiday without permission.

    e. Not being allowed to appeal the "disciplinary decision". The judge queried whether there had been a disciplinary sanction which could be subject to appeal under the disciplinary procedures. He asked whether this might not be a matter under the grievance policy, in dealing with an appeal against the refusal of annual leave on the requested dates. The claimant maintained that this <u>*was*</u> covered by the disciplinary policy, and that she should have been given a right to appeal the conclusion that she should not take leave, and that she would be subjected to disciplinary procedures if she absented herself without leave.

    f. In January 2017 the claimant was forced to take sick leave after her mother died, when she believed she should have been given paid bereavement leave. The judge established at this point, that it was agreed by the parties that the contract did not provide for "bereavement leave", but it provided for up to thirty days' discretionary sick leave per year. The respondent's case was that in fact the claimant *was* given a week's discretionary bereavement leave, and that after that the claimant was signed off sick, and consequently received pay. The judge asked the claimant what the disadvantage was, and how this could amount to fundamental breach of contract. He established that the potential disadvantage for the claimant was that because sick pay would normally be paid for only up to 30 days per

year, using up sick pay might restrict the ability to take paid sick leave later in the year, and in fact the claimant had a number of health issues at the time. She did not dispute that she had produced a fit note signing her off as unfit to work.

28. It is for the claimant to prove, on a balance of probabilities, that the respondent was in repudiatory breach of contract. She must also establish that she resigned in response to that breach.

29. The respondent's case is that there was no repudiatory breach of contract, and therefore the claimant was not entitled to resign and claim constructive dismissal. Additionally, even if there had been a breach of contract at some stage, the respondent's case would be that the real reason the claimant resigned was probably that she wished to take a holiday in February 2018, and therefore wished to resign so as to be free to do so. The respondent's case was that although at the time the claimant had said she would *not* take the holiday, having resigned, she in fact did go on holiday then, suggesting this was a significant motive for her resignation.

30. The respondent does not rely on any potentially fair reason for dismissal, and *Polkey* considerations do not apply. That said, the respondent does make the point that part of the difficulty in the Autumn of 2017 was that, in reality the claimant's role had become redundant, and the respondent was trying not to put itself in the position where it had to dismiss the claimant. Instead, it was working with her to try to find alternative roles that were suitable. With the benefit of hindsight, the respondent was of the view that it might have been better to warn the claimant that she was at risk of redundancy and dealt with matters as a potential redundancy situation. However, as it would have been likely, and indeed was their intention, that they would find suitable alternative work for the claimant, including ongoing mediation work (which she wanted to do), the respondent would not rely upon a *Polkey* adjustment. In the event, this matter did not need not be determined.

31. In respect of **remedy**, issues would arise in respect of the amount of any unauthorised deduction of wages, if the claimant was able to establish the basis of a claim, albeit the judge pointed out that much of the evidence relating to remedy would effectively need to be covered in liability, as the claimant would need to show in what sense, and on what occasions she was paid less than her contractual entitlement. In the event, the claimant provided no such evidence. In respect of unfair dismissal, the claimant would rely on ongoing loss of earnings and mitigation of loss would be in issue. In the event these matters did not need to be considered.

The parties' closing submissions

32. It was agreed at the start of the hearing that each party would have up to fifteen minutes for oral submissions. Neither party wished to present written submissions. It later became apparent that Dr Brennan had typed up a speaking note for her closing submissions, which she was intending to read out. The judge pointed out that it would be helpful if a copy of this could be provided to the tribunal and to the claimant in advance, which would mean the claimant would have more time to consider her response, and the judge would not need to take a long hand note of everything which was said. Dr

Brennan handed up her notes before the close of evidence, and copies were taken by tribunal staff and given to the judge and claimant as soon as the evidence completed.

33. What appears below is not intended to be a comprehensive summary of every matter raised, but a broad overview of the salient points.

34. In her closing submissions of just under fifteen minutes, Dr Brennan read out her script and added a few additional points. In essence, she explained that this had been a difficult process from the respondent's point of view, because the claimant's claim had remained rather confusing and unclear, and there had been a warm working relationship with the claimant during her employment. She set out a helpful summary of what she saw as the key events in the claimant's employment, including taking on additional responsibilities relating to mediation, which the claimant was keen to embrace, and happy that she could cover within her existing duties. But when the role had become more onerous, the respondent's response was to take on additional staff to ease the burden on the claimant. At the stage that the claimant resigned, the claimant having decided she no longer wished to do her original role, and the contract with the local authority having ended, they were discussing what future duties the claimant would carry out at the respondent's school, and the respondent was making a number of generous offers as to the remuneration package, which would have represented an improvement. The reasons for refusing the claimant's holiday during term-time were entirely reasonable, and as the claimant would need to be working within the respondent's school during term, it was not possible to accommodate her wish to be absent at the time she wanted to take leave. She pointed out that as well as various professional milestones, there were various events in the claimant's personal life (including the death of her mother) which were obviously devastating for her.

35. Dr Brennan considered that the respondent could rebut the claimant's allegations, and that there was no fundamental breach of contract. The respondent was at a loss to understand what the claimant was hoping for, in the months before her resignation, as she was receiving additional support, with additional staff employed to assist, and the claimant's workload had decreased. The claimant having withdrawn from her initial role, she was offered a range of other options with the final offer before her resignation (which had not been accepted) of a considerably increased salary, albeit effectively the same hourly rate as she had previously been receiving on a term-time only contract at £26,000. The case was very sad but the respondent did not consider it should be legally liable for the claimant's decision to resign, and did not owe her additional wages. The claimant had been paid overtime for carrying out mediation duties outside term, when she was on a term-time only contract, and was expected to organise her hours to cover her duties at other points. Dr Brennan explained that the claimant had put in her timesheets, and had not at the time requested payment for additional hours. Dr Brennan added that the respondent had found it hurtful to be at the receiving end of all sorts of allegations, including an assertion that the claimant's signature had been forged, which was untrue, and unwarranted attempts to undermine her personal integrity.

36. In extremely brief submissions in response, all the claimant had to say was that she disagreed with the respondent in respect of the suggestion that she would have ended her career just to go on holiday. She asserted that she had two jobs, and never received recognition, support or compassion. The respondent had not complied with their obligations.

The facts

37. This is a case which largely turns on its facts. Some detailed initial comment on key issues is called for.

General comments on the evidence and upon credibility

38. Most of the primary facts are simply not in dispute, and many matters do not appear to have been disputed between the parties at the time. It is only after resigning, that the claimant has raised a wide range of matters to which she now explains she objects.

39. The tribunal notes that when the claimant resigned by email (page 98 of the bundle) she made no specific complaint, let alone the matters now relied upon, but stated as follows: "*I have really enjoyed my time at RP and the belief and support that I was given, but have felt the last few years have been extremely difficult*". She explained that she would be working at a school in Portsmouth. The respondent had a grievance procedure, but during her employment the claimant never raised a grievance. This does not support the claimant's case that matters were so serious that she had no choice but to resign. Many of the claimant's arguments relate more to her perceptions, and her own (if unclear) understanding as to her legal rights, rather than a dispute as to what actually happened.

40. Although there appeared at the start of the hearing to be a dispute as to whether the claimant was paid overtime for working during vacations when on a term-time-only contract, in cross-examination she then accepted that in fact she was paid. That particular factual allegation cannot be sustained.

41. Although there appeared to an evidential issue as to when the claimant carried out mediation work for which she was not paid, in her oral evidence the claimant did not in fact establish any primary facts capable of supporting a finding that there were specific occasions when she carried out mediation work for which she was not paid.

