



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4104950/2018

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Held in Glasgow on 21 and 22 January 2019

Employment Judge: David Hoey

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Miss C Quinn

**Claimant
In Person**

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Momentum Scotland Ltd

**Respondent
Represented by:
Mr J Grant -
Solicitor**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The claimant was unfairly constructively dismissed and the respondent shall pay to the claimant compensation in the sum of £2,661.45.

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The Employment Protection (Recoupment of Jobseekers Allowance and Income Support) Regulations 1996 do not apply to this award.

REASONS

Introduction

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1. By claim form presented on 25 May 2018 the claimant claimed constructive unfair dismissal. The case called for a full Hearing. The case had been subject to case management and a preliminary hearing had taken place on 2 October 2018.

E.T. Z4 (WR)

2. The claimant was in attendance and the respondent was represented by Mr Grant, solicitor. Mr Gill was in attendance to instruct Mr Grant.

5 3. Given the claimant was not legally represented I explained to the claimant (and Mr Grant) the terms of the overriding objective as set out in the Employment Tribunals (Rules of Procedure) Regulations 2013 and of the importance of the parties working together to achieve this. I ensured that the claimant understood the procedure that was being followed and each step of the process. Mr Grant assisted the Tribunal in ensuring the case was dealt
10 with justly and fairly. I also ensured that the parties were placed on an equal footing.

4. I began by identifying any preliminary issues that arose. There were a number of issues. I shall deal with these in turn.

15 **Preliminary issue: strike out**

5. Mr Grant had made an application to the Tribunal seeking a strike out of the claims in correspondence (to which the claimant had responded) between 20 and 23 December 2018. The claimant had objected to the application. Employment Judge MacLean had directed that the respondent's application
20 be considered at the start of the Hearing.

6. In short the respondent's position was that the claimant had left her role with the respondent and immediately commenced more remunerative employment. She had accordingly not lost any money as such. Mr Grant
25 understood that the claimant was not seeking compensation and was seeking a declaration that she had been constructively dismissed unfairly.

7. Mr Grant referred to the authorities in this area, in particular **Nicolson v Nicolson** 2010 IRLR 859 at para 39 where Lady Smith noted that there was
30 no power simply to seek a declaration in an unfair dismissal case (in contrast to discrimination cases).

8. Mr Grant accepted that the claimant may well be entitled to a basic award and that if her claim was successful she may be entitled to some form of compensatory award (such as a sum representing the loss of statutory rights). This was notwithstanding the fact the claimant had secured other employment which paid at least the same as she received from the respondent immediately following the cessation of her employment with the respondent.
9. The claimant submitted that she did seek such sums and that she wished to proceed with her claim.
10. I issued reasons at the time declining to strike out the claim. Given the claimant was not seeking a declaration as such - she was seeking compensation, the circumstances of this case were materially different from those in the authorities to which reference was made. It would not be just to strike out the claim.

Issues to be determined

11. A discussion then took place to identify what the issues were that the Tribunal required to determine. This had been considered at the preliminary hearing on 2 October 2018 (see paragraph 5). The claimant explained that there were a number of reasons why she had resigned and which she considered amounted to a fundamental breach of her employment contract.
12. The issues that required to be determined were:
- (i) What were the alleged breaches of the claimant's contract of employment that she relied upon?
 - (ii) Were these breaches by themselves or cumulatively sufficient to entitle the claimant to resign from her employment?
 - (iii) Did the claimant unreasonably delay in resigning?
 - (iv) Did the claimant resign because of the breaches?
 - (v) What compensation, if any, would be due in the event of a successful claim?

13. The claimant explained that the alleged breaches relied upon were numerous but were essentially related to her losing trust and confidence in her employer.
14. The claimant maintained that she had raised a grievance on 11 April 2017 which the respondent had not properly progressed. She felt she was being ignored and this continued up to her employment ended.
15. The claimant maintained that she had raised a second grievance on 27 October 2017 which she said was not properly progressed. A hearing had taken place on 9 January 2018. She had asked for a full investigation into her grievance. That did not happen.
16. The claimant believed there were breaches of the respondent's own grievance procedure, including the involvement of Mr Gill in the process, the time taken to fix a hearing and issue a decision and the lack of a fair investigation. The claimant also argued that the behaviour to which she had been subject (which formed the basis of her 2 grievances) was also related to her decision to resign.
17. The claimant said the content of the grievances set out the background for her resignation. The grievance letters referred to behaviour to which the claimant had been subject by colleagues which she said was inappropriate and which had not been stopped by the respondent, in breach of its duty of care to the claimant.
18. Ultimately the claimant felt that she had been ignored, she had been subjected to inappropriate behaviour which the respondent had failed to prevent and the respondent had not properly engaged with the concerns she had and failed to follow a fair process in the resolution of her disputes. She resigned believing the respondent to be in fundamental breach of her contract of employment.
19. The respondent denied that there was a breach of the claimant's contract or that any breach was individually or taken together sufficient to entitle the

claimant to resign and claim unfair constructive dismissal. The respondent also alleged that the claimant did not resign because of any such breach.

5 20. The parties had submitted a joint schedule of loss setting out the basic award and provision for loss of statutory rights.

21. The parties also lodged a bundle of documents amounting to 248 pages (which included additional documents lodged on day 2 of the Hearing).

10 22. The Tribunal heard evidence from the claimant. The respondent reserved its position at the start of the hearing to lead witnesses and ultimately decided not to lead any evidence.

15 23. The claimant had initially planned to bring a number of other witnesses. One had passed away and the others whom the claimant had contacted had indicated that they would not attend voluntarily. The claimant did not speak with Mr Grant to secure their attendance nor seek any witness order from the Tribunal. She had obtained a written statement (from those still in employment) but without the attendance of the relevant individuals to speak
20 to their evidence, the written statements would not be considered. The claimant decided not to lead any other evidence and upon conclusion of her evidence the respondent decided not to lead any witnesses.

25 24. I explained the broad legal principles applicable to the claims before the Tribunal (with which Mr Grant concurred) and the claimant was given time to prepare her submissions. Mr Grant usefully agreed to lead with his submissions with the claimant thereafter setting out her position.

