Case Number: 2303977/2018

THE EMPLOYMENT TRIBUNAL

SITTING AT: **LONDON SOUTH (Croydon)**

BEFORE: **EMPLOYMENT JUDGE HARRINGTON**

BETWEEN:

Miss R A Davess **Claimant**

and

Edwards & Ward Limited **Respondent**

ON: **25 April 2019**

APPEARANCES:

For the Claimant: **In person**

For the Respondent: **Mr T Welch, Counsel**

JUDGMENT

The Claimant's claim of unfair dismissal is not well founded and is dismissed.

REASONS

Introduction

1 By an ET1 received by the Tribunal on 2 November 2018 the Claimant, Miss Davess, brings a claim of unfair constructive dismissal against the Respondent, Edwards & Ward Limited. The Claimant was employed by the Respondent as a general assistant from 16 May 2016 until 8 October 2018, when she resigned. The Respondent denies the claim in its entirety.

2 At the start of the hearing I was provided with the following:

2.1 A bundle of documents produced by the Respondent, paginated 1 - 90 [page numbers from this bundle are referenced in square brackets throughout this judgment];

2.2 Written submissions and a chronology from the Respondent;

2.3 A selection of documents, including some photographs, from the Claimant (unpaginated);

2.4 A bundle of documents produced by the Claimant to the Respondent and paginated by the Respondent 1 - 75;

2.4 Witness statements from the Claimant, Natalie Howard-Carr, Paula Berryman, Sharon Scholfield and Emma Watkins.

3 Following the afternoon break on the day of the hearing, the Claimant produced some further documents that she wished to rely upon. Mr Welch was content to deal with the additional documents despite their late production. In particular the Claimant produced three Statements of Fitness for Work notes dated 21 February 2018, 10 May 2018 and 3 September 2018.

4 I heard oral evidence from the Claimant and in support of the Respondent's case from Ms Howard-Carr, Group Manager, Ms Berryman, Contract Manager, Ms Scholfield, Payroll and HR Manager, and Ms Watkins, Operations Manager.

5 The Claimant represented herself and the Respondent was represented by Mr Tim Welch of Counsel. Following my reading of the witness statements and core documents, the witnesses gave oral evidence and both parties made closing submissions. Judgment was reserved.

6 At the start of the hearing the Claimant told me that she had not received a copy of the bundle. After taking instructions, Mr Welch said that the bundle had been sent to the Claimant in a series of emails on 24 January

2019, with the first email timed at 14.14 hours. He also said that the Claimant had not complied with any of the case management directions and had not, at the time of compilation of the bundle, sent any documents for inclusion into the bundle. The Claimant had, at a later stage, produced various documents that the Respondent considered were irrelevant to any of the issues in the case. However the Respondent's solicitor paginated them into a supplemental bundle, providing a copy of that bundle to the Claimant.

7 The Claimant said that she did not remember getting the bundle by email. She confirmed that she had received a number of emails and that they had been sent to her 'junk' mail. She was unable to confirm if she had received the specific emails sending her the bundle for the hearing.

8 I suggested to the Claimant that I should consider adjourning the case because she had not seen the bundle before today. She told me repeatedly that she wished to continue with the hearing and that she was content to proceed with her case having had a look through the documents this morning. During the afternoon, following the production of additional documents by the Claimant and reference by her to further documents not produced, I again asked her whether she wished to proceed today. Again, she stated that she wanted the hearing to continue and did not want the case to be adjourned. In the circumstances, the case was heard in its entirety with judgment being reserved. I was satisfied that the Claimant had had an opportunity to engage with the Respondent prior to the hearing about the documentary evidence to be produced and that, prior to the oral evidence being heard, she had considered the Respondent's bundle which contained the most relevant documents and was a modest length of 90 pages.

9 At the start of the hearing, the issues to be determined were clarified with the parties. It was agreed that the issues for the Tribunal were as follows:

Unfair Dismissal

10 The Claimant brings a claim of alleged unfair constructive dismissal. The Claimant resigned her employment by an email dated 8 October 2018 [55]. The Claimant asserts that she was constructively dismissed and says that her contract of employment was breached in the following ways:

10.1 The accident on 6 December 2017 was not investigated or reported in an accident log book;

10.2 The Claimant was prevented from returning to work after the accident;

10.3 The Respondent failed to pay the Claimant sick pay for the period between 15 January 2018 and 24 September 2018;

10.4 The Respondent failed to investigate the Claimant's allegations of bullying at Anslem's School;

10.5 The Respondent refused to allow the Claimant to return to the Franciscan School.

11 Do the above alleged breaches, if made out on the facts, either individually or cumulatively amount to a repudiatory breach of contract?