42. Although there may on the face of it have appeared to be a dispute over the hours worked by the claimant, in reality there was very little evidential dispute as to hours worked. The claimant states that in order to carry out her duties properly, she felt it necessary to work well beyond her contractual hours. The respondent's position was that the claimant was frequently working on her own, or away from supervision by management, and was expected to regulate her working practices to complete her duties during her contractual hours. If this was not the case, she should have arranged in advance for agreed overtime, or at least put in a time sheet and a request to be paid additional hours, to be agreed retrospectively. The tribunal accepts, from the credible (and largely uncontested) evidence from the respondent, that the claimant was trusted to work unsupervised within her contractual hours, that on occasion overtime was agreed and paid, and that on other

occasions the claimant was paid her contractual basic pay, and did not request additional remuneration.

43. Similarly, although the claimant appeared to be objecting as to what she had agreed to do because of problems in producing up-to-date written contracts, this was not in fact a matter of particular significance. It was clear to the tribunal, from the evidence of both parties, that when the claimant's responsibilities changed, and she took on additional responsibilities (notably the mediation role), this was entirely with her agreement. When her working hours and wages were varied, this was also with the claimant's agreement. It was never imposed on her. The fact that the paperwork took some time to catch up with the oral agreement is neither here nor there.

44. Similarly, although the claimant complains about an updated contract not being agreed in late 2017, the tribunal considers that she has wholly missed the point. Nothing was imposed on her, and if this triggered the resignation, she unquestionably resigned at far too an early a stage. It was entirely clear to the tribunal that this was *not* a question of a new contract being unilaterally enforced on the claimant. The claimant had agreed to the previous changes in working arrangements and remuneration package (none of which led to a less advantageous package). However, after there was no longer a need for someone to carry out the claimant's existing main role after Autumn 2017, there were positive discussions to try and find a new role, and a remuneration package, that would be acceptable to the claimant.

45. Dr Brennan had made proposals to the claimant on a number of occasions, in respect of how her job and conditions of service might be changed. The tribunal accepts that this certainly did not amount to an attempt unilaterally to vary the claimant's contract, especially as it is clear to the tribunal that in reality of a redundancy situation had arisen and the respondent might have taken steps to dismiss the claimant. What Dr Brennan was clearly attempting to do was to see if matters could be resolved by agreement. In a small, informal organisation, discussions (and usually agreement) as to future working relationships should not be elevated to the status of being an attempt to impose a unilateral variation of contract. This was plainly not the case.

46. One area which again appeared, at least in the claimant's mind, to be a serious evidential discrepancy was whether the claimant was or was not given and whether she did or did not sign, a copy of one of the amended contracts of several years previously. In reality, this turned out not to be a matter of any particular significance in the Employment Tribunal claim. The claimant made the rather speculative (and unnecessarily inflammatory) assertion that her signature in the contract was plainly forged, because she did not sign this particular contract. Cogent evidence is required to support such a serious allegation as forgery, and none was supplied. It amounted to little more than the claimant not having remembered signing it. In any event, to suggest that this was a material document deliberately produced to the tribunal to affect the outcome, was fanciful. It was not a document particularly relied upon by the respondent, and the tribunal accepted Dr Brennan's account as this particular contract had been queried, Dr Brennan went to the personnel file and found a copy of the contract, which appeared to bear the claimant's signature, and she had no reason to believe that the

claimant had not signed it. There was no reason to conclude that Dr Brennan was not acting in good faith, and indeed when the claimant told her that she was sure she had *not* signed this particular contract, Dr Brennan did not seek to suggest that the claimant was not telling the truth. The reality was in any event that when the working arrangements had changed, regardless of whether the oral agreement had been reflected in a new signed contract, the claimant had been content with the new working arrangements and the new remuneration package. The confusion over whether this particular written version of the contract had or had not been signed does not significantly change to the evidence in the case. Plainly, there is no cogent evidence of forgery, and the tribunal finds Dr Brennan's explanation to be entirely honest. Dr Brennan did not assert she was present when the claimant signed the contract, but merely explained that she had looked in the file, and copied the document she had found in the file. The tribunal did not in any event need to rely on this document. This matter generated more heat than light.

47. It should be noted that the background to this case is very much that the respondent is a small and informal charity, with limited administrative resources, where Dr Brennan had a very wide range of responsibilities, including responsibility for HR Matters. Although she did have access to internal and external advice from time to time if required, the administrative and financial resources of the charity did not allow for much expenditure on formal HR process. It is evident, and wholly unsurprising, that matters were treated informally. Because of good internal working relationships, and the facts that staff were all committed to the charity's objectives (at least until matters went awry for the claimant), it is clear that the fact that the paperwork was not as taught as it might be, did not have any appreciable affect on the smooth running of the charity. The tribunal draws no adverse inferences from the fact that the contractual paperwork with the claimant was not managed effectively as it might be in a larger and more efficient organisation, with specialist HR staff within the team. Whilst, no doubt, lessons will be learned, it came as no surprise to the tribunal that a small informal charity was a little relaxed when it came to the paperwork. This is not a matter of great importance.

48. In those circumstances the tribunal found the oral evidence of Dr Brennan and Mr King to be credible, consistent and plausible. They both gave a clear account of events from their prospective, and in questions in cross-examination, and searching further questions from the judge, they were both able to give a good account of themselves. The tribunal is entirely happy to accept that both are witnesses of truth. They gave a clear explanation as to how they were seeking to run the charity, and manage the claimant, and the tribunal accepts that they had the claimant's best interest at heart. The claimant complains that she was busy, but has rather overlooked the fact that she was not the only person with a lot on her plate, and appears unwilling to accept that others might have had difficulty completing all their duties in the hours available, a limited budget and small staff, and might from time to time have missed the finer points. Dr Brennan and Mr king had other issues, as well as the claimant, to think about. The tribunal accepts that the charity's management was keen to ensure that over the longer term, a sensible plan could be put in place, so that the work could be distributed fairly, and additional staff taken on if (for example) it

turned out that the new mediation role became a significant part of the charity's work, and needed greater resourcing.

49. The tribunal is also content to find that the claimant was a witness of truth. It does, however, consider that many of her allegations and assertions during the course of her evidence, are distorted by her undoubted sense of grievance. The claimant's evidence has also been distorted by her own assumptions as to legal rights, and as to the nature of the contractual relationship between employer and employee. She frequently expressed a rather unrealistic view, and stated her opinion (even if this was not a matter raised at the time, during her employment) that a contract between employer and employee can only be valid if it clearly set out in full in writing each time it changes. She appeared to believe that even if she orally agreed to changes in her job, this could not be legally acceptable, and must be set out in a new signed contract before it could be enforced. This has led to some rather illogical and legally-flawed assertions during the course of her sworn evidence, and in the presentation of her claim generally. Again, for example, repeated objection to the tribunal that the respondent was in breach of its disciplinary policy because it did not give her the right of appeal, also missed the point. If the claimant felt upset because the respondent failed to understand or implement its own policy, the principal failure in fact lay in the claimant's own understanding. This was a conventional, if fairly brief, disciplinary policy which did indeed allow for appeals, but plainly in the context that these were appeals against disciplinary sanction.

50. What had happened in the claimant's case (see below) was that her request to take leave during term-time had been refused, for operational reasons, and she had then indicated that she was intending to take leave, anyway. Had she done so, she would plainly, on the face of it, been absent without leave in circumstances which could indeed have amounted to gross misconduct, but that situation had not yet accrued, and plainly, if the claimant had been aggrieved, the obvious and sensible course would have ben to have recourse to the grievance procedure. The respondent, possibly mistakenly, had treated this indication from the claimant as a matter requiring a disciplinary investigation. The outcome of this was not any sanction against the claimant, but confirmation that if she did go ahead and absent herself without leave having been granted, this would be treated as a disciplinary matter. That is an unsurprising conclusion. The claimant did not in fact absent herself without leave. The tribunal considers that an objective and commonsense approach, and taking into account the purpose and contents of the ACAS Code of Practice, is that this was plainly not a matter which should have been subject to the disciplinary appeal process. If the claimant objected to a leave being refused, and the fact that the respondent made it clear it would be a disciplinary matter if she disregarded instructions in the future, it was of course open for her to present a grievance which would plainly be the appropriate way of dealing with this matter. The claimant did not, and it does not assist her case to seek to miss-label this as a breach of procedure, as the appeal procedure did not apply. This is an example of the claimant's case being very weak, but which does not actually undermine her credibility as a witness of fact.

