EMPLOYMENT TRIBUNALS

Claimant **Unnamed**

Respondent **The Bishop of Llandaff Church-in-Wales High School**

Heard at: Cardiff

On: 27th and 28th June 2019

Before: Employment Judge A Frazer

Representation:

Claimant: In person
Respondent: Ms C Urquhart of Counsel

JUDGMENT

1. The Claimant was not constructively dismissed and her claim is not well founded.

REASONS

1. By way of an ET1 dated 13th December 2018 the claimant brings a claim of constructive dismissal against the respondent. She claims that she was entitled to resign by reason of its conduct further to s.95(1)(c) of the **Employment Rights Act 1996**. The issues were set out in counsel's Opening Note and were agreed at the outset of the hearing. The claimant relied on the following alleged conduct on the part of the respondent as a breach of the implied term:

    a. The headteacher's treatment of her in a meeting in March 2017, which she alleges was bullying;

b. The respondent's failure to deal appropriately with the aftermath of an incident (which the claimant described as an assault) by an individual, namely 'X' which occurred on 26th May 2017, specifically –
   i. The lack of formal contact with the claimant during her sickness absence;
   ii. The respondent's failure to offer the claimant counselling or a referral to occupational health;
   iii. The respondent's failure to suspend X;
   iv. The respondent's failure to investigate X's behaviour;
   v. The respondent's continued lack of concern for the claimant, as demonstrated at the meeting of 24th July 2018, which the claimant describes as the last straw.

The Law

2. It is for the Tribunal to determine whether, in accordance with the test set out in **Western Excavating v Sharp [1978] ICR 221** the respondent committed a fundamental breach of contract, whether the claimant resigned in response and whether the claimant resigned without undue delay (in case she might have been treated as having waived the breach). It is an implied term in every contract of employment that an employer shall not without just cause conduct itself in a manner which is calculated or likely to damage or seriously destroy the relationship of trust and confidence (**Malik v BCCI [1998] AC 20**). The employer's conduct is to be judged objectively.

3. In **Lewis v Motorworld Garages Ltd [1986] ICR 157** it was held that the repudiatory conduct may consist of a series of acts or incidents, some of which are quite trivial, which cumulatively amount to a breach of the implied term of trust and confidence. In **London Borough of Waltham Forest v Omilaju [2004] EWCA Civ 1493 CA** Dyson LJ held at paragraph 19; *'The quality that the final straw must have is that it should be an act in a series whose cumulative effect is to amount to a breach of the implied term. I do not use the phrase "an act in a series" in a precise or technical sense. The act does not have to be of the same character as the earlier acts. Its essential quality is that, when taken in conjunction with the earlier acts on which the employee relies, it amounts to a breach of the implied term of trust and confidence. It must contribute something to that breach, although what it adds may be relatively insignificant'*.

The Hearing

4. It was agreed at the outset of the hearing that the Tribunal was not required to make any findings of fact about an incident which occurred on 26th May 2017 but that its focus would be on the respondent's conduct in dealing with it, judged objectively.

5. On behalf of the claimant I received a bundle of documents with fourteen enclosures. On behalf of the parties I received a joint bundle of documents running to 392 pages. I also had two witness statements for the claimant dated 28th May 2019; a witness statement for Marc Belli, Headteacher of the respondent and a witness statement of Sarah Maunder, HR Consultant. All witnesses gave evidence via oath or affirmation and were cross-examined. I

heard closing submissions from both parties' representatives and I reserved my decision.

Findings of Fact

6. The claimant was employed by the respondent as an Administrative Assistant WBQ and Sixth Form from 23rd February 2015 until 7th August 2018 when her employment ended by reason of her resignation. The claimant's line manager was Reverend Rayner-Williams, Assistant Headteacher. Her job description is on page 81 of the joint bundle. Her contract of employment is at page 84. She was recruited on spine point 16 on the Grade 3 payscale. She was contracted to work 34 hours a week on a term time only basis.