12 If so, did the Claimant resign in response to the Respondent's repudiatory breach of contract?

13 Did the Claimant expressly or impliedly affirm the contract by actions or material delay indicating an intention to be bound by it subsequent to the breach such that she waived the breach and treated the contract as continuing?

14 If the Claimant was dismissed, what was the reason for dismissal and was the dismissal fair in all the circumstances?

15 If the Claimant is found to have been unfairly constructively dismissed, what compensation is she entitled to?

The Facts

16 The findings of fact are set out below. The standard of proof is on the balance of probabilities, namely what is more likely than not.

17 The Claimant began her employment with the Respondent as a General Assistant on 16 May 2016. The Claimant's role involved working 3 hours a day in an industrial kitchen. Ms Howard-Carr described the job as 'heavy duty' and I entirely accept that description and that the role was a physical one.

18 It was agreed by the parties that the Claimant had a written contract of employment which she signed on 27 May 2016 [23 - 29]. The following clauses of that contract are of particular relevance to this claim:

18.1 Clauses 1 and 2: The Claimant's place of work was stated as being the Franciscan Primary School. The workplace could be varied 'from one unit to another within a reasonable geographical area as required by the business needs' [23].

18.2 Clause 6: The Claimant's rate of pay was £421.20 per month for 16.25 hours of work;

18.3 Clause 11: The Claimant's entitlement to statutory sick pay was dependant on her earnings and length of service [24].

19 The Claimant worked in the kitchen at the Franciscan Primary School for around 3.5 hours per day. She worked with colleagues Maxine Scott and Julie Scott.

20 On 6 December 2017 there was an accident at the School which caused injury to the Claimant including an electrical burn to her left hand. A vacuum cleaner had been plugged into an electric socket in the kitchen and the Claimant received an electric shock. The vacuum cleaner was not equipment which had been issued by the Respondent but rather had been brought into the kitchen by Julie Scott. Whilst an examination by an electrician after the accident confirmed that there was no demonstrable issues with the plug socket, the vacuum cleaner does not appear to have been PAT tested.

21 After the accident, the Claimant left the School with her two colleagues. I accept Ms Howard-Carr's evidence that she was contacted that afternoon by Maxine Scott to be told about the accident. I found Ms Howard-Carr's evidence on this point clear and straightforward. She was also robust on this point even when challenged by the Claimant. Later that day, at approximately 6 – 6.30pm, Ms Howard-Carr was also telephoned by the Claimant's cousin to be told that the Claimant had experienced some symptoms including dizziness, headaches and a lack of sensation in her hand after the accident and that an ambulance had been called.

22 Later that evening, the Claimant herself called Ms Howard-Carr to tell her about the medical treatment she had received. The Claimant said she would attend work the following day and it was agreed that they would meet then.

23 The accident was noted in the accident log book [77]. I accept the Claimant's evidence that this was done on the day after the accident when Ms Howard-Carr visited the school. On that day witness statements were also taken [78 - 88]. Ms Howard-Carr was unable to determine how the accident had occurred but was reassured that the electrical socket was not faulty. By her time of arriving at the kitchen on 7 December 2018, the vacuum cleaner had already been disposed of.

24 On 7 December 2017 the Claimant began a period of sick leave. On 9 January 2018 the Claimant obtained a Statement of Fitness for Work from her GP which recommended a return to work on light duties because of the burn to her left hand and reduced sensation and weakness in that hand [31b].

25 On 11 January 2018 the Claimant had a return to work interview with Natalie Howard-Carr, her line manager [31c-d]. It is agreed by the

parties that the Claimant said she was suffering from headaches and dizziness at that time. As a matter of fact the Claimant worked on 11 and 12 January 2018. On 12 January 2018 the Respondent was advised by its external health and safety consultant, Mr Joe Vella, that the kitchen environment was 'extremely dangerous' for the Claimant because of her symptoms of dizziness and lack of sensation [31]. On Monday 15 January 2018 Ms Howard-Carr told the Claimant that she would not be allowed to return to work until she was entirely fit to do so.