51. Similarly, although the claimant now argues that she feels she should have been contractually entitled to much more money, when she took on

additional responsibilities for mediation, there is no suggestion that at the time there was any agreement as to a specific enhanced remuneration package to give her extra money for taking on a new role within her wider responsibilities. She must show a contractual entitlement to extra remuneration, but has called no evidence capable of supporting her case. The existing contract allowed for overtime to be paid, if authorised in advance, and there was no suggestion that this provision needed to change. Rather, the claimant appears to feel that the respondent had some sort of *moral* obligation to pay her more money because she had agreed to carry out a new role (which, incidentally, she was keen to do, and for which the respondent paid for training). The claimant plainly thought it significant, that when independent contractors were brought in to carry out the mediation role, they were paid a flat fee. The primary facts are not in dispute, but the fact that this happened does not mean that the claimant should, as an employee, be entitled to the same fee to carrying out her duties as an employee, as if she was a self-employed contractor. It is unfortunate that these misunderstandings on the claimant's part appeared to have been elevated in her mind to assertions of fact, when they are in reality no more than the claimant's opinion.

52. To the extent that there is any dispute over primary facts, or as to the reason that various events occurred, the tribunal, on balance, prefers the respondent's version of events.

53. Another apparent dispute, where in fact the primary facts do not appear to be in dispute, is the claimant's objection that she was not given bereavement leave. Although the judge sought to resolve this matter in discussing and agreeing the issues at the start of the hearing, the claimant persisted in this rather unrealistic part of her constructive dismissal claim. The claimant's compliant was that the respondent refused to give her bereavement leave. She accepts, as she must, that there was no contractual entitlement. Dr Brennan gave entirely clear and credible evidence that in fact she had indeed, within her discretion, given the claimant a week's paid special leave after her mother had died, and in fact the claimant did not dispute this in cross-examination. There was no contractual entitlement to bereavement leave, but the claimant was given it anyway. but Dr Brennan, quite reasonably, thought it was appropriate to give a week's extra leave at full pay, and the claimant did not request extra unpaid leave. After this period, the claimant then presented a fit note signed by her GP, signing her off work. Unsurprisingly, the absence was treated as sick leave. This is precisely what one would expect any employer to do. Although the claimant now states that her GP only signed her off because she asked her GP to do so, it is hardly a valid criticism of an employer to count as sick leave, a period when a medical practitioner has signed off an employee as unfit to work.

54. So, on the issue of bereavement leave, it is understandable that the claimant was upset at the time by her bereavement. But there is really no basis for attaching any significant blame to the way the respondent handled matters. In essence, Dr Brennan had given the claimant a week's extra paid leave as bereavement leave, despite there being no contractual entitlement, and the tribunal does not consider that the claimant has pointed to anything unreasonable in the way the matter was handled. When she was signed off sick, she was given paid sick leave.

55. Similarly, later on, the claimant took a short period of sick leave when she had surgery on her hand, and now criticises the respondent for expecting her to be back at work (although that is not part of her constructive dismissal case). The tribunal has considerable sympathy with the respondent's point of view, that managers had no medical knowledge as to the extent of the claimant's surgery, and effect on her, and the mere fact that her wrist was in plaster with not necessarily indicate that the claimant was unable to carry out her duties, especially as arrangements were made for the claimant's daughter to drive her whilst the claimant was unfit to work. If the reality was that the claimant's doctor had advised her not to work, this was not something which the claimant raised with her employers. She did not provide a fit note limiting her ability to work. The claimant having said she was fit to work, and there was no duty on Dr Brennan to look behind that. Similarly, criticism was made of the respondent for not referring the claimant to Occupational Health. But nothing was drawn to the tribunal's attention in the respondent's policies, suggesting that any situation had arisen whereby there was an expectation of an OH referral. The tribunal accepts that the charity would have paid for an OH referral, and had indeed done so in the past, in the case of long-term sickness, or where it was clear, for example, that somebody had a medical condition which would require adjustments or which would inhibit their ability to carry out their role over the longer term. The respondent did not consider that a relatively minor operation, after which the claimant said she was fit to work, warranted spending charity money on an OH referral, there was nothing in the policies to suggest this was the case, and the claimant herself did not request a referral. This is now raised as another general criticism of the respondent charity, presumably on the basis that although it has not been identified as part of the fundamental breach of contract, it might nevertheless in some way undermine the respondent's case. It does not. The assertion that the respondent had in some way breached its obligations or procedures, is based upon no more than the claimant's opinion, with hindsight, in preparing for the Employment Tribunal case. There is, in fact, little in the primary facts capable of supporting the claimant's case.

56. There has been considerable comment on the facts above, and specific findings of fact. There are also comments and findings within the tribunal's conclusions. The written reasons should be read as a whole. However, for the sake of clarity, the tribunal has set out a narrative finding of facts below, to put the events in context.

Narrative findings of fact

57. The tribunal makes the following findings of fact upon a balance of probabilities:

    (1) The respondent is a small charitable Company based in Havant, Hampshire, also with premises in Chichester. It employs some 32 people. The Chief Executive is Mr Mike King. Dr Catherine Brennan carries out a Senior Executive role, and has line management responsibilities and a particular responsibility for HR-related matters.

    (2) The purpose of the charity is to provide alternative education for children who do not thrive in mainstream schools, most of whom have emotional

or behavioural vulnerability. As well as providing support to schools within the state sector, the charity is also registered as an independent school and has provision for teaching up to 50 pupils, where the mainstream state schools are unable to provide them with the support they need.

(3) Most of the funding of the charity is through contracts with local authorities. One contract with Portsmouth City Council was "the near to school" programme. This was to provide additional support to pupils, schools and families, where the pupils were in mainstream schools but needed additional support. This project was running in 2011, but came to an end in 2017. The funding for this project was always a little uncertain, but it remained funded up to the end of 2017.

(4) Another initiative developed by the respondent, at the request of Hampshire County Council, as to provide a mediation service in respect of children with special educational needs. This service was first requested in the first half of the 2014, at which stage neither party was clear how it might develop in the future. In the event, an increasing number of mediations were referred to the respondent, which required additional staff to cover it.

(5) The charity is small, albeit with a turnover in excess of £1m per year, with a relatively small number of staff, and informal management practices. It is accepted by both parties that working relationships within the team were generally very good, and staff dedicated to supporting the vulnerable children that the services were aimed to provide for. The charity had a number of policies relating to HR-related matters, to which it had rarely been necessary to have recourse. These included conventional grievance and disciplinary policies.

(6) The respondent operates, broadly speaking, on a cycle based on the academic year starting in September each year. Some of the staff are employed within the respondent's school. Some staff are employed on term-time only contracts, albeit it would appear that this means they are still paid each month of the year, but (like conventional teachers), their responsibilities are during the academic term only, and in effect they get up to 12 weeks' annual leave, when they would not normally be expected to work, albeit wages would be expected to reflect the shorter working period. Other staff are on conventional annual contracts, with holiday limited to the entitlement under the Working Time Regulations. Most of the services provided by the charity involve support to children at school, during the academic year, whilst some services may be less dependent upon the academic term.

(7) There was no entitlement to paid leave other than annual leave and statutory entitlements, albeit management had the discretion to award additional leave in appropriate circumstances. For staff who have completed a year, up to a month's paid sick leave would normally be allowed, on a rolling 12-month basis, provided it was suitably certified.