Findings in fact

30 25. I make the following findings in fact from the evidence that was led, including the oral evidence of the claimant and the productions to which reference was made. Reference is made only to the facts that are relevant for the determination of the claim.

Background

26. The respondent provides vocational services supporting disabled and other vulnerable people, including by seeking sustainable employment. The respondent employs 141 staff and had an HR support function.
- 5 27. The claimant began her employment on 8 September 2014.
28. The claimant was engaged as a job coach helping people with disabilities to secure sustained employment. The claimant was initially working on the work choice contract and in January 2016 worked in the GMC project. There are
10 various stages within this project to try and secure sustainable employment for relevant clients.
29. The claimant was based in the Templeton office and covered the east of the city. She then agreed in addition to cover the west of the city.
- 15 30. The claimant reported to (amongst others) Amanda Fitzpatrick (whose line manager was Linda Fisher).
31. The claimant was given a contract of employment together with a number of
20 policy documents, which included a grievance policy. Clause 13 of the contract stated that the grievance policy (amongst others) was contractual.

Grievance policy

32. The grievance policy runs to 8 pages and states that the respondent is
25 “committed to ensuring that the staff member’s rights to natural justice and fair procedures are upheld at all times”. The policy states that the respondent would endeavour to take all steps promptly and without unreasonable delay” and that managers and supervisors who deal with grievances should not have been directly involved in the circumstances leading to the grievance.
- 30 33. Stage 2 of the formal grievance procedure applies where the complaint is about a line manager. The policy sets out the process for dealing with the grievance. A meeting should be arranged “normally within 5 working days” from receipt of the grievance to discuss the matter. The policy states that this

may be longer where the issues are complex or require investigation and depends upon individual availability.

34. A decision should be taken normally within 10 working days except in
5 “exceptional circumstances or in mutual agreement”.

35. An appeal process exists following a decision being issued with a decision to be issued normally within 10 working days.

December 2016

10 36. In the course of mid to late December 2016 the claimant required to undergo surgery and would need time off. At that stage she had not acquired the right to paid sick leave. The claimant could not afford to take unpaid sick leave. The claimant asked Mr Gill, HR, who suggested she contact Linda Fisher to authorise paid leave. The claimant’s line manager was prepared to agree to
15 it but the claimant wished Ms Fisher’s approval.

37. The claimant sent an email to Ms Fisher on 7 December 2016 asking for paid leave. Ms Fisher did not respond to that email.

20 38. The claimant had also raised concerns about staff being recruited without following the appropriate procedures.

39. The claimant’s then line manager was abrupt and abrasive and swore at the claimant and others in the course of her employment. Her line manager
25 criticised the claimant when the claimant had tried to support an individual in his employment, an individual that the claimant had assisted for some months. The claimant was told that if she was not happy, she should get another job.

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Claimant seeks a confidential meeting – February 2017

40. In February 2017 the claimant was unhappy with how she had been treated by her line manager. She was also concerned about the alleged incorrect recruitment processes.

5 41. On 23 February 2017 the claimant emailed Mr Gill seeking an “informal confidential chat”. Various emails pass between the claimant and Mr Gill to identify a suitable time. The claimant does not set out the purpose of her meeting request with Mr Gill. Dates that were fixed required to be changed due to work pressures. The claimant advised Mr Gill on 3 March 2017 that “it
10 is urgent but I prefer to speak to you”. On 6 March 2017 the claimant suggests 13 March at 9am. Mr Gill responds on 6 March saying

42. “Pencil it in – I don’t want to have to cancel out yet again so give me a day or so until I know what the demands might be on my time at the start of next
15 week and then I’ll confirm. Have you any alternatives, if Monday doesn’t work....”

43. The claimant does not reply to that email and attends at the agreed time. Mr Gill does not attend. At 923am on 13 March 2017 the claimant emails Mr Gill
20 stating “I assume you aren’t coming to Templeton this morning?”.

44. The claimant then receives Mr Gill’s out of office and she sends another email on 13 March 2017 at 1034:

25 45. “I have received your out of office this morning regarding the meeting I initially requested on 23 February 2017. There is no need to reschedule this meeting as its clear you have other priorities.”

46. Mr Gill does not respond to either email.

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47. The claimant decided not to pursue her concerns and continued to attend work.

March 2017 issues re Yoker office

48. During March 2017 the claimant is asked to cover the Yoker office due to staff absence. The claimant agreed.

5 49. The claimant had worked at the Yoker office before and on occasion when the claimant attended around 9am she required to await the opening of the office (by standing in a local supermarket). The claimant did not have a key and the other key holders were often late in opening the office.

10 50. The claimant had raised concerns with her line manager about the working environment at that office. The claimant did not get on with some of the other staff who worked in that office and she had alerted her line manager to this. She had concerns about the office. For example, other staff would smoke at the entrance to the office and often leave the door open.

15 51. On 16 March 2017 the Claimant sent her line manager an email referring to the aggressive approach of one of her colleagues who was based in the Yoker office.

20 52. The claimant was feeling isolated. She had raised ideas at team meetings which were not supported. She was feeling ignored. The team meetings would often involve raised voices and heated arguments.

April 2017 issues

25 53. On 6 April 2017, when the claimant was working in the Yoker office, an individual entered the office in which the claimant was working, shouted at the claimant and threatened her with violence. The claimant was the only member of staff in that office but staff arrived from the office next door, from where the individual had come, and removed the individual from the respondent's premises.

30 54. The claimant called her line manager and advised that she felt uncomfortable in the Yoker office and would put in annual leave rather than work in that environment.

11 April 2017 grievance

55. On 11 April 2017 the claimant sent her line manager an email headed “grievance”. That email fills 1.5 A4 pages. The email referred to the “conversation yesterday”. The claimant said:

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56. “I am concerned that I am putting myself in a very vulnerable position for further false accusations. I don’t feel the incident which happened in Yoker last Thursday has been properly addressed and it’s my concern that there is an agenda being facilitated against me. I have attached my annual leave form as I don’t feel comfortable attending Yoker on 9 April”

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57. The letter then narrates 10 bullet points that outline the claimant’s concerns, including Sharn (a colleague of the claimant’s who worked at the Yoker office) allegedly having a passive aggressive attitude to the claimant, the verbal assault and threats suffered by the claimant and other issues in connection with the claimant’s colleagues behaviour towards her. The email ended by asking for a full investigation to take place and that the client who threatened the claimant be removed from the service.