26 As referred to above, the Claimant produced some additional Statements of Fitness for Work during the afternoon session of the hearing. I do not accept that these notes were provided to the Respondent at the relevant time. One of the notes was dated 21 February 2018. That note recorded that the Claimant had a hand injury and headache (improving) secondary to electrocution. It was suggested that the Claimant be allowed to take breaks. The second note dated 10 May 2018 recorded that the Claimant was unfit to attend a grievance hearing for a period of 28 days because of anxiety and post traumatic stress disorder. The final note dated 3 September 2018 referred to a phased return to work due to symptoms of anxiety and post traumatic stress disorder. I heard evidence from the Respondent's witnesses confirming that they had not seen these notes at the time. In particular, I accept Ms Scholfield's evidence that she had not seen these notes and they had not been provided to her by the Claimant. Within the additional paginated bundle of the Claimant's documents at pages 19 and 22, I note that there are letters sent to the Claimant, dated 15 March 2018 and 4 April 2018, about her absence. I accept Ms Scholfield's evidence that the produced of these letters was triggered by a lack of updates or notification from the Claimant as to her sickness absence.

27 On 5 April 2018 the Claimant brought a grievance complaining about her lack of pay and that she wanted to return to work [31A]. At this stage the Claimant was understandably frustrated that she was unable to go back to work because of problems with her health arising after the accident at work, which had not been her fault. She was not permitted to go back on light duties, she was not entitled to SSP and was not entitled to claim certain benefits because she remained employed.

28 On 25 May 2018 a grievance meeting was held [32 - 37]. On 2 July 2018 an outcome letter was sent to the Claimant [39]. That letter explained to the Claimant that she was not entitled to statutory sick pay because she had not worked enough hours to qualify for it. The letter also set out that her colleagues at the Franciscan School had received appropriate disciplinary warnings about the accident and that she would be referred for an occupational health assessment to determine if she was fit to return to work .

29 The Claimant appealed the grievance outcome on 9 July 2018 [40A]. An appeal meeting took place on 14 August 2018 [42 - 46]. The Claimant

attended the meeting with Stephen Charley, a senior employment specialist. At the meeting the Claimant said that her dizziness had gone but that she did not want to return to work at the Franciscan Primary School ('*I don't want to go back to Franciscan'*) [45]. I accept that is what the Claimant said, it is recorded in the notes of the hearing and the Claimant confirmed to me in her oral evidence that she had told the Respondent that she did not want to go back to the Franciscan School because in her opinion nothing was being dealt with and she wanted a fresh start.

30 For the avoidance of doubt, I do not accept that the Claimant was told in this meeting that she could not return back to Franciscan School. During the hearing the Claimant said that she was told she could not go back to the School because her position had been filled. It appears that this allegation was first made by the Claimant during the hearing – it did not, for example, appear within her witness statement. Later during the hearing, the Claimant also alleged that in December 2017 '*someone from the company'* had told her in an email that her position at Franciscan *'had been filled'*. Again, and for the avoidance of doubt, I do not accept this evidence. This allegation also did not appear in the Claimant's witness statement, I have not been shown the alleged email to which the Claimant referred, the Respondent denies that such an email was sent. Furthermore, the sending of such an email is entirely inconsistent with the evidence as to what was said in the grievance appeal meeting on 14 August 2018. If the Claimant had already been notified very shortly after the accident that her position had been taken by another, there would have been no discussion about the possibility of her returning to that kitchen. The allegation about a December email is also entirely inconsistent with the agreed facts that the Claimant met with Ms Howard-Carr on 11 January 2018 at the Franciscan School to discuss her return to work and the Claimant's account, which I have accepted, that she actually worked at the School on 11 and 12 January 2018. That would not have happened if there was no job for the Claimant. I also consider it highly likely that if her job had been taken by someone else, this would have been an issue the Claimant would have complained about at the grievance meetings in May and August 2018.

31 At the meeting on 14 August 2018, it was agreed that the Respondent would find a new school for the Claimant and that she could start at that new school once she had a statement of fitness for work.