(8) The claimant was initially employed by the respondent charity, starting at the beginning of the academic year, on 1 September 2011. This was at a time before Dr Brennan had joined the staff. The contract was an

annual contract, rather than term-time only. She was initially engaged on a salary of £21,000, payable monthly in arrears on the last working day of each month. Her work was funded by the contract with Portsmouth City Council, and her job title was "Near to School – Project Leader". She was contracted to work five days per week, but the hours of work would need to be flexible, in view of the seasonal nature of the work, and varying needs of the groups worked with, which would vary from day to day and week to week, and was not predictable. The contract provided that occasionally the hours would be unsociable and demanding, but that overall hours would fall within the terms of the Working Time Regulations. Subject to the Working Time Regulations, the contract did not specify how many hours each week needed to be worked, save that the holiday entitlement was calculated on the basis of a full-time week of forty hours. By implication this was agreed to be the norm. As a responsible employee, the claimant was expected to organise her own time during her working week.

(9) Annual leave would be booked off in advance, as agreed by the line manager, and subject to operation needs. All staff, whether on a term-time only or an annual contract, were required to take leave only at specified times, which involved taking leave outside term-time.

(10) The contract provided that overtime must be agreed in advance, and would be recompensed with time off in lieu, albeit the tribunal accepts that in practice the respondent would pay overtime, if it was agreed in advance. The tribunal accepts that there was no occasion when the claimant worked agreed overtime, and was not paid the sums agreed.

(11) The working arrangements and remuneration were changed, by agreement, from time to time. The tribunal accepts that on each occasion there was oral agreement and the claimant agreed to work under the varied arrangements, without objection (the only specific disagreements as to the contractual agreements related to what would happen from January 2018, which in the event were never formally agreed before the claimant resigned). The main changes are set out below.

(12) In February 2014 it was agreed that the claimant would transfer to a term-time only contract from the beginning of the summer term. Her wage was not increased, but in effect she became entitled to extra time off.

(13) In early 2014 Hampshire County Council approached the respondent to discuss the provision of independent mediation services between parents and the SEN Department (as one of three service-providers, at that stage). The charity agreed. The claimant was interested and enthusiastic in carrying out the mediation role, and in April 2014 it was agreed that she would do so, and the respondent would arrange and pay for suitable training. It was not clear how the mediation service might develop in future, nor what time commitment it might involve.

(14) There was no agreement to extra wages, and the claimant would carry out the mediation role in addition to existing duties, during her working time (as arranged by herself), subject to the possibility of agreeing "overtime" in advance.

(15) It should be stressed that there was never any agreement to increase the claimant's basic salary to reflect her mediation duties, whatever the claimant may have personally felt regarding her value to the organisation.

(16) A new contract was greed in November 2014, still as the near to school project leader, and remaining on a term-time only contract, with an increased salary of £23,500 per annum.

(17) Later in November the mediation contract with Hampshire County Council came into force, and by then the claimant was qualified and ready to take on whichever mediations were referred.

(18) In September 2015 the claimant's contract was varied, by agreement, with the job title changed to "Near to School Project Leader/Mediation Service Lead", still on a term-time only contract, on an increased salary of £26,000. However, mediation work might be needed during holiday periods. The hours were, formally, 37 hours per week, but retaining a provision (as in previous versions of the contract) that "*occasionally the hours will be unsociable and demanding. Overall hours will however fall within the terms of the Working Time Regulations. Overtime must be agreed in advance*". The claimant does not recall signing a printed copy of the amended contract, but the tribunal accepts that she agreed the changes in pay and working, and consented to continue working under these arrangements.

(19) These arrangements continued for the next two years, with mediation sometimes being very busy, sometimes rather less so. The tribunal accepts that when mediation took place during school holidays, the claimant claimed overtime and was paid accordingly. In October 2016 the respondent took on a part-time administrator to co-ordinate the mediation service and take pressure of the claimant.

(20) Meanwhile, at the end of November 2016, the respondent signed a new contract with Hampshire County Council, as the sole provider of SEN mediation services. The mediation work increased, and when it became clear that this increase would be sustained, arrangements were put in train to engage additional support and a part-time mediator (the former in place from 1 May 2017, and the latter commencing work from late June 2017).

(21) In November 2016 the claimant's mother was diagnosed with a terminal illness, and in January 2017 she sadly died. Dr Brennan gave the claimant a week's discretionary paid special leave, effectively as bereavement leave, and after that the claimant was signed off sick for a period, and was consequently given paid sick leave.

(22) The claimant came back to work on 30 January 2017, and on 31 January she told Dr Brennan that she had just been given a date for an

exploratory operation on her hand later the same week. The claimant told Dr Brennan that she would be fit to return to work after self-certified sick leave 2-6 February 2017. She confirmed that she was fit to work, and to conduct the panned mediations, provided her daughter could be paid to drive her to the next 3 mediations. This was queried by Dr Brennan, but the claimant confirmed that she was sure that she would be fit. Dr Brennan agreed, and also agreed to pay the claimant's daughter to drive her.

(23) In the spring of 2017 (March to May) the claimant was very busy with mediations, until the new mediator joined in June to take over part of the load.

(24) In late June 2017 the claimant indicated that she did not wish to continue to lead the Near to School project, as well as the mediation, and it was also discussed that there was also an issue over continuing funding for the Near to School project. Future working arrangements were discussed, and the claimant wanted increased wages. The respondent suggested a new role based in the respondent's school, whilst continuing mediation work three days a week, and other duties two days a week, on an increased salary but on an annual rather than a term-time contract. The minutes of the meeting express the proposed new working arrangements as an "offer", and discussions about how the detail might be agreed. In fact, in the circumstances, and in view of the precarious funding arrangements, the respondent also decided in any event to end the contract with Portsmouth City Council at the end of the year, with a transitional period leading up to that, when the school which was being supported would make the arrangements to take over the management of the project.

(25) The position in summer 2017 was therefore that, by agreement, the claimant would be giving up her role leading the Near to School project, and whilst she would continue to carry out mediations from time to time, the respondent needed to find her a new role within its organisation. The new role identified was a combination of providing mediation services and providing therapeutic support across the respondent's operations, starting from the end of December 2017, and based in the Havant office. On 12 July 2017 Mr King wrote to the claimant explaining that the existing role would come to an end just before Christmas, and setting out the proposed arrangements, setting the salary at an increased level of £27,000, but on an annual contract, and making it clear that the new role, which would be developed over the course of the next two terms. The claimant was invited to sign an amended contract, with the job title "Lead Mediator/Therapeutic Lead" but declined to do so.

(26) From July until December 2017 there were various negotiations as to the claimant's future working arrangements and remuneration package, with various drafts being produced. The claimant was not happy to leave a term-time only contract, and wanted an increase in her wages to £30,000. In September 2017 Mr King suggested that a solution could be that the claimant took on management of the mediation team, on the increased salary of £30,000, on an annual contract, whilst continuing to mediate as well as "contributing to the therapeutic model in the school". The claimant was interested in this proposal, but the

detailed discussions progressed rather slowly and the final arrangements were not agreed in writing before the claimant resigned.

(27) In early October 2017, management having heard that the claimant was planning to take a holiday during term-time in the following February, a meeting was held with the claimant to discuss this, and the claimant was told that she would not be spared at this time, during term, for operational reasons. She indicated that she would take the holiday anyway.