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58. The client was not removed from the service. A full investigation did not take place.

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59. The respondent did not reply to the grievance lodged by the claimant.

60. Due to personal issues within the claimant’s life at this time she did not chase the respondent for a response.

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April 2017 team meeting

61. On 22 April 2017 a team meeting took place at which the following were present – the claimant, Linda Fisher, Sharn Boyle, Sharon Coyle and Michelle O’Neill. The claimant had been advised that there had been complaints made about her and the meeting would discuss these. No minute was kept of the meeting. A number of the claimant’s colleagues criticised the claimant openly suggesting she was not good at her job. The meeting was not constructive. A

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colleague of the claimant said she felt uncomfortable about how the meeting was conducted.

July 2017 issues

5 62. On 20 July 2017 the claimant had a discussion with her line manager and followed this up with an email. The email was headed "Yoker Incident" and stated that the claimant wanted to "put in writing [her] concerns regarding he unacceptable and unprofessional behaviour of [her] 2 colleagues." The claimant referred again to the incident in the Yoker office and states that there were discussions taking place about the claimant in a detrimental fashion. The
10 claimant stated that she had "no intention of revisiting this incident" but she wanted her concerns "documented for future reference as [she] wholeheartedly believe that there is an agenda". The claimant's line manager did not reply to that email.

15 63. The claimant continued to raise concerns with her line manager about her colleagues and their treatment of the claimant.

64. The claimant was given monthly performance review meetings. She did not raise her grievance at the July performance meeting but did raise a concern
20 in an email in July.

September 2017 onwards

65. During September 2017 the claimant received a call from her line manager advising that a complaint had been made about the claimant by a colleague alleging that the claimant had "bad mouthed" the colleague to a third party.
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66. A meeting took place on 17 October 2017 at which the following were present: Sharon Boyle, Sharn Coyle, the claimant, Linda Fisher. The claimant denied that she had made any comment about her colleagues. The claimant sought to discuss the issues that had arisen before but Linda Fisher had refused to
30 allow a discussion to take place in relation to that matter. No minute was kept of this meeting.

67. Another team meeting took place on 18 October 2017 at which the following were present – the claimant, Janet Quinn, Michelle O’Neill, Maureen McBain, Sharon Coyle, Linda Fisher and Claire Brady. Linda opened the meeting by explaining that the purpose of the meeting was to discuss “team behaviours”.
5 Some present at the meeting began to refer to the claimant as a “liar”. Linda did not close down the critics of the claimant. The criticisms of the claimant were allowed to continue.
68. The claimant was very concerned about the behaviours shown at the meeting
10 and the failure to prevent the criticisms of her and the way in which the meeting was conducted.

27 October 2017 grievance

69. On 27 October 2017 the claimant lodged a grievance. She had telephoned the Irish parent company and obtained the name of the relevant individual to whom her grievance should be directed. Given the failure to address her
15 previous letters she had no confidence the Glasgow recipients would deal with it properly. The email was headed “grievance” and fills almost 2 A4 pages.
- 20 70. The email begins that the claimant “after great deliberation” decided that she “had no other course of action but to lodge a formal grievance against Linda Fisher and Sharn Boyle.” She referred to “ongoing issues” and stated that the most recent incident and treatment over the last couple of weeks has been totally unacceptable.
- 25 71. The claimant outlines her concerns in relation to the treatment she suffered at the meeting of 17 October. She states that the behaviour of her colleagues was “tantamount to bullying and harassment”. The grievance also refers to the meeting on 18 October at which the claimant alleges she was subject to
30 “total humiliation” and complains that Linda Fisher did not close the criticism down.

72. The claimant stated that she had met the person to whom it was alleged the claimant had made comments about a colleague and the third party denied such comments were made.

5 73. The grievance ends by stating that she had tried to arrange an appointment with Mr Gill by rescheduling 3 appointments and that he failed to attend on the fourth. She also pointed out that there was no one within the Glasgow office to whom she could confidently complain and so the matter was raised with the Irish HR team.

10 74. The claimant chased up her grievance before heading off for surgery on 14 November 2017 but received no response.

9 January 2018 grievance meeting

15 75. The claimant was asked to attend a hearing on 30 November. This was the only day the claimant could not make due to a medical appointment and the meeting was convened for 9 January 2018 (although the claimant stated she was available all other times).

20 76. The claimant had understood she had raised a level 1 grievance and that a meeting ought to have been convened within 5 working days.

77. At the grievance meeting on 9 January 2018 was the claimant and her companion, Sairah Quereshi, Mr Black (Operations) and Ms May (HR). The
25 minute of the meeting that was produced had a number of inaccuracies within it, including the meeting date being 29 January (it was 9 January), claimant's companion being Jane (it was Sairah) and the comment that Linda took good (when it was Amanda Fitzpatrick).

30 78. At the meeting the claimant was asked what an "ideal outcome" to her grievance would be and she said that "she had intended to resign but likes her job and thinks she adds value... She stated that this was the best job she ever had but working for the worst organisation." The claimant also said at

the meeting that “she had only stayed so long because she wanted to benefit from sick leave for her recent operation”. She claimant said that she had asked Linda Fisher around a year ago if she could take extended sick leave but did not receive a response. The claimant then said that she did not feel valued.

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79. The claimant explained that she had been called to a meeting on 17 October “to answer allegations by Sharon Boyle” at which Sharon and Linda Fisher were present. The claimant alleged that she was called a liar at this meeting and that Linda prevented the claimant from responding to the criticisms. The claimant advised that her colleague continued to call the claimant a “lying individual” and Linda had made no attempt to close that down. The claimant stated that during that meeting she had been called a liar around a dozen times with no one stopping the discussion.

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15 80. The claimant explained that she had thought about resigning but as she liked her job she decided to raise the grievance on 27 October.