7. On 14th March 2017 the claimant submitted leave of absence requests to the headteacher, Mr Belli. They are at pages 103 to 106 of the joint bundle. On the first such sheet the claimant requested that she took three hours and fifteen minutes' leave on 17th March and stated 'time owing 27 hr 35 min leaving 24 hr 20 mins'. She requested the time off with pay. On the second sheet the claimant requested a day off with pay on 24th March. She stated 'day off from time owing, 6 hours 30 minutes from 24 hours 20 minutes leaving 17 hr 50 min.' On the third sheet the claimant requested to leave work at 1015 on 30th June with pay. She stated 'finish at 1015am from time owing 17hr50mins (4hrs + 30min lunch) leaving 13hrs50mins.' On the fourth sheet she requested two days' off paid for a birthday weekend from the time that she claims she was owed (being 13 hrs 50 mins). The claimant submitted overtime sheets that she had compiled herself (pages 96 to 99). These were in the form of a spreadsheet. Across the top were the following columns: 'date', 'additional information', 'additional hours worked', 'additional hours claimed', 'total remaining' and 'confirmed (initial)'. On 15th March Mr Belli sent an email to the claimant to discuss these requests. Around this time the claimant received the results of her job evaluation, which were that her job had been evaluated at a grader higher. The claimant was given the right to appeal by the council. In his email of 15th March Mr Belli also indicated that he wanted to discuss the claimant's role, the grade and some of the activities that she mentioned in her job evaluation questionnaire.

8. The claimant's job was evaluated and this resulted in her job being re-graded from Grade 3 to Grade 4. Although the claimant had gone up a grade she was not happy and spoke to an individual from the council who advised her of her right to appeal. The claimant felt that her supervisory responsibilities had not been reflected in the role. The individual from the council gave her the view that she could be re-graded to a Grade 6.

9. Following the outcome of the evaluation, the claimant met with Mr Belli on 13th March 2017. At that meeting Mr Belli expressed to the claimant that he was pleased that her job had gone up by a grade. Mr Belli had signed the job evaluation form off in January. Mr Belli expressed to the claimant that he thought certain aspects of the role had been exaggerated, such as the claimant's managing and mentoring responsibilities. He did not consider that her role ought to be banded beyond Grade 4. The claimant felt that this devalued her.

10. Mr Belli met also with the claimant and her line manager, Reverend Rayner-Williams in his office on 16th March 2017. At that meeting Mr Belli had regard to the claimant's overtime spreadsheets and expressed to the claimant that he was dissatisfied with the manner in which she had worked overtime hours over the last two years so that she could have time off subsequently. This was because the school did not operate a flexitime system and no changes to her contract had been officially made to reflect this arrangement. Mr Belli was concerned that the claimant's own spreadsheets indicated that the school owed her almost a week's leave by her reckoning and in accordance with the arrangement she was putting forward.

11. The basis for the arrangement as the claimant understood it was from a conversation that she had had with Mr Chris Brown in 2016. The claimant was due to sit exams in the summer and she had therefore clocked up some overtime so that she could take the time off with pay. Mr Brown told her that flexitime was not permitted and hours had to be arranged in advance by himself or by Revered Rayner-Williams. The claimant used her spreadsheets as a means of logging her requests for time off. They were generally agreed by Mr Rayner Williams.

12. Mr Belli was aware that Mr Brown had had this conversation with the claimant in around 2016. He was concerned as she continued to use her own spreadsheets as a means of operating an overtime arrangement contrary to the warning that she had been given that flexitime was not allowed. The claimant's position was that her line manager had allowed her to work extra hours so that she could take time off for inset days or any other things that might crop up. Mr Belli accepted that some managers had discretionary arrangements with their staff so that they could take some time off if and when required.

13. At the meeting Mr Belli told the claimant that she was not to complete any more forms but that she should arrange any overtime with Mr Brown. He stated that should she work overtime she should be paid by way of her salary and not by time off in lieu. Mr Belli agreed to review the claimant's spreadsheets and pay her for any overtime that she had agreed to work. On 22nd March 2017 he agreed to the claimant being paid 12.25 hours at her new grade as a gesture of goodwill. He did not authorise the leave requested to be paid.

14. In my finding, Mr Belli was issuing a reasonable management instruction to the claimant to have any further overtime authorised via Mr Brown. There was no entitlement to flexitime. He was endorsing managers' discretion to operate some flexibility in allowing staff the odd occasion to leave early for childcare or other appointments but did not support staff to operate their own flexitime system on a wider basis, in the way that the claimant was doing. He was alarmed that she had accrued almost a week's hours as overtime over a long period and was seeking to claim those back via paid leave. It was reasonable, given the claimant's spreadsheets, for him to issue this instruction given that the claimant had previously been warned that she should not operate her own system of overtime by Mr Brown.