32 On 16 August 2018 the Respondent sent the Claimant an appeal outcome letter. This again stated that the Claimant was not entitled to SSP but set a return date for the Claimant to go back to work [47-48]. On 12 September 2018 the Claimant attended an occupational health assessment [49 - 52].

33 On 24 September 2018 the Claimant returned to work. At or around this time she had a further return to work meeting with Ms Howard-Carr. She

attended Anslem's School in Tooting. Anslem's School is smaller than the Franciscan Primary School with a smaller kitchen run by three members of staff. The Claimant worked at the school from 24 - 27 September.

34 During this time the Claimant was in contact with Ms Howard-Carr. The Claimant did not like her new workplace. In an email on 26 September 2018 she referred to 'being made a slave in that kitchen' [53] and that she wanted to return back to Franciscan. On 27 September 2018 at 07.53 hours, Ms Howard-Carr responded that she had been placed in a school with low meal numbers and 'that is calm, organised and close to your home' [53]. In a reply from the Claimant, she referred to her colleague being 'rude to people' [53].

35 In the event, the Claimant only worked at Anslem's School for three days. On 8 October 2018 the Claimant emailed the Respondent saying that she was leaving the company. She said that the new kitchen caused her stress and anxiety. The Claimant also referred to bringing a tribunal claim [55].

36 On 9 October 2018 the Respondent replied to the Claimant's email. They sought to engage with her as to the difficulties she was experiencing [56] and to arrange a grievance meeting to consider the Claimant's complaints about the working environment in the kitchen at Anslem's School. A meeting planned for 1 November 2018 was postponed at the Claimant's request due to illness [65].

37 On 2 November 2018 the Claimant presented her claim to the employment tribunal.

38 The rearranged grievance meeting planned for 16 November 2018 was postponed again at the Claimant's request. On 3 December 2018 a grievance meeting was held, at the Claimant's request, in her absence [68-69]. Other than her complaints of bullying made to Ms Howard-Carr, the Claimant provided no additional evidence to be taken into consideration at the hearing. Ms Watkins considered the Claimant's complaints about the working environment at Anslem's School and the requested transfer back to Franciscan School (see witness statement Ms Watkins, paragraphs 7 and 8). The Claimant's colleagues had flatly denied her allegations about the Claimant's new working environment. It was also noted that the Claimant had requested a move from Franciscan School and therefore a replacement employee had been put into that kitchen.

39 On 14 December 2018 an outcome letter was sent to the Claimant [72 - 74]. The Claimant's grievance was not upheld.

Closing Submissions

40 Mr Welch submitted that the Claimant had the burden of proving a repudiatory breach of the contract of employment. He referred to the cases of Tullett Prebon PLC & Ors v BGC Brokers LP & Ors [2011] EWCA Civ 131 and Malik v Bank of Credit Commerce International SA [1997] IRLR 462.

41 In addressing the five alleged breaches, he referenced his written submissions and contended that whether individually or cumulatively, there was no repudiatory breach of contract in this case. In the alternative, Mr Welch submitted that because the Claimant had returned to work at Anslem's School following her sickness absence, the act of returning would have affirmed the earlier alleged breaches. With regards to the last two allegations (the failure to investigate allegations of bullying at Anslem's School and the failure to allow the Claimant to return to Franciscan School), the Respondent submitted that the contract had not been breached. The Respondent had set up repeated grievance meetings to enable the Claimant to attend to give details of her complaints. She did not attend but asked for the meeting to go ahead in her absence. She provided no additional evidence in support of her allegations for the Respondent's consideration. Ms Howard-Carr spoke to the other employees at Anslem's School and reported back what she had been told to Ms Watkins. This approach was said to be reasonable and appropriate in the circumstances. With regards to the return of the Claimant to Franciscan School, there was no refusal by the Respondent to allow the Claimant back after the accident. Her move to Anslem's School was triggered by her express request to be moved away from Franciscan School. Mr Welch submitted that it was not reasonable for the Respondent to keep the vacancy open when the Claimant had asked to be moved. The Respondent had filled the vacancy and it was not a breach of contract to fail to organise a return. There was evidence that the Respondent had tried to assist with a return to the School but the School were content with the Claimant's replacement [63A]. Again, in the circumstances the Respondent's approach to this issue was not a fundamental breach of a term of the Claimant's contract of employment.