81. The claimant explained that the grievance was “essentially about Linda Fisher and the way she handled the meetings on 17 and 18 October”

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82. The claimant asked for a full investigation to be carried out with those present being asked what happened. The claimant was told that the matter would be fully investigated.

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83. The claimant handed over a statement from a former colleague at the meeting. This 2.5 page statement (which is unsigned) contained an email and mobile number and set out alleged issues in connection with the culture and environment at the respondent. The letter raised concerns about the recruitment practices and alleged “nasty vindictive” behaviour within the Yoker office. The statement commented positively upon the claimant but criticised the “toxic workplace” and atmosphere attitude and behaviours of colleague. The statement ended by suggesting the person dealing with the matter contact the author by phone or email.

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84. The claimant was told that the comments would be taken on board and that a full investigation would take place.

5 85. The claimant discovered during the early part of 2018 that none of her colleagues who had been present at the meeting had been spoken to by the respondent.

Events post grievance

10 86. The claimant had been absent from work from 14 November 2017 until 18 January 2018 (aside from attending the grievance meeting on 9 January 2018).

87. The claimant continued to work from 18 January 2018 up to the end of her employment.

Resignation

15 88. On 12 February 2018 the claimant wrote to the respondent resigning from her employment. She sent the letter to the parent company in Ireland stating that she had “no confidence it would be followed up by anyone within the senior management team in Glasgow. The letter stated the claimant was unhappy during the last 12 months and refers to the issues raised in her grievance lodged on 11 April 2017 and 27 October 2017. She states that “to date neither of which have been resolved to my knowledge even followed up.”

25 89. She lists “2 examples of unacceptable behaviours” which occurred within the last 3 months which were “key factors” leading to her resignation. She referred to the incident in the Yoker office where she was physically threatened. She said she reported her to her line manager and Linda Fisher and no action was taken. She also referred to being bullied and humiliated by another colleague at the team meeting which was not stopped by Linda fisher. The letter referred to alleged weak management and an unsafe working environment.

30 90. The claimant chose to resign for a number of reasons, including the time that the resolution of her grievance was taking. She believed that the policy

required it dealt with within 5 working days and yet no one had been asked about the issues (and by so doing the respondent had not properly investigated her grievance). She felt that she had been constantly ignored and that she was being undermined by her managers. She did not see that
5 changing. As Linda Fisher had been promoted to another role, there was nowhere within the organisation for the claimant to go.

91. The claimant had suffered stress and shingles and was struggling to sleep as a result of the delays and her perception of the treatment she received from
10 the respondent.

92. On 23 February 2018 Mr Gill responded to the claimant's resignation letter. He explained that he had been absent and that her grievance dated 27 October 2017 had been investigated fully and she should receive a formal
15 written response within the week. The email also stated that the claimant had withdrawn her request to meet with Mr Gill in March 2017 and so the meeting did not take place. He also noted that at the October 2017 grievance meeting no mention was made of any outstanding grievances. He also stated that the claimant had indicated that she did not intend to revisit the incident that took
20 place.

Outcome to grievance letter dated 23 February 2018

93. The outcome of the grievance meeting was confirmed in a letter dated 23 February 2018. The grievance was dismissed in its entirety.

25 94. The outcome letter states that Mr Black "considered the grievance in more detail and interviewed Linda Fisher". The letter states that on face value there have been issues between the claimant and certain members of the team. He noted that Linda rebuts the claimant's version of events. Mr Black stated he could find no evidence corroborate the claims made by the claimant (although
30 he had not spoken to other individuals). He also stated that had the claimant remained in employment, as the claimant's line manager had stated the claimant was "equally if not fully responsible for the breakdowns in working relationships" he would seek to resolve these issues.

95. The claimant had spoken with her line manager who denied stating that the claimant was equally if not fully responsible for the breakdown in working relationships.

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96. Mr Black did not undertake a full investigation in relation to the issues that arose in the claimant's grievance. A statement was obtained from the employee about whom the claimant complained (who was still working for the respondent). Mr Black did not speak to others who were present at the meeting in question (which would have given him corroboration about the issues in question).

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Appeal against outcome

97. On 26 February 2018 the claimant appealed against the outcome of the grievance. The letter runs to 1.5 A4 pages and raises a number of issues about the grievance outcome She referred to the statement she had produced from her colleague and the fact that the claimant had asked for a full investigation to take place whereby the other 4 people at the meeting could have been spoken to and instead the respondent accepted the position of the person about whom the claimant complained.

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98. The letter states that "despite assurances from Steve Black it is clear that absolutely no weight has been given to my concerns and there has been no investigation into the incident on 18 October where a staff member was allowed to bully and make continued disparaging comments about me in a team meeting chaired by Linda Fisher". She continued that "In my original grievance letter dated 27 October 2017 I provided all the names of all staff members who were in attendance at this meeting, however, I can confirm that I have spoken to 4 of these people and they have not been questioned in relation to the this incident and this response is clearly Linda Fishers version of events. I am alarmed by the length of time taken to reach the conclusion to uphold my grievance considering the fact that no actual investigation has been done and no staff members have been interviewed regarding my allegations."

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- 5 99. On 28 February 2018 the claimant sent to the appeal officer a statement from a former client supporting the claimant's position. In her email she also named colleagues who would be able to provide statements as to the team meeting on 18 October 2017. She also stated that she had spoken with her line manager who denied stating that the claimant was equally if not fully responsible for the breakdown in working relationships.
- 10 100. The claimant ended that email by stating that she was "becoming increasingly concerned that her complaint will be ignored."
- 15 101. An appeal meeting date was eventually found. A handwritten minute was taken of this meeting. The meeting took place (by conference call) on 23 March 2018 and was chaired by Mr Lawson, Regional Operating Officer UK.
- 20 102. The claimant asked for a full investigation to be taken in relation to the issues she had raised with those present at the relevant meeting being spoken to. Mr Lawson advised the claimant he would do so.
- 25 103. The appeal outcome letter is dated 9 April 2018 and runs to some 6 pages. The response notes that the "investigation" that took place involved the investigation manager obtaining a statement from the person against whom the claimant complained "with supporting evidence". No meetings took place with relevant witnesses. Mr Lawson does say that he interviewed Mr Black "at length and questioned him on the decisions he made in relation to the process of investigation, how he assessed the available evidence and the validity of the conclusions he reached from the evidence".
- 30 104. He said that "while there was the potential for further and more detailed investigation, an exhaustive approach would not necessarily be deemed as either proportionate in relation to the nature of the grievance or an effective use of limited resources". He concluded that there was no need to speak with anyone else.