15. The claimant's regrading was discussed. Mr Belli was of the view that the claimant was a grade 4 as a member of support staff. He said that he would not support a grading of any more than 4. The claimant accepted under cross-examination that Mr Belli's motivation in not accepting that she was a grade 6 was to ensure that she was correctly placed in the pay bands as a member of support staff. In her evidence the claimant stated that Mr Belli took her through the tasks and asked her for examples. He said that he did not want her to do certain tasks such as mentoring. Mr Belli went through the questionnaire and expressed to the claimant that he did not feel that certain tasks were those that the claimant should be doing as against her job description. I do not find that there was anything unreasonable in Mr Belli expressing his understanding of the role to the claimant. She had a different view. I find that there was some measure of disagreement between them about the nature of the duties and that it was this disagreement which led to the meeting being what was subsequently described by Mr Belli in cross-examination as a 'frank exchange'.

16. The claimant's view of the meeting was that it was long and that Mr Belli had fired questions at her. She said that she had asked him to stop the meeting three times as she was visibly upset. Mr Belli stated that when the meeting came to an end he accepted that the claimant was upset and stopped the meeting.

17. I find that it is more likely than not that the claimant felt as though Mr Belli was accusing her of being dishonest both by using the spreadsheets in the way she did and by going through her job evaluation questionnaire. I find that in all likelihood, the meeting did become tense as the issues were being discussed which Mr Belli disagreed with. Mr Belli was entitled to discuss those issues with the claimant as the headteacher; to issue instructions regarding the authorisation of overtime and to express his views about the claimant's grade and the job evaluation form. I do not consider those views were expressed because he was seeking to undermine the claimant but rather because he was communicating to her what her responsibilities ought to be in accordance with her job description and as a member of support staff. He was also instructing her not to operate a system of overtime. The claimant took issue with Mr Belli's position on both of those matters and there was a measure of disagreement.

18. I do not find that there is any evidence that Mr Belli was unsupportive of the claimant. He had supported her in going up a grade and was of the view that she had 'great skills'.

19. The claimant did not make any complaint or grievance about the meeting with Mr Belli. In fact, she did not raise any complaint about Mr Belli's handling of the meeting until the meeting with her union representatives on 24th July 2018, over a year later.

20. On 26th May 2017 the claimant and some colleagues went out socially. This was an evening that was organised amongst staff. It was the start of half term. Later that evening an incident occurred between the claimant and another member of staff. The claimant cannot recall what happened. The events of that evening left the claimant very distressed and she subsequently sought medical

attention. On 5th June 2019 she returned to school and confided in her line manager, Mr Rayner-Williams, whom she also considered to be her friend, that she had gone out for a drink and that something had happened. It is clear that the claimant had a close relationship with Mr Rayner-Wiliams and felt able to share details about the night with him. Mr Rayner-Willliams made notes of his discussions with the claimant which are at page 132 of the joint bundle. He noted that the claimant had informed him that she had ended up in X's bed not remembering what had happened. He relayed the contents of that discussion to Mr Belli on 6th June. Mr Belli's notes of his meeting with Mr Rayner-Williams are at page 151. At that stage there was no disclosure of any misconduct on the part of any individual.

21. Mr Belli invited the members of staff who were responsible for safeguarding to the meeting. The notes state '*GRW to be link to avoid further disclosure'*. Under cross-examination Mr Belli stated that it was agreed that Mr Rayner Williams would continue to be the point of contact for the claimant. This was because, in cases where a disclosure has been made, it was appropriate for that individual to maintain contact with the individual to whom they had disclosed instead of having to disclose to other members of staff. On the respondent's understanding at that stage, therefore, the claimant's point of contact with the school was to continue to be Mr Rayner-Williams, her line manager.

22. On 14th June 2017 the claimant was signed off sick. On 23rd June 2019 she contacted the police about what had happened on 26th May 2017. She informed Mr Rayner-Williams of this on 25th June 2017. She also informed him that she was signed off sick for another month. I was taken to the evidence of text communication between the claimant and Mr Rayner-Williams. The claimant's evidence was that they were friends and that the contact was in the context of friendship rather than line management. I find on the evidence of the texts that the relationship between Mr Rayner-Williams crossed the boundaries between friendship and that of a line manager. Mr Rayner-Williams was evidently very supportive of the claimant and the claimant felt that she could open up to him. However, he did report the disclosure to the headteacher, which indicated that he was acting in the capacity of a line manager. In addition, the claimant informed him that she was signed off sick, which indicated that she was passing that information to him in his capacity as her line manager. In my finding the school were entitled to rely on Mr Rayner-Williams' contact with the claimant as effectively, contact from the school. Mr Rayner-Williams offered to meet with the claimant for a coffee on 25th June but she did not take up the offer. She said that she would let him know as she was meeting with the police and counsellors.