42 The Claimant did not wish to make any additional closing submissions other than to refer me to an email from her employment adviser, Mr Charley (see page 53 of Claimant's documents).

Legal Summary

43 Section 95(1)(c) of the Employment Rights Act 1996 states that there is a dismissal when the employee terminates the contract of employment in circumstances such that he is entitled to terminate it without notice by reason of the employer's conduct. This type of dismissal is referred to as 'constructive dismissal'.

44 In order to claim constructive dismissal, the employee must establish that:

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

ii. the employer's breach of contract caused the employee to resign;

iii. the employee did not delay too long before resigning, thus affirming the contract and losing the right to claim constructive dismissal.

45 In the case of Western Excavating (ECC) Ltd v Sharp 1978 ICR 221, CA the Court of Appeal ruled that for an employer's conduct to give rise to a constructive dismissal, it must involve a repudiatory breach of contract.

46 The issue of what amounts to a repudiatory breach of contract was discussed in the case of Tullett Prebon PLC & Ors v BGC Brokers LP & Ors [2011] EWCA Civ 131. It was described that the contract breaker has clearly shown an intention to abandon and altogether refuse to perform the contract.

47 Contractual terms may be either express or implied. Express terms are those specifically agreed between the parties either in writing or orally. Often an employee will seek to rely upon on an alleged breach of the implied term of trust and confidence.

48 In the case of Malik v Bank of Credit Commerce International SA [1997] IRLR 462 it was stated that the parties to the contract must not without reasonable and proper cause conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust which should exist between employer and employee. A breach of the implied term of mutual trust and confidence is likely to be repudiatory.

49 A delay in resigning following a repudiatory breach may indicate that the claimant has affirmed the contract. However an employee may continue to perform the employment contract under protest for a period without necessarily being taken to have affirmed the contract. Section 95(1)(c) of the ERA 1995 refers to a dismissal taking place where an employee resigns with or without notice. Accordingly the act of giving notice cannot by itself constitute affirmation.

50 In the recent case of Kaur v Leeds Teaching Hospitals NHS Trust [2018] EWCA Civ 978 Underhill LJ listed five questions which should be sufficient for a Tribunal to ask in most constructive dismissal cases:

50.1 What was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, his or her resignation?

50.2 Has he or she affirmed the contract since that act?

50.3 If not, was that act (or omission) by itself a repudiatory breach of contract?

50.4 If not, was it nevertheless a part (applying the approach explained in Omilaju) of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a (repudiatory) breach of the Malik term?

50.5 Did the employee resign in response (or partly in response) to that breach?

Tribunal's Conclusions

51 In reaching my conclusions, I have taken into account the entirety of the witness evidence I have heard, the documentary evidence to which I have been referred and the submissions made by both parties. I must consider whether there was a fundamental breach of the contract of employment by the Respondent. I shall consider each of the alleged breaches in turn:

Accident was not investigated or reported in an accident log book

52 The Claimant accepted in her evidence that the accident was reported in the log book the day after the accident. It is not the case, as originally asserted by the Claimant, that the accident was not reported. I am entirely satisfied that no breach of contract arises from the Respondent having reported the accident in the log-book the day after it occurred.

53 I also do not accept that the accident was not investigated. There is documentary evidence which establishes that the accident was in fact investigated the day after the accident. Oral evidence both from the Claimant and Ms Howard-Carr confirmed that witness statements were taken the day after the accident and those statements were produced in the bundle. I also accept Ms Howard-Carr's evidence that an electrician attended the site and examined the electrical socket. Ms Howard-Carr was unable to establish the specific cause of the accident but it was investigated. Following the Claimant's grievance hearing, further steps were taken to pursue disciplinary proceedings against the Claimant's colleagues from Franciscan School. The grievance outcome letter confirmed that a disciplinary process was followed against these individuals and that warnings had been issued to them. The Respondent therefore did take positive action on this matter.