105. In relation to the grievance taking almost 4 months to conclude, the letter notes that there was an extended period of absence and annual leave absences which had resulted in delay. The letter states that it was not unreasonable to accept the view of Linda Fisher rather than the claimant.

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106. The appeal was dismissed.

107. Mr Lawson concluded by stating that a review would take place as to the cultural issues that had been raised.

10 Earnings and other employment

108. The claimant earned £1608 net with the respondent. This yielded an annual salary of around £24,500. She had not joined the pension scheme. She worked 36.5 hours a week, ending at 3pm on a Friday. A week's pay was £471.

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109. She started her new job on 5 March 2018. She earned £25,000 a year working 9 to 5 but 37.5 hours a week, working a full day on a Friday.

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110. The claimant had gone for an interview for the new role before she knew of the outcome of the grievance meeting. She spoke to the new employer around Christmas 2017. The claimant was offered a role in January 2017 but declined to accept it. She was offered a role on 21 February 2018 which she accepted and commenced on 5 March 2018.

Observations on the evidence

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111. In this case only the Claimant gave evidence. She was cross examined in relation to relevant points. The Claimant gave her evidence in a credible and reliable way. The claimant was candid in her approach. In the absence of contrary evidence from the respondent, the majority of the evidence led by the claimant was accepted.

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112. The respondent did challenge a number of points raised by the claimant. One of the key areas of dispute was the reason for the claimant resigning. That

was a matter over which the respondent had no control. The respondent argued that the real reason for the claimant's resignation was because she had got another job. The claimant was candid in her response and accepted that this was part of her reason for resigning. I accepted the claimant's evidence that a reason for her resignation was because of how she felt the respondent had treated her, in terms of the delay with her grievance etc.

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113. The claimant had explained that when she had returned from holiday in January 2018 she had spoken to some of her colleagues who were at the meeting that she had complained about. These were the people that would have given the respondent the corroboration as to what actually happened. The claimant was told that the respondent had not spoken to these individuals. The claimant believed that this was another example of her position being ignored and she felt undermined. She was also fed up with the time that had taken and absent a response to her grievance (given the lengthy time that had passed) she decided to leave. She had lost all trust and confidence in her employer.

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114. I accepted the claimant's evidence that had her grievance been properly investigated and had the matter been progressed within a reasonable period of time, the claimant would have remained in employment. The claimant clearly enjoyed her role and she had flourished (at least in the Templeton office as her supervision notes show). The claimant did resign because of the treatment she received by the respondent.

25 **Relevant law**

115. In terms of the right to claim unfair dismissal, section 95 of the Employment Rights Act 1996 ("ERA") provides:

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“(1) For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2) only if... (c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct.”

116. Where the respondent denies dismissal, the claimant has the burden of proving dismissal within section 95(1)(c). In other words the claimant must bring evidence which shows the claimant was entitled to terminate her contract by reason of the employer's conduct.

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117. In accordance with **Western Excavating v Sharpe** 1978 IRLR 27 CA, it is not enough for the claimant to leave merely because the employer has acted unreasonably, rather a breach of contract must be established.

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118. In order to prove constructive dismissal four elements must be established:

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- (i) there must be an actual or anticipatory breach by the respondent;
- (ii) the breach must be fundamental, which is to say serious and going to the root of the contract;
- (iii) the claimant must resign in response to the breach and not for another reasons;
- (iv) the claimant must not affirm the contract of employment by delay or otherwise.

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119. Implied into all contracts of employment is the term identified in **Malik v BCCI** 1997 IRLR 462 HL: The employer shall not without reasonable and proper cause conduct itself in a manner calculated and likely to destroy or seriously damage the relationship of confidence and trust between employer and employee.

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120. Either as an incident of trust and confidence, or as a separate implied term, employers are under a duty to afford their employees a means of prompt redress with respect to their grievances; see *W A Goold (Pearmark) Limited v McConnell* 1995 IRLR 516 EAT, per Morrison J:

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"11. [...] It is clear therefore, that Parliament considered that good industrial relations requires employers to provide their employees with a method of dealing with grievances in a proper and timeous fashion. This is also

consistent, of course, with the codes of practice. That being so, the industrial tribunal was entitled, in our judgment, to conclude that there was an implied term in the contract of employment that the employers would reasonably and promptly afford a reasonable opportunity to their employees to obtain redress of any grievance they may have. It was in our judgment rightly conceded at the industrial tribunal that such could be a breach of contract.”

121. Whilst mere delay will not amount to affirmation, where the employee continues to perform their contract a point may be reached when that becomes persuasive evidence they have indeed affirmed the contract: see **W E Cox Toner (International) Limited v Crook** 1981 ICR 823 EAT.

122. Where the breach of contract relied upon is comprised of conduct over a period of time, if there affirmation in the middle of the same the question may arise as to whether the claimant has lost the right to rely upon the earlier behaviour. This point was addressed recently by the Court of Appeal **Kaur v Leeds Teaching Hospitals NHS Trust** 2018 EWCA Civ 978, per Underhill LJ.

123. Where the claimant resigns in part because of a repudiatory breach of contract, that will suffice, the breach need not be the only or the main cause for that decision; see **Wright v North Ayrshire Council** 2014 IRLR 4.