23. On 30th June 2017 Sarah Maunder, the respondent's HR Consultant, rang the claimant to see if she was ok. The phone call was brief. Ms Maunder accepted under cross-examination that the claimant sounded anxious. The claimant told Ms Maunder that she was off sick with anxiety. I accept Ms Maunder's evidence that she offered the claimant assistance from occupational health or counselling. This is reflected in her notes of the conversation. I find that the claimant stated that she did not think that she needed to attend occupational health at that stage and that she was already receiving counselling through her

GP. Whilst the claimant was receiving counselling through another organisation I find that she did say that she was receiving counselling already as this is what she had told Mr Rayner-Williams on 14th June. I find that the claimant told Ms Maunder that she was in regular contact with Mr Rayner-Williams as this was indeed the case. Ms Maunder gave the claimant her details in case there was anything that she needed through the school. This was an appropriate and timely response to the claimant's being signed off sick in my finding.

24. On 1st July the police interviewed X under caution. On 2nd July the police contacted Mr Belli to inform them that they had interviewed X, a formal complaint of sexual assault having been raised by the claimant. Mr Belli contacted Ms Maunder of HR that evening, who advised Mr Belli to suspend X on a neutral basis. That evening, Mr Belli wrote to X inviting him to a meeting the following day and giving him the right of accompaniment. X responded, requesting that the meeting be adjourned until after school. Mr Belli then spoke to X on the phone and it was agreed that the meeting would be postponed until X had had a chance to obtain union advice.

25. There was no need to suspend him. Ms Maunder's evidence was that this was in line with the Council's School Staff Discipline Procedure. I was referred to the Manager's Guide at paragraph 5.5.

26. Mr Belli contacted Cardiff Council's Intake and Assessment Team on 3rd July. On 20th July 2017 a professional strategy meeting was held. The minutes of the meeting are at page 217 and 218 of the bundle. It became apparent in the hearing that both parties disputed the accuracy of the minutes and therefore I attach limited weight to them. The school did not receive them until a year later. It was agreed at the meeting that the school would take no further action pending the police investigation. This was a reasonable position of the school to take given that the matter was in the hands of the police.

27. On 30th August 2017 the respondent was informed that the police would be taking no further action. The respondent did not undertake any investigation into X's alleged conduct as his employment terminated that day.

28. I consider that it was appropriate for the school not to have suspended X. Suspension is not an indication of culpability and should not be considered a disciplinary action. It is a neutral act. There was no evidence here that there was a risk with interference with property or any of the respondent's witnesses such as would warrant a suspension. The matter was already in the hands of the police. I do not consider that it was incumbent on the school to have suspended in those circumstances. By the time the police investigation was concluded, X's contract with the school was to be terminated. Therefore there was no obligation on the school to conduct any disciplinary investigation into the matter either.

29. I find that the school did take the incident seriously and to that end it engaged its safeguarding procedures. That was appropriate in the circumstances.

30. I do consider that the claimant may have felt out of the loop in that she was off sick and would not have been party to all that was going on with regard to the safeguarding procedures. Whilst the school's decision not to suspend or investigate the matter was not information to which she would necessarily have been privy, I consider that out of courtesy it would have been desirable for the school to have contacted her at the end of the summer to inform her what had happened (i.e. that safeguarding procedures had been engaged but that no action would be taken against X).

31. From an objective point of view, the information that the respondent had via Mr Rayner-Williams at the start of the autumn term 2017 was that the claimant had settled in. She did not mention about what had happened in the May and did not resurrect any issues about the meeting that she had had with Mr Belli in the March. Therefore, the respondent was entitled to suppose that she was not unhappy with the employment relationship or with how the respondent had handled matters hitherto. I find that this significant, not least because it is more likely than not, that if she did have cause for complaint at that time she would have raised any issues with Mr Rayner Williams, given that she had trusted him with her concerns in the past.

32. There was no contact from the claimant to the respondent or from the respondent to the claimant until 12th March 2018. The claimant responded by email dated 23rd March in which she stated 'thanks for your letter….it's nice to hear from the school.' She stated in evidence that she said that sarcastically. The letter was polite in tone and I do not consider that on any objective reading of it, it could be construed as being sarcastic.

33. On 16th July 2018 the claimant emailed Mr Belli to request a meeting before the end of term as her union representative wanted to raise some concerns. She did not state what those concerns were. The meeting took place on 24th July 2018 and was attended by Mr Belli, the claimant, Sarah Maunder, Angie Shields and Suzanne Williams (the claimant's union representatives).

34. The first issue that was raised in the meeting was the change of the claimant's job title. Mr Belli informed the claimant that there had been an administrative error as regards the job title. Ms Maunder stated that a new form would be sent out to her. Her representatives also complained about Mr Belli's conduct of the meeting in March 2017.