(28) On 10 October 2017 Dr Brennan wrote to the claimant to explain that the contract of employment required her to obtain prior approval for her holiday plans, which must be taken outside term, and that if leave was taken which was not approved it would be unpaid and may lead to disciplinary proceedings. There would be a "disciplinary investigation". Including a meeting with the claimant. The disciplinary investigation meeting took place on 13 October 2017, at which Mr King confirmed that the charity Trustees had confirmed that the term-time leave requested would not be authorised, and if they were to do so this would set an unfortunate precedent for other staff, who were not permitted to take leave in term time. It was explained to the claimant that if she took leave on the suggested dates it would be unauthorised and unpaid, and would result in a written warning. The claimant stated that the flights had not been paid for and could be cancelled, which appeared to have resolved the matter.

(29) Meanwhile, the respondent tried to make plans for what would happen after the Christmas period, but it was difficult to get hold of the claimant, who was not keen to attend a meeting with her line manager. On 6 December 2017 Dr Brennan emailed the claimant to arrange a meeting to discuss the way ahead, attaching a copy of part of the proposed job description and a copy of a contract to commence on 1 January 2018. There were emailed exchanges about the need to clarify/confirm details. Various different draft contracts had been prepared.

(30) On 13 December 2017 the claimant met with Dr Brennan and Mr King, and discussed various difficulties the claimant had been having in the current role supporting Near to School. The claimant presented as upset at the meeting did not, sign the new contract, or clearly set out what she wished to do. She wished to leave the meeting early and was permitted to do so. Matters were therefore left rather vague, with an outstanding need to agree the details, and Dr Brennan was hoping for another opportunity to do so before the Christmas break.

(31) On the morning of Tuesday 19 December 2017, the claimant sent an email to Dr Brennan, resigning her employment with effect from 31 December 2017. She explained that she had just been offered a new job. The only other explanation she gave for her resignation was, "*I have really enjoyed my time at RP and the belief and support that I was given, but have felt that the last few years have been extremely difficult*".

(32) The resignation was accepted, and employment ended on 31 December 2017.

Conclusions

Deduction of wages

58. The extent of this claim is considered in some detail in the "issues" section above, at paragraphs 17-22, which need not be repeated here. In essence, this was a somewhat muddled claim under section 13(3) of the Employment Rights Act 1996, and as indicated above it was for the claimant to establish not just some generalised contractual entitlement to receive additional wages in some circumstances, but the claimant would need to establish, with sufficiently clear evidence, that on specific occasions she had carried out specific additional work, for which she was contractually entitled to additional payment, but had not received payment for that work.

59. Given this reminder at the start of the hearing, the claimant never provided any satisfactory evidential basis for her claim.

60. In analysing the evidence called by the parties, the tribunal would observe that it was clarified at the beginning of the hearing that this relates solely to the claimant's duties as a mediator in respect of children with special educational needs.

61. This was a role which the claimant carried out from 2014 onwards, from time to time, mediation having been identified as a need with Hampshire County Council, which wished to offer this new service, which the respondent was willing to provide. To that end, the respondent arranged for the claimant to be trained in mediation, and the claimant was keen to carry out this role. Although there was some criticism of the respondent as to its failure to reflect the new responsibilities in a clear written contract or job description, the tribunal notes that as a matter of law there is no need for a written contract: it is abundantly clear to the tribunal that the claimant was keen to do this mediation role, albeit at the time it was not yet clear how it might develop. Nobody was sure how it would develop in the future, how much work there would be, whether this would fit in well with the charity's role or (going forwards) exactly what Hampshire County Council was likely to require. It was, however, agreed that this appeared to be a good idea. The claimant was keen to take on this new responsibility, and the respondent was content that it was suitable for her, and paid for the claimant to be trained as a mediator.

62. Although a new written contract was issued by the respondent, it did not reflect precisely what the new responsibilities were, no doubt, in part, because it was not clear what would be done in the future. However, the claimant did agree to carry out this role. The claimant's existing contract was by this time a term-time only contract. The claimant's wages were increased to £23,500 per annum from November 2014. There was no agreement to enhance the claimant's salary further, to reflect new responsibilities within her role. At the same time the respondent signed an agreement with Hampshire County Council for the provision of mediation services.

63. The position, thereafter, was that the claimant was on a term-time only contract of employment. It did not expressly require specific hours per

week, but it is clear from the wording of the contract that the expectation was that the working week would normally be 40 hours. The contract did allow for some flexibility. There is no suggestion that this particular issue had been a problem for anybody in the past, and at this stage it was not clear how much mediation there would be in future, and at what times of the school year this would need to occur. Although the claimant had identified, at the beginning of the hearing, that she was "never paid any overtime", she did accept in cross-examination that overtime was paid when there was mediation outside term-time. There was provision in the contract of employment for overtime to be paid, which would normally be authorised in advance. The tribunal accepts that when this was agreed in advance, it was paid to the claimant.

64. The material issue is, therefore, whether there were specific occasions when the claimant carried out mediation work when she was contractually entitled to be paid extra (ie, additional wages were "properly payable") but was not paid her entitlement.

65. The tribunal considers that the mere fact that an employee has agreed to take on additional responsibilities does not mean that there is a wholly new contract of employment. It means, of course, that the responsibilities have changed. It is open to the parties to negotiate a different remuneration package. That is not what happened in this case. It would have been better if the respondent had produced a clear job description, and paperwork to support the change in responsibilities. But the fact that this did not happen at the time, does not negate the agreement. The basic facts were as follows: the claimant who had an existing contract of employment, had agreed to take on additional responsibilities in respect of mediation, and clearly saw it as an attractive and interesting addition to her job description. one can see why it would be an attractive role to take on and albeit at that The claimant was contracted to work full-time (term-time only), subject to the Working Time Regulation limits, and it was clear that hours would vary and employees at the claimant's level were expected to organise their own time so as to complete their work within the working week.

66. The tribunal accepts Dr Brennan's evidence that when the claimant filled in her timesheet, she did not request or was not refused any additional pay for additional hours worked. This is in a professional role and if from time to time the claimant had to work late, it did not automatically follow that she was therefore entitled to work overtime, if this had not been expressly arranged in advance.

67. The tribunal accepts that when the mediation role commenced, there were only occasional mediations, albeit it is plain that it became much busier later. As indicated above, the claimant organised her own hours and Whilst this may have required concentrated periods of work, this does not mean that there was an entitlement to extra wages.

68. It is clear that from late 2016 onwards, there was an increase in the number of mediations needed, and that extra staff would be needed to cover them effectively, so as not to put an unsustainable burden on the claimant. Indeed, the respondent *did* employ extra staff to try to ensure that the charity was in a position to meet the need, and had sufficient staff to carry out mediation duties. No doubt the claimant was very busy from time to

time, and the respondent might have been slow in putting new resources in place to provide increased support, but this did not result in a contractual entitlement to an enhanced salary. Although there was occasional use of an independent contractor to carry out mediations on behalf of the charity, the person contacted to carry out that role was never an employee of the charity. The claimant remained an employee, on wholly different contractual terms. The independent contractor was contracted, for a fee, to carry out specific mediations. The claimant continued to carry out mediation as part of her role as an employee, with no agreement to pay a fee (which would have been an unusual arrangement to make with an employee).

69. Arising from the facts of the case, the tribunal finds that the claimant never had a contractual entitlement to wages above her basic wages, save that by agreement overtime could be paid if it was agreed with management. When agreed, it was always paid. The tribunal has found that there was no occasion when the claimant asked for specific additional wages, for specific additional hours worked, when such wages were refused. The tribunal finds nothing indicating a contractual entitlement to additional wages, above those which were actually paid.

70. In the circumstances, there is plainly no evidence of any specific deduction made, which was never the claimant's case. The claim is brought under section 16(3) of the Employment Rights Act 1996, and the tribunal's conclusion, on a balance of probabilities, is that there were no occasions when the claimant was paid less than the sums properly payable in wages.