124. In terms of compensation, a successful claimant consequent upon a finding of unfair dismissal may be entitled to a basic award and a compensatory award. These are found in sections 119 and 123 of the Employment Rights Act 1996:

“119 Basic award

(1) Subject to the provisions of this section, sections 120 to 122 and section 126, the amount of the basic award shall be calculated by—
(a) determining the period, ending with the effective date of termination, during which the employee has been continuously employed,

(b) reckoning backwards from the end of that period the number of years of employment falling within that period, and

(c) allowing the appropriate amount for each of those years of employment

(2) In subsection (1)(c) 'the appropriate amount' means—

5 (a) one and a half weeks' pay for a year of employment in which the employee was not below the age of forty-one,

(b) one week's pay for a year of employment (not within paragraph (a)) in which he was not below the age of twenty-two, and

(c) half a week's pay for a year of employment not within paragraph (a) or (b).

10 (3) Where twenty years of employment have been reckoned under subsection (1), no account shall be taken under that subsection of any 30 year of employment earlier than those twenty years.”

123 Compensatory award:

15 “the amount of the compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer.”

20 125. Section 207A of the Trade Union & Labour Relations (Consolidation) Act 1992 Employment Act gives the Tribunal a discretion, if it considers it just and equitable, to increase any award to an employee by up to 25% if it appears to the tribunal that the employer has unreasonably failed to comply with the ACAS Code.

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126. The ACAS Code of Practice on Disciplinary and Grievance Procedures states the following:

30 “33 Employers should arrange for a formal meeting to be held without unreasonable delay after a grievance is received.

34 Employers, employees and their companions should make every effort to attend the meeting. Employees should be allowed to explain their grievance and how they think it should be resolved. Consideration

should be given to adjourning the meeting for any investigation that may be necessary.

40 Following the meeting decide on what action, if any, to take. Decisions should be communicated to the employee, in writing, without
5 unreasonable delay and, where appropriate, should set out what action the employer intends to take to resolve the grievance. The employee should be informed that they can appeal if they are not content with the action taken.”

10 127. The Employment Protection (Recoupment of Jobseekers Allowance and Income Support) Regulations 1996 apply where a claimant is in receipt of certain benefits. This is not applicable in this case as the claimant was not in receipt of any benefits.

Submissions

15 **Respondent’s submissions**

128. Mr Grant had agreed to begin the submissions to ensure the claimant understood the respondent’s position (and he was given the opportunity to respond to the points raised by the claimant).

20 129. Mr Grant noted that the onus is on the claimant to establish that there was a breach of contract and that this was of sufficient importance to entitle the claimant to resign. He noted that it was clear that the claimant felt very strongly about her former employer. He submitted that the essence of her complaint related to 2 days in October 2017. The claimant had alleged she lodged a
25 grievance in February 2017 and that this was not dealt with but the email exchange showed this was a confidential chat and due to oversight the matter was not progressed. There is no evidence that the respondent knew what the claimant wanted to discuss.

30 130. The next incident was a purported grievance in April 2017. While the email is headed “grievance” it is not clear that the claimant wished a grievance hearing. The claimant in any event did not take any steps to progress it and

she was happy not to do so. She simply got on with her work and decided not to pursue it.

5 131. Mr Grant said that this left the October 2017 grievance which he submitted was dealt with fully and appropriately. The grievance procedure is contractual but there was no breach of contract.

10 132. He noted that “normally” a meeting would take place within 10 days with a decision as soon as possible, normally in writing within 10 days unless there are exceptional circumstances or mutual agreement.

15 133. The grievance was dated 27 October 2017 with the meeting arranged on 9 January 2018, outwith the 10 day but the policy does say “normally” 10 days. Mr Grant suggested that the claimant’s main concern was not the time fixing a meeting but the time achieving an outcome.

20 134. Following the 9 January meeting, the outcome letter was dated 23 February. Again this was outwith the 10 days but Mr Grant submitted that the claimant had accepted the extended timescale. Nowhere prior to her resignation does the claimant raise any concern and by implication Mr Grant says the claimant accepted the delay. There was implied agreement by her actions.

25 135. Even absent agreement, there may well have been exceptional circumstances: The claimant was wanting a full investigation.

30 136. Mr Grant submitted that even if there was a breach of contract, the breach was not sufficiently fundamental to entitle the claimant to resign. At no point in the claimant’s evidence, said Mr Grant, did the claimant say she was prejudiced because of the delay. The matter was being dealt with and the claimant was absent from work in any event. While there may have been anxiety, the claimant did not flag this up or chase it.

137. By the time the claimant had resigned it was clear that she had decided to look for another job. The respondent did not wish her to leave. The claimant

did not resign in response to the failure to uphold the grievance since her resignation predated the outcome letter.

- 5 138. The claimant did not incur any losses as a result of her resignation since she started a new job immediately (at a higher rate of pay).
139. At all stages Mr Grant submitted the respondent undertook a fair process. Mr Grant was unsure as to what the claimant's concerns were.
- 10 140. I suggested that her main concerns, as identified at the outset of the hearing, and developed in her evidence, was the way in which her concerns had been dealt with together with the behaviour to which she said she had been subjected as set out in her grievance letter. The claimant had produced a statement at the grievance hearing supporting her position in terms of her colleagues' behaviour and that she felt isolated. She believed the respondent
15 did not listen to her, value her and simply accepted the position set out by her manager. The claimant believed that the grievance procedure had not been followed fairly as a full investigation had not been carried out in her view as those present at the meetings about which she complained were not spoken to. Had the respondent done so, they would have understood that the claimant
20 was correct (and her line manager was not).
141. The claimant confirmed this was her position.
- 25 142. Mr Grant submitted that there was a meeting and that the issues around the Yoker incident were relatively minor, having occurred over a few days. At no stage did the claimant refuse to work there (albeit she did take a holiday to avoid attending).
- 30 143. Mr Grant's submission was that the accumulation of the issues was at most the incident in October and alleged flaws regarding the grievance and that taken together these did not justify her resignation.
144. Mr Grant also submitted that the claimant had resigned when she did because she wanted to be paid sick pay. There had been discussions with a new

employer and the position on offer appeared to change which was the reason for her resignation.