54 During the hearing, the Claimant did not put any specific arguments about any perceived limitations to the investigation. Whilst I accept that comment could be made about the delay in pursuing a disciplinary process against the Claimant's colleagues at Franciscan School (as noted above, this was carried out apparently after it was raised by the

Claimant at her grievance hearing), I do not consider the Respondent's delay to progress this matter between the date of the accident and the grievance outcome amounted to a fundamental breach of the Claimant's contract of employment. The Claimant raised her concerns about the failure to pursue disciplinary matters against her colleagues and the Respondent responded to this complaint and set out the action it had taken in its grievance outcome letter. In the circumstances I do not consider that the Respondent fundamentally breached the Claimant's contract of employment and the implied term of mutual trust and confidence in the ways alleged. An initial investigation was carried out including witness statements being obtained and an expert, namely a trained electrician, being brought in to examine the relevant socket. Following a complaint raised by the Claimant, a further disciplinary process was pursued.

Claimant was prevented from returning to work between January and September 2018

55 The Claimant suggested during the hearing that she was told she could not return to work in December 2017. I do not accept that the Respondent ever said this to the Claimant. This particular complaint did not appear within the Claimant's statement and did not form part of the grievance raised by the Claimant in 2018. Further, the Respondent's witnesses denied that this instruction was ever issued to the Claimant. I also found the Claimant's evidence on this point contradictory to the agreed facts that she attended a return to work meeting in January 2018 with Ms Howard-Carr and that she actually worked for 2 days in January 2018 prior to the occupational health advice being received by the Respondent.

56 Following receipt of that occupational health advice, the Claimant was prevented from returning to work until she was deemed to be fully fit. It is agreed that after the accident the Claimant was not fully fit. She had ongoing medical issues which affected her ability to work. These were identified by the Claimant herself at the return to work meeting on 11 January 2018 with Ms Howard-Carr. The Respondent sought advice from its health and safety consultant and was advised that it was unsafe to have the Claimant working in the industrial kitchen with the reported symptoms. In her evidence the Claimant accepted that it would have been irresponsible to allow her to return to work when she was complaining of recurring headaches and dizziness.

57 As previously stated above, I do not accept that the additional fitness for work notes were produced to the Respondent at the relevant time. Accordingly the reports of the Claimant's health after January 2018 were limited to some text correspondence between the Claimant and Ms Howard-Carr. I accepted Ms Howard-Carr's evidence regarding this text correspondence that the Claimant, at some stage between January and August 2018, said she could return to work with regular breaks but that

she continued to have hand therapy. As the Claimant's job was entirely manual and for a limited shift of 3.5 hours per day, Ms Howard-Carr considered it was inappropriate for the Claimant to return with those limitations. Following the grievance appeal meeting, the occupational health report from 12 September 2018 and the recovery of the Claimant's health, the Claimant's return to work was facilitated by the Respondent.

58 I am not satisfied that the Respondent's conduct concerning the issue of the Claimant's return to work amounted to a fundamental breach of the Claimant's contract of employment and the implied term of mutual trust and confidence. It was entirely sensible for the Respondent to require the Claimant to be in good health for her to attend and carry out her heavy manual work. I note that the Claimant accepts that she should not have returned to work for at least some of the relevant time period she has identified in respect of this allegation. It may be that the Respondent could have provided an occupational health assessment before September 2018 however I am not persuaded that any such delay was particularly significant. I note, for example, that the Claimant herself wished to delay her return to work because she wanted to support her child's start at school. I emphasise that no criticism is made of that but it demonstrates that the Claimant was not pressing for an immediate return to work in September 2018.

59 In the circumstances I do not find that there was any repudiatory breach of the Claimant's contract of employment in the Respondent's approach to the Claimant returning to work after the accident.

Failure to pay Claimant sick pay

60 The Claimant was not entitled to statutory sick pay ('SSP'). Her eligibility to SSP was determined by the extent of her service. This was clear from the Claimant's terms and conditions. Further documentary evidence has been produced by the Respondent setting out the hours worked by the Claimant and the remuneration she received. This also demonstrates that she did not reach the required threshold to receive SSP whilst she was absent rom work.

61 Understandably the Claimant missed her income from her work whilst off on sick leave. She had financial commitments and a family to support. However as a matter of fact, the Claimant was not entitled to SSP and she had no other entitlement to sick pay. In those circumstances the Respondent's failure to pay the Claimant's sick pay during her absence was not a breach of clause 11 of her contract of employment or the implied term of mutual trust and confidence.