71. The claim for unpaid wages is not well founded.

<u>Constructive dismissal</u>

72. If there is an express dismissal of an employee, the matter is straightforward. However, Section 95(1)(c) of the Act allows for there to be a dismissal of an employee when "an employee is entitled to terminate the contract by reason of the employer's conduct". This reflects well established principles under contract law that if an employer is in fundamental breach of the contract of employment, an employee is entitled to accept that breach and treat himself as constructively dismissed. In this case, the claimant resigned by email of 19 December 2017, giving notice that her employment would end on 31 December 2017. She must show, on a balance of probabilities, that this amounted to a constructive dismissal.

73. For a claim of constructive dismissal to succeed, it is well established law that:

    1. the employer has to commit a breach of contract that is so serious as to show that it intends to abandon and altogether refuse to perform the employer side of the bargain (see for example <u>*Tullet Prebon plc v BGC Brokers LLP*</u> *[2001] EWCA 131*, adopting the words of Etherton LJ in <u>*Eminence Property Developments Limited v Heaney*</u> [2010] *EWCA Civ 1168*, para 61) (albeit a gloss is put on this in respect of the Respondent's intentions – see below); and

    2. The Claimant has to resign, at least in part, because of this breach without, before choosing to do so, behaving in such a way as to

indicate an acceptance that the contract can continue notwithstanding the breach.

74. The term of the contract relied upon in respect of the fundamental breach may be an express term or an implied one. In this case, the claimant relies on the implied contractual term of mutual trust and confidence. A good summary of the law relating to the doctrine of breach of trust and confidence and the law relating to the "last straw" situation, as relied upon in this case, is well summarised in the judgment of Dyson LJ in the case of *Omilaju v Waltham Forest London Borough Council* *[2005] ICR 481*. Paragraph 14 of that judgment sets out the following basic propositions of law derived from the authorities:

    1. The test for constructive dismissal is whether the employer's actions or conduct amounted to a repudiatory breach of the contract of employment: *Weston Excavating (ECC) Limited v Sharp* *[1978] ICR 221*.

    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 confidence and trust between employer and employee: see for example *Mahmoud v Bank of Credit and Commerce International SA* *[1997] ICR* 606, 610E, 611A (Lord Nicholls of Birkenhead), 610H to 622C (Lord Steyn). I shall refer to this as "the implied term of trust and confidence".

    3. Any breach of the implied term of trust and confidence will amount to a repudiation of the contract: see or example, Browne Wilkinson J in *Woods v W M Car Services (Peterborough) Limited* *[1981] ICR 166,* 672A. The very essence of the breach of implied term is that it is calculated or likely to destroy or seriously damage the relationship.

    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 *Mahmoud*, at P610H, the conduct relied upon 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 confidence the employee is reasonably entitled to have in his employer" (emphasis added).

    5. A relatively minor act may be sufficient to entitle the employee to resign and leave his employment if it is the last straw in a series of incidents. It is well put in Harvey on Industrial Relations and Employment Law, paragraph D1 [480]:

        "many of the constructive dismissal cases which arise from the undermining of trust and confidence will involve the employee leaving in response to a course of conduct carried on over a period of time. The particular incident which causes the employee to leave may in itself be insufficient to justify his taking that action but when viewed against the background of such incidents it may be considered by the courts to warrant their treating the resignation as

a constructive dismissal. It may be the "last straw" which causes the employee to determinate a deteriorating relationship".

75. The tribunal has also noted the more recent case of *Kaur v Leeds City Teaching Hospital* *[2018] EWCA Civ 978*. The Court of Appeal confirmed that further contributory acts can effectively revive a claim for constructive dismissal, notwithstanding earlier affirmation of the contract of employment.

76. The initial matter for the Tribunal to determine is whether, individually or cumulatively, there was a fundamental breach of contract. The Tribunal has considered this in the round, albeit it is necessary to look at the individual allegations.

77. The claimant relies upon a number of matters said, individually or cumulatively, to amount to fundamental breach of contract. The claimant relies upon a "last straw", namely new conditions of service said to have been imposed in December 2017. This appeared to add very little to the case, but to the extent that there might amount to being a last straw, the tribunal has considered the point, taking into account *Omilaju* and *Kaur*, above. The reality is that it is not capable of affecting the tribunal's conclusions.

78. The claimant identified 6 matters said, individually or cumulatively, to amount to fundamental breach of contract. These are set out at paragraph 27(a)-(e), above. They may be briefly summarized as follows:

    a. Changes in annual leave entitlement in various contracts of employment.

    b. Different job titles, salary, and job role imposed on the claimant.

    c. Long working hours.

    d. The claimant being told she would be disciplined if she took holiday without permission.

    e. Not being allowed to appeal the "disciplinary decision".

    f. In January 2017 being forced to take sick leave after her mother died, when she believed she should have been given paid bereavement leave.

79. The claimant also gave evidence, but did not expressly rely upon this as part of her constructive dismissal case, that "whenever she raised a grievance this was not dealt with". It became clear that she never raised a formal grievance, despite knowing that she could do so, but was referring to various conversations when she had raised matters and was unhappy with the response. The tribunal has taken account of all the evidence, in the round, in considering the claim of unfair dismissal, albeit the analysis below concentrates on the specific matters identified by the claimant as amounting to a fundamental breach of contract.

80. The claimant needs to be able to prove that when she resigned on 19 December 2017 there had been a fundamental breach of contract, and also

that it was the effective cause of her resignation. There is some dispute about causation of resignation: the respondent suggests that the real reason might be so that the claimant would be free to go on the pre-booked holiday in February 2018 which had been refused, but in any event this issue would not arise unless there had been a fundamental breach of contract.

81. The first matter raised as being or contributing to the fundamental breach of contract relates to changes in the claimant's annual leave entitlement, in a succession of new contracts, when the claimant asserts that she had not been consulted.

82. Having considered the evidence from both parties and having noted this was a relatively small informal charity with no HR expertise in house, it does appear to be clear that sometimes the HR-related paperwork was a little slow to catch up with reality. However, on the various occasions when the claimant's working relationship changed, when there was a salary change, wages were increased. The first change was when the claimant was on £21,000 for a full year including school holidays subject to a statutory minimum annual leave. Then in 2014 this changed term-time only at £23,500.

83. The tribunal does not consider that the evidence supports the conclusion that these were unilateral changes imposed on the claimant. In any event the claimant worked under the new working arrangements. Whether or not they reflected in writing, there is no suggestion that the claimant was unaware what her roles were or unaware of what hours, whether she was term-time only or throughout the year and no suggestion the claimant wasn't aware of her salary.

84. Although frequent changes may go someway way to undermine matters and cause difficulty, what is described are not unexpected or onerous changes. They are unsurprising, given the (agreed) way in which the claimant's role developed over time, and given new responsibilities which were taken on. The respondent is a small charity providing services to children, and the work to be carried out by employees depended on what the local authorities needed, what they were prepared to pay for, and what they wished to contract from the charity for. Clearly needs would change over time, and that was the context of the claimant and her employer agreeing changes in the working arrangements. Either the changes were expressly agreed to, or if the agreement was vaguer, the claimant effectively consented to the changes and continued to work. In respect, specifically, of changes relating to carrying out mediation work, the wanted to take on this specific role.

85. The tribunal does not consider that the claimant has established any actual reduction in her annual leave entitlement. To the extent that new working patterns led, inevitably, to a different way of calculating leave, or the role requiring leave normally to be taken during school vacations when it changed to a "term-time only" contract, the tribunal accepts that the claimant effectively agreed to the changes. The claimant would have well understood the need for working practices to change over time, and did not object to those changes at the time.

86. The tribunal does not consider that this matter amounts to a fundamental breach of contract, or that it has any significant impact on any cumulative breach of contract.