5 145. The claimant had failed to clearly set out what the breach of contract was and in any event there was no breach, or any breach of sufficient importance to entitle the claimant to claim constructive dismissal. The respondent dealt with the grievances in good faith and in the best way it could

10 146. Mr Grant referred to **Kaur v Leeds Teaching Hospital** 2018 EWCA Civ 978. His submission was initially that the reason for the resignation was only the October issue but even if it were the January grievance and October hearing and alleged behaviours, his position in relation to the 5 points in Kaur (at para 55) was:

- 15 (i) The most recent act causing the resignation was the alleged failure to deal with the grievance (in terms of the alleged failure to investigate and time it took)
- (ii) The respondent accepts that the claimant did not affirm the contract since that date
- 20 (iii) There was no repudiatory breach individually or cumulatively – The October incidents were addressed and even if there was a breach of the policy the claimant suffered no prejudice,
- (iv) There was no course of conduct which amounted to a breach
- (v) Finally the real reason for the claimant's resignation was that she
- 25 wanted to be paid sick pay

147. Mr Grant submitted in conclusion that there was no failures that justified the claimant resigning. He did not accept that there should be any uplift in any compensation due as his position was that the respondent did reasonably

30 comply with the ACAS Code of Practice.

148. Mr Grant concluded his submissions by noting that he was instructed to seek expenses. He did not have a note of the sums claimed. I confirmed I would

note the position and the respondent could determine its position once they had received my judgment.

Claimant's submissions

5 149. The claimant stated that she resigned because the meeting to hear her grievance was outwith the contractual period and the decision letter was considerably beyond the time period in the policy. She also argued her manager should not have been involved in the process as her grievance involved Mr Gill. The claimant explained that she felt she had been humiliated in front of her colleagues and a series of events caused her to resign.

10 150. She maintained that her first grievance on 11 April 2017 had not been addressed. She had been spoken to in a way that was inappropriate by her manager. The second grievance was not handled fairly. No adequate reasons were given for the failure to properly investigate her grievance. She had
15 repeated asked that those present at the meetings be spoken to but this had been ignored. The respondent accepted the word of her manager without checking whether she was correct in her assertions. The timescales for dealing with it was excessive and so unfair.

20 151. When the claimant returned from her holidays she explained that she had hoped the matter would have been dealt with and the respondent would have spoken to the relevant people. When she spoke with colleagues and learned that they had not been spoken to she felt that she could not stay in that role. The promotion of her line manager to another role meant the claimant had
25 nowhere else to go.

152. The claimant believed that all trust and confidence had been destroyed. Her mental health had been affected and she was really stressed.

30 153. The claimant stated that the issues affecting her were not just one off issues but ongoing issues. She could not stay working for the respondent in her view.

154. In response to the suggestion she resigned because of the sick pay position, she said that this was not the only reason for her resignation. She had returned from sick leave 3 weeks early and wanted to stay. She loved the role.

5 155. Finally the claimant submitted that the figures set out in the joint schedule of loss were accurate. A basic award had been assessed as £2,119.50 (4.5 x £471). A figure of £250 had been set out in respect of loss of statutory rights.

Discussion and decision

10 156. I shall deal with the issues that require to be determined in turn.

a) Breaches of the claimant's contract of employment

15 157. It was clear that the claimant relied upon the implied term of trust and confidence. The claimant relied upon the following in support of her claim that trust and confidence had been destroyed:

- the behaviour to which she said she had been subjected (as set out in her grievances) which was behaviour of (or the responsibility of) the respondent.
- 20 - she believed the respondent did not listen to her and she felt isolated (for example by preferring the evidence of her line manager, the person about whom she had complained, despite not investigating the issue).
- the claimant believed that the grievance procedure had not been followed fairly. She was not happy that a full investigation had not been carried out
25 in her view as those present at the meetings about which she complained were not spoken to. She was also unhappy with the time that had been taken to progress it and conclude her grievance.

30 158. The first communication to the claimant's line manager of her email of 23 February 2017 did not set out the concerns the claimant had. However, the claimant did indicate that she wished an "informal confidential chat". That was not a grievance as such but it was a clear indicator that the claimant had

concerns. No steps were taken to follow up her email of 13 March 2017 commenting on the lack of attendance (or apologise for the failure to attend the meeting which the claimant attended). There is no question that the failure to follow this up resulted in the claimant feeling disengaged and unsupported.

5

159. The 11 April 2017 email was clearly a grievance. The email heading says “grievance” and the 10 bullet points raise concerns about the claimant’s employment. She also refers to the respondent’s alleged failure to fulfil their duty of care to the claimant. That email was not followed up at all by the respondent. They appear to have ignored it.

10

160. Even although the claimant decided not to pursue her concerns further (for example by chasing the respondent for a response), the respondent was clearly under notice that the claimant was unhappy with how she felt she had been treated and she had sought the respondent’s assistance, which was not forthcoming.

15

161. Given the failure to respond to the claimant’s email in relation to the meeting with Mr Gill in February 2017 it is not surprising that the claimant decided not to pursue the matter.

20

162. Nevertheless the claimant did not resign at this stage and she remained in employment.

163. The grievance she raised in her email of 27 October 2017 was not handled well. The claimant’s contract (and the ACAS Code) requires her grievance to have been dealt with promptly. A meeting ought to have taken place within 10 working days unless there was good reason not to do so. The grievance was dated 27 October 2017 and yet a meeting was not convened until 9 January 2018. There was no good reason to have delayed the convening of this meeting, particularly given the effect matters were having upon the claimant. There was no suggestion that the claimant was wishing the matter delayed – on the contrary, she had sought a resolution and was prepared to meet sooner.

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164. No evidence was led by the respondent to justify the timings of the grievance or the large delays in convening a meeting or in issuing a decision.

5 165. While the claimant was absent from work, it was clear that the claimant wanted these matters dealt with promptly. The claimant is entitled to expect that her grievance would be progressed expeditiously. The claimant's health had been affected by the delays and issues she encountered at work. She had offered to meet sooner and was clearly keen to have the matter progressed.
10

166. The meeting took place on 9 January 2018. The claimant was told that a full investigation would take place. The claimant alleged that she was treated badly at a meeting in October 2017. The claimant asked that those present at
15 the meeting be spoken to. Mr Black instead considered a statement provided by the claimant's line manager (who was the person about whom the claimant complained). It is not surprising Mr Black found no corroborating evidence since he did not speak to those who could have provided such evidence. The information provided by the claimant at the meeting appeared to support her
20 position. The investigation undertaken by the respondent was inadequate and failed to appreciate the impact this had upon the claimant. This is particularly so given the evidence the claimant had provided in support of her position, which included a statement from a former employee which appeared to corroborate what the claimant had said.