Failure to investigate Claimant's allegations of bullying

62 After starting work at Anslem's School the Claimant sent messages to Ms Howard-Carr complaining of the conduct of a colleague in the kitchen at

the School. The Claimant did not particularise particular incidents or conduct that she complained of but rather made a general complaint that she was being poorly treated.

63 As set out above, the Claimant worked for 3 days in the School before failing to return. Following her resignation on 8 October 2018, the Respondent sought to hold a grievance meeting with the Claimant to further understand her complaints. In the event the Claimant did not attend the meeting nor did she provide any further details of her complaint.

64 The Respondent carried out some investigation into the complaint. Ms Howard-Carr attended Anslem's School and spoke to the staff there. The complaints of poor conduct on behalf of one individual at the School were flatly denied by that individual and another colleague who worked in the kitchen. These responses were passed back to Ms Watkins who considered the Claimant's complaints.

65 The Claimant alleges that the Respondent actions in this regard amounted to a fundamental or repudiatory breach of her contract of employment. I have accepted Ms Howard-Carr's evidence that she did attend the School and speak to the relevant individuals and that she reported the information she obtained from that visit back to Ms Watkins. In those circumstances I do not accept the Claimant's allegation that there was a failure by the Respondent to investigate her allegations.

66 A process was set up by the Respondent in response to the complaint raised and some investigation of the Claimant's complaint was carried out. Without the Claimant engaging further in the process including failing to provide any additional information, I am not sure what further steps the Claimant is suggesting should have been taken by the Respondent. The nature of the investigation was limited but that was in the context of a generic allegation from the Claimant. In the circumstances I am not satisfied that the Respondent's response to the Claimant's complaint about the conduct of an individual at Anslem's School amounted to a fundamental breach of her contract of employment and the implied term of mutual trust and confidence. Rather, I consider the Respondent used its best endeavours to consider the Claimant's complaints.

Respondent's refusal to allow Claimant to return to Franciscan School

67 As set out within my findings of fact, the Claimant was moved from the kitchen at the Franciscan School because she requested that she be moved. Several weeks after this request and having started work at Anslem's School, the Claimant requested to return to the Franciscan School. I have to consider whether the failure to return the Claimant to the Franciscan School as her workplace, was a fundamental breach of the implied term of mutual trust and confidence.

68 I am entirely satisfied that it was not. I accept the Respondent's submission that it was not a reasonable expectation for the vacancy at the Franciscan School to be kept open after the Claimant had moved to Anslem's School at her own request. The Respondent did engage with the Franciscan School to enquire as to the possibility of the Claimant's return but the School requested that the existing team remained in place. In the circumstances, including the fact there was a mobility clause within her contract, the Respondent's failure to move the Claimant back to the Franciscan School did not amount to a fundamental breach of the Claimant's contract of employment and the implied term of mutual trust and confidence.

69 In deciding this claim I have also considered what is referred to as 'last straw' cases. A course of conduct can cumulatively amount to a fundamental breach of contract entitling an employee to resign and claim constructive dismissal following a 'last straw' incident. I have carefully reviewed the entirety of the conduct complained about by the Claimant to determine whether this is a last straw case. As set out above, I have concluded that none of the five alleged breaches amounts to a fundamental breach of the Claimant's contract of employment. I have also concluded that cumulatively the conduct complained of does not amount to fundamental breach of contract entitling the Claimant to resign following a 'last straw' incident. It was extremely regrettable that the Claimant was injured in an accident at work resulting in her being unable to return to work for a period of time. However having examined the Respondent's conduct in detail, I am satisfied the totality of the matters relied upon by the Claimant did not amount to a fundamental breach of contract. Further, I am also satisfied that neither of the Claimant's final allegations (namely the investigation into the allegations of bullying by a colleague in the kitchen at Anslem's School and the Claimant being unable to return to the Franciscan School) can be said to amount to a last straw. I am satisfied that in respect of these matters the Respondent's conduct was perfectly reasonable and justifiable. I do not find that the Respondent's conduct with reference to these matters could be said to have contributed to the breach of the implied term of mutual trust and confidence.

70 In conclusion therefore the Claimant's claim of unfair dismissal is not well founded and is dismissed.

Employment Judge Harrington
Date: 10 July 2019