87. The second complaint was broader, relating to job title, salary, hours and role. The claimant asserts that changes were imposed on her, although she agreed to some changes in 2011 and 2014. General comments have already been made on this topic, above. The tribunal does not consider that the evidence adduced by the parties supports such a conclusion. Indeed, by the end of 2017 it was a more complicated picture: the situation at that point, although described by the claimant as if a new contract had been forced upon her, against her will, was in reality rather different. No new and disadvantageous contract was imposed on the claimant.

88. The claimant has relied, in particular, upon what was happening in December 2017, shortly before she resigned. The claimant explains that she objected to reduced pay, reduced hours, and a different job role. This proposal was, in fact, initially with a small pay rise, but the claimant felt that this was a dilution of her terms and conditions, in part because although there was a salary rise, the claimant would move from a term-time only contract, to work spread throughout the year.

89. The tribunal accepts that the position, as credibly described by Dr Brennan, was essentially that the claimant's existing role was redundant, because the role had been created to support a specific local authority contract, which was then coming to an end. The claimant had already expressed a desire no longer to do the role for which she had originally been employed (which was working on the "near to school" project), but once the funding ended the claimant's job role would inevitably have to change significantly if she was to remain as an employee. The respondent did not, however, have any proposal to commence a redundancy process, because the claimant was a valued employee and there was little doubt that there were other equivalent roles to be carried out within the charity, for which the claimant would be well-qualified, and where she should be able to provide a good service.

90. It is perhaps unfortunate that in the Autumn of 2017 a succession of draft contracts were proposed, which left the claimant's future working arrangements rather unclear, but change was an inevitable consequence of the need to find a new role for the claimant, which might be term-time only, or might be throughout the year. A key factor, however, is that these were very much draft contracts, proposed by Dr Brennan to the claimant in the hope that the claimant and respondent would find a mutually agreeable arrangement. Indeed, the final version offered to the claimant before she resigned was an improved offer, with an increased salary of £30,000, based in Havant, within the school operated by the respondent. This was in fact the salary which the claimant had asked for.

91. In the event, the claimant did not wish to accept any of these offers, and did not wish to continue working for the respondent. It is understandable that the proposals were not to the claimant's taste, and that she was uncertain as to her future within the charity. But they were clearly made in good faith, for good reason, and were simply proposals: nothing was imposed upon her. The claimant must also have realised that the reality was that when she turned down a proposal as unacceptable, Dr Brennan was attempting make

an improved offer, in the hope of finding something that would suit the claimant better.

92. The position when the claimant resigned, therefore, was that no contractual change had been imposed, and the respondent was seeking to provide an improved package. Although it was unfortunate that things were in a state of flux, and there was a need for clarity over future working arrangements, it should have been clear to the claimant the respondent was trying to resolve matter and find a mutually agreeable way ahead.

93. Whilst this matter is capable of being a "last straw", it is not capable of amounting to fundamental breach of contract, and its overall contribution to any cumulative effect of fundamental breach of contract would be very limited. The tribunal considers that the argument that there had been contractual changes imposed in the past, and that in December 2017 the claimant was treated particularly badly, is a very weak one.

94. The third matter which the claimant raised, was the matter of extra working hours for conducting mediation, which has already been considered above. This is, perhaps, a slightly broader point in this context. The claimant's objection is that she was required to work extra hours to carry out mediation. There appears to be some merit in the claimant's point that this was a time-consuming task (albeit a fulfilling one which she was keen to take on), and she had to work very hard in order to find the time to carry out the necessary work, albeit there appears to have been a hard-work culture generally amongst respondent employees. The tribunal recognises that this would sometimes have been something of a burden, especially as the claimant was initially the sole mediator, and particularly when extra mediation work came in after it was agreed that the respondent would be the sole provider, in late 2016. That said, the claimant was responsible for organising her own working hours, to ensure that she was available at the times needed.

95. In terms of the extra hours, had the respondent simply left matters that the claimant would have no prospect of support, that could have developed into a very unsatisfactory and untenable position. But, of course, there is more to it than that. What happened was that the respondent agreed that there was a need for additional support, with administrative staff and indeed access to an additional mediator, which would greatly reduce the need for the claimant to commit time to this part of her role. Extra administrative support was provided from November 2016, increased in May 2017, and a new mediator was appointed by the middle of 2017.

96. Again, although this is a matter which no doubt made working life more difficult for the claimant, at least for a temporary period, it falls some way below anything which amounts to a fundamental breach of contract. The claimant was not required to work specific unpaid extra hours; although the claimant was busy, management were trying to resolve that matter (and did do so).

97. It is notable that this is an example of the sort of issue which can arise in the workplace, where an employee, if aggrieved by her treatment, can have recourse to the formal grievance process. A grievance process is designed to be able to resolve the majority of issues which can arise in any

workplace. The claimant did not consider it necessary to use the grievance process.

98. The tribunal notes that a number of other things were going at the time that the claimant was needing to work hard, including the unfortunate fact that her mother became very ill, and that at the beginning of 2017 she died. The tribunal extends its sympathy, and realises that, of course, this would have put extra pressure on the claimant at the time. The claimant also needed surgery on her hand in February 2017, and the appointment came up rather quicker than originally expected.

99. Although capable of providing some support, overall, for an argument that there was a cumulative breach of contract, this point is, in itself, well below the threshold which would amount to fundamental breach of contract.

100. The fourth specific point raised by the claimant as fundamental breach of contract was the disciplinary investigation in October 2017. The background for this was it was envisaged that the claimant would be based in the respondent's school in the following year, and an operational view had been taken that (like the other employees) she would not be able, save in exceptional circumstances, to take holiday during the school term. The claimant's daughter had recently married and the claimant and her husband had made the arrangement that they would attend part of the honeymoon holiday with their daughter in February 2018. It came to Dr Brennan's attention that the claimant was planning to take a holiday, and when the claimant presented a leave request for taking holiday in February 2018, this was considered by management, with the authority of the trustees, and it was concluded that the claimant simply could not be spared from her duties during school term and would not be able to take holiday then.

101. The decision was unfortunate for the claimant, although the decision as to whether or not to grant leave on the date requested was a matter within the management prerogative. With hindsight, it can be said that perhaps this was not handled as well or as tactfully as it could be. However, when the claimant indicated that she was planning to take the holiday, knowing that management had not approved it, there was a "disciplinary investigation". That was, perhaps, the wrong label to put upon matters, but it is uncontroversial that the claimant had, in effect, indicated that she might be planning to absent herself without leave. She could easily have presented a formal grievance against the decision, but did not do so. Not unnaturally, management wished to consider what its response would be, should the claimant carry out her threat. They chose to do this through what was termed a "disciplinary investigation", which included the Chief Executive Officer consulting Trustees, and holding a meeting with the claimant to discuss her wish to take leave. This concluded that, a management decision as to leave dates having been taken, if she deliberately refused to turn up for work, this would be dealt with as a disciplinary matter. The conclusion was communicated to the claimant in October 2018. The tribunal considers that, on a purely factual basis, the conclusion must be right: if the claimant was not given leave, and the claimant refused to turn up for work, she would clearly be absent without leave, which would be a potentially serious disciplinary matter, striking to the heart of the contract of employment.

102. The tribunal considers that it was entirely clear that although the respondent used the vehicle of a disciplinary investigation to look into the matter, there had at that point been no misconduct. There had plainly been no disciplinary sanction, as must have been entirely clear to the claimant. This was merely an investigation into the circumstances, with the indication that if (a few months) later the claimant absented herself without leave then the respondent would feel the need to treat this as a serious disciplinary matter. But that eventuality was plainly some weeks ahead, and the respondent did not know whether the claimant would *actually* absent herself without leave. As it turned out, the claimant appeared to be indicating at the investigation meeting that she would probably not take the leave.