25 167. The failure to convene the meeting within a reasonable time and the failure to issue a decision within a reasonable time amounts to a breach of contract – a breach of the express term of the claimant's contract of employment but also a breach of the implied term of trust and confidence.

30 168. I am satisfied that there was a course of conduct that amounted to a breach of the implied term of trust and confidence. The respondent's failure to fully engage with the claimant and to properly progress her grievance fairly and reasonably amounted to a breach of the claimant's contract of employment.

169. At para 44 in **Kaur** (above) the court said:

5 “It is obvious why the position as stated in **Omilaju** is right in principle. In cases of this kind the repudiatory nature of the employer’s conduct consists precisely in the accumulation of a series of acts or omissions which are not repudiatory if viewed in isolation. It would be extraordinary if, by failing to object at the first moment that the conduct reached the Malik threshold, the employee lost the right ever to rely on that conduct.”

10

170. This principle is relevant in this case since the earlier acts of the employer (the failure to follow up the claimant’s wish to meet to discuss “urgent confidential matters”, the failure to reply to the email when the claimant attended the meeting and no one from the respondent attended, the failure to progress the April grievance and the behaviour to which the claimant was subjected during her employment, which formed the basis of her grievances), all contributed to the claimant’s belief that trust and confidence within the employment relationship had been destroyed. Nevertheless she did not resign at that stage. Instead she continued to work. She is, however, entitled to rely upon these issues when she is faced with further breaches of her contract, particularly the failure to properly progress her October grievance in arguing that the trust and confidence within her employment contract had been destroyed.

15

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171. In my view the issues around the October grievance by themselves are sufficient to amount to a breach of the claimant’s contract. The failure is a breach of the express terms of the contract (with regard to timing of the meeting and outcome) but also a breach of the implied term of trust and confidence (including the implied term to progress grievances within a reasonable period of time).

30

172. I am satisfied, in any event, that the cumulative effect of the respondent’s actions as set out above amount to a breach of the implied term of trust and confidence within the claimant’s contract of employment.

173. I do not accept the claimant's argument that Mr Gill's involvement in the process amounted to a breach of contract. I am not satisfied that this was in fact the case. Mr Gill was not involved in determining the grievance or appeal and took no material role in these proceedings.

b) Were these breaches by themselves or cumulatively sufficient to entitle the claimant to resign her employment?

174. The claimant had raised serious concerns about her working environment and how she felt she was being treated. The respondent did not fully investigate these concerns. The respondent had been given evidence by the claimant (and from third parties) to support what the claimant had said had happened. The respondent did not properly engage with these issues and instead assumed what the claimant's line manager had said (one of the persons about whom the claimant had complained) was correct. No explanation was given as to why the evidence presented by the claimant (by herself and by a third party) was rejected.

175. These breaches of the claimant's contract went to the root of the employment relationship. The claimant felt that she had been undermined and ignored. She felt that her line manager's word was being preferred to hers and that she was not being listened to. Those concerns were entirely justified on the facts I have found and the facts entitled the claimant to conclude that the trust and confidence had been destroyed.

176. The October grievance issues by themselves in my view would amount to a significant breach taken in context. In any event the cumulative effect would be sufficient to amount to a repudiatory breach that entitles the claimant to resign.

177. Given the claimant resigned before the outcome of the grievance had been communicated to her, the content of that letter cannot be used to assess

whether or not the conduct the claimant faced entitled her to resign. I have instead considered the facts facing the claimant at the time she resigned.

c) Did the claimant unreasonably delay in resigning her employment?

5 178. The claimant resigned when she concluded that the respondent had failed to properly progress her grievance and when she concluded that her complaints had not been properly investigated. In fact she resigned before the outcome of the grievance was communicated to her, precisely because she believed that she had waited long enough. The claimant did not unreasonably delay in resigning.

10 **d) Did the claimant resign because of the breaches?**

179. The claimant resigned because of the treatment she had received by the respondent. The fact that she had another job to go to, and may well have resigned in part because of this, does not alter the fact that she resigned because of the fundamental breaches of her employment contract. That was the position in **Wright** (above). The fundamental breaches of the claimant's contract caused the claimant to resign.

180. I am therefore satisfied that the claimant resigned in circumstances that she was entitled to resign as a result of the respondent's conduct. There is no suggestion that such a dismissal was fair. She was therefore unfairly constructively dismissed.

e) What compensation, if any, would be due in the event of a successful claim?

181. The claimant is entitled to a basic award. This is calculated as follows: 4.5 (3 complete year's service x 1.5 (as the claimant was 47)) x £471 (a week's pay) which amounts to £2,119.50. This was agreed between the parties.

182. With regard to a compensatory award, the claimant suffered no wage loss since she found another job immediately at a better rate of pay. Nevertheless a sum in respect of the loss of statutory rights is appropriate. The claimant will

require to work for her new employer for 2 years before she acquires the right to claim unfair dismissal etc. In this regard I award the sum of £300 as a reasonable sum to reflect this head of loss.

5 183. Finally I have concluded that the respondent's failure to deal with the claimant's grievance within a reasonable time amounted to an unreasonable failure to comply with the ACAS Code of Practice. The time taken to fix a meeting and the time taken to reach a decision was in my view unreasonable in all the circumstances as set out above. No explanation has been tendered
10 to justify the failures in this regard. In all the circumstances, it is fair to uplift the award by 10%.

184. The total sum awarded to the claimant is £2,119.50 + £300 which is £2,419.50 plus 10% (£241.95) which is £2661.45.

15 185. I thank the parties for their professionalism in their conduct of this case and the way in which they cooperated to achieve the overriding objective of dealing justly with the issues that arose.

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25 **Employment Judge: David Hoey**
Date of Judgment: 01 February 2019
Entered in register: 04 February 2019
and copied to parties