103. Whilst one can perhaps criticise the way that this was handled, and why the respondent chose to put the label of "disciplinary investigation" upon matters, ultimately the point, relatively uncontroversially, was as follows: The claimant wanted to take leave; the respondent did not grant leave for the dates requested, for operational reasons; the claimant had appeared to indicate an intention to take the leave anyway; the respondent considered what its response would be if the claimant did not turn up for work; the respondent informed the claimant, with clarity, of the likely consequences, were she to carry out her threat, which would help the claimant decide how to proceed. The claimant appeared to have decided that she would not try to take the leave.

104. This was in an organisation where there had been good working relationships, and no doubt this sort of incident was not something that was at all usual in the charity, which may very well have contributed to the decision to conduct a formal investigation, to consider what the response would be to this novel situation. A more experienced HR manager, in an organisation used to dealing with disciplinary breaches, might well have given the immediate (and obvious) response of "*if you deliberately absent yourself from work on a day when you are fit to work and have not been given leave, then that is a serious disciplinary matter which will lead to disciplinary proceedings."*

105. The means of dealing with the point were perhaps a little heavy-handed, but in essence the advice given to the claimant was entirely correct. This is nowhere near a fundamental breach of contract, and cumulatively has little impact on the claimant's case.

106. Linked to this matter is the fifth issue raised, concerning not being allowed to appeal the "disciplinary decision". This is a misconceived point, as there was no disciplinary decision of a type which could be appealed. On a proper reading of the respondent's disciplinary process, or indeed the principles of any formal disciplinary process or the ACAS Code of Practice, there was plainly no disciplinary sanction which required a disciplinary appeal.

107. Had these matters happened *after* the claimant had absented herself in February 2018, and she had been disciplined and that resulted in a hearing at which she was awarded a demotion, a final written warning or a dismissal, then plainly the appeal provisions would apply. That situation had not arisen. The tribunal considers that there was no formal process for an appeal, and no obligation upon the respondent to invent a procedure and to offer her one. Plainly, if the claimant was unhappy in the arrangements that

the respondent put in place to refuse her leave, this was a matter which could have justified a formal grievance. The claimant did not present one.

108. Overall, the way that the "disciplinary" matters were handled adds nothing of significance to any cumulative breach of contract, and the specific point about a lack of "appeal" misses the point.

109. The final matter raised by the claimant, which goes back to an earlier period of time, in early 2017, relates to the death of the claimant's mother. The claimant's specific allegation is that she was "forced" to take sick leave when her mother died. It was also factually asserted by the claimant that she was not given bereavement leave.

110. It is clear to the tribunal that within the contract of employment, there was no contractual entitlement to bereavement leave or to some other special paid leave. The tribunal was not taken to any other document indicating that the respondent would normally give extra paid leave in relevant circumstances. Clearly an employer has the discretion to award extra leave, and the discretion to pay an employee their wages during that extra leave. By the summer of 2016 (and probably earlier), the position was there was no contractual entitlement to sick pay, but the contract made it clear that there was a "*discretionary sick pay scheme, up to a maximum of 30 days within a rolling 12 month period, for all employees who have successfully completed their probationary period*…" Whatever the precise contractual entitlement to sick pay, the claimant knew that the expectation was that she would receive up to thirty days' paid sick leave a year.

111. The tribunal has, however, accepted Dr Brennan's evidence that notwithstanding the lack of contractual entitlement to extra leave, in her discretion she gave the claimant a week's special leave as bereavement leave immediately after the claimant's mother died. The tribunal also accepts that after that initial week, the claimant produced a GP's fit note, signing her off as unfit to work from 12 to 22 January 2017. She then produced a further fit note, signing her off 22 to 28 January 2019. This is uncontroversial: the claimant was given a week's discretionary bereavement leave, and when she presented a fit note she was given a period of paid sick leave for the period covered by the fit note. There is nothing to complain about here: a week's bereavement leave when an employee is otherwise healthy would not appear to be unreasonable. The respondent could have given unpaid leave, but was content to give a week's paid leave. If the bereavement causes some form of illness and/or emotional unfitness to work, there appears to be nothing wrong in principle in treating this as sick leave.

112. The tribunal considers that this is not a matter which was likely to fundamentally undermine mutual trust and confidence, but in any event, it would be with "good cause", because the claimant was not contractually entitled and having (reasonably) been given a week's extra leave. As indicated above, on the facts of the case that would appear to be a reasonable period of special paid leave to grant, unless there were medical need for a longer period (which would be sick leave). The claimant having then put in a sick note, it was not unreasonable for the respondent to then treat the following period as sick leave.

113. The tribunal has also noted the following, although this was not set out as a breach of contract relied upon by the claimant: Shortly after this period of leave, the claimant needed surgery. The claimant's account was that she felt under pressure to go back to work before she was properly fit to work, and she criticises the respondent for not obtaining an Occupational Health report and making further enquiries. The tribunal considers that even if this matter had been relied upon, this would have added nothing of substance to the claim. There was no fit not signing the claimant off for a further period, after completion of the surgery, as unfit to work. If the claimant says, in essence, "I have had an operation but I'm fit to come back to work now", there was no need for the respondent to go behind that. The tribunal has not had its attention drawn to any policy document suggesting that in those circumstances the charity should commission a medical report of some sort, and on the facts, there would be no obvious reason to do so. In any event, this is not a matter likely to undermine mutual trust and confidence. The contractual position is that if an employee is contracted to work, the employee is expected to work, unless given annual leave or signed off as sick.

114. The matters of early 2017 fall well below any fundamental breach of contract and do not provide any significant contribution to a cumulative fundamental breach.

115. In evaluating the claimant's constructive dismissal case, and in deciding whether the claimant has discharged the burden of showing that the respondent was in fundamental or repudiatory breach of the contract of employment, the tribunal has taken a step back and looked at events in the round.

116. The tribunal notes that the respondent is an informal charity, but also notes that it is quite clear that the claimant had had a fairly torrid time of things for a period, with her mother dying, a need for surgery, and a really busy job. Similarly, it clearly took a while for the respondent to react to the increase in mediation work to ensure that it had the additional people in place. It is also relevant that the claimant having indicated she wanted to stop working on the "near to school" project, and by the end of 2017 the respondent no longer being contracted to provide this service to the local authority, the claimant's future role was inevitably uncertain. The position was, therefore, that the respondent had a longstanding and valued employee who would inevitably need to be redeployed to other duties, and there were ongoing discussions and proposals about what she should do. Ultimately, however, the claimant resigned at a time when the new contractual arrangements had not yet been agreed, and at a time when the claimant was unhappy that her leave request had been refused (although the respondent was entitled to do that).

117. The tribunal readily appreciates that the claimant may well legitimately have decided that it was time to move on, and that she would be happier elsewhere (and indeed she resigned immediately after having been offered another job). It does not criticise her for, in principle, bringing a claim of constructive dismissal to see if it has sufficient cogency for the tribunal to be able to provide a remedy, but in reality the case she has brought is not strong enough to show that the respondent had, without reasonable and proper cause, conducted itself in a manner calculated or likely to destroy or

seriously damage the relationship of confidence and trust between employer and employee.

118. The claimant resigned at a time when the respondent was not in repudiatory breach of contract. The claimant was perfectly entitled to resign and find more congenial employment, and this might well have been the best thing for her. However, the law does not entitle her to treat this as a dismissal, and to succeed in a claim of unfair dismissal, unless she can show that she was constructively dismissed. It is often quite difficult for employees to prove constructive dismissal, and so it has proved in this case. The evidence in this case has not been sufficient to discharge the burden of showing that the respondent was in fundamental breach of contract. In statutory terms, the claimant does not fall within the scope of section 95(1)(c) of the Employment Rights Act 1996.

119. In consequence, the claim of unfair dismissal is not well founded, and no other issues relating to the dismissal fall to be determined.

Employment Judge Emerton

Date: 11 June 2019

Reasons sent to parties: 17 June 2019

FOR THE TRIBUNAL OFFICE