35. Mr Belli's evidence was that the union representatives were aggressive. The claimant stated in evidence that she asked whether if the case had involved a pupil, would they have suspended. Mr Belli did not answer that question. Ms Maunder stated that it would depend on the circumstances. The claimant threw some appointment letters and cards on the table. She stated that she had suffered from PTSD. Mr Belli and Ms Maunder asked what they could do to support her but she did not say anything.

36. At the meeting the claimant complained that the school had shown a lack of contact towards her. The representatives made complaint that the only contact

had been from Ms Maunder on 30th June 2017. Mr Belli explained that the claimant had been in touch with Mr Rayner-Williams. Mr Belli queried why the representatives had not been in touch before and at that point the union representative made comparisons with high profile sex abuse cases where victims had come forward many years later.

37. There was a discussion between Ms Maunder and the representative about the issue of X's suspension. She explained that the school had not investigated because of the police procedures. The representatives referred to the failure to suspend as 'disgusting'. The representatives ended the meeting saying they were going to see their lawyers. Under cross-examination Mr Belli stated that they said that they were going to speak to the Chief Education Officer.

38. The meeting ended acrimoniously. Mr Belli did not contact the claimant thereafter. He stated that he was acutely aware, given the level of aggression that it was not appropriate to contact the claimant.

39. The claimant resigned by letter to Mr Belli on 7th August 2018. The reasons cited were those which have formed part of her claim, namely the lack of contact and support; the failure to suspend X or investigate matters and the conduct of Mr Belli in the meeting of March 2017.

40. Under cross-examination the claimant was asked why she raised the matters about the March 2017 meeting over a year later and she stated that it had taken her this long to work up the courage to approach the union.

Conclusions

41. Having regard the findings that I have made above, I consider that there was some level of terse exchange or disagreement between Mr Belli and the claimant in the meeting in March. As I have found above, I consider that Mr Belli's response to the issues raised was reasonable. The claimant was upset after the meeting and to that end, Mr Rayner Williams texted her to ask her if she was ok. I find that there was a disagreement, both about the claimant's use of the overtime system and about her job description. Therefore, it is more likely than not that Mr Belli was firm with the claimant. I do not consider that his manner would have given rise to a repudiatory breach of contract. However even if it did, I find that since the claimant did not complain about the meeting until a year and three months later, she waived any breach of contract.

42. I do not find that the events from May to August can be viewed as repudiatory, either cumulatively or individually for the reasons I have given above. The school's response was proportionate. I find that the level of contact was reasonable by way of the text communications from Mr Rayner Williams and the phone call from Ms Maunders. The claimant was made aware that she could approach the school if she needed anything. By September the claimant was no longer on sick leave.

43. There was ongoing contact between the school and the claimant during the period during which she was off sick. She did not raise any complaints at that

time and if she had any to raise, it would be reasonable to expect that she would have raised these with Mr Rayner Williams.

44. Whilst I consider that it would have been courteous on the part of the school to send the claimant a formal letter to let her know that it had concluded matters in terms of safeguarding and had decided to take no further action against X, its failure to do so did not amount to a breach of contract either on its own or together with the other matters complained of.

45. I find that it is more likely than not that the meeting on 24th July 2018 was acrimonious. I find that the union representatives adopted an accusatory manner and the meeting became a stand-off. On the one hand, the union representatives brought up a number of the claimant's complaints and in relation to each Ms Maunder and Mr Belli sought to defend their position. It was regrettable that the claimant did not issue her complaints properly via the respondent's grievance procedure. The respondent might then have had an opportunity to take a considered approach to them. However, given that the meeting ended with the representatives saying that they were going to take legal action and escalate matters, it was likely to have been too late by then for the respondent to have invited the claimant to use its internal procedures.

46. I do not consider that the respondent acted unreasonably in the meeting of 24th July 2018. Having been faced with a number of allegations both Mr Belli and Ms Maunder were in effect 'blocking the punches' that were being delivered by the union representatives. Even if I were to find that the respondent's conduct of this meeting was of sufficient quality to be the last straw, given that the claimant did not complain about the matters between March and August 2017 beforehand, I find that she waived any prior repudiation and there was nothing to add the last straw to (**London Borough of Waltham Forest v Omilaju [2004] EWCA Civ 1493).**

47. Having regard to the evidence and the findings I have made in respect of the respondent's conduct judged objectively I do not find that either cumulatively or singularly the respondent's conduct was either calculated or likely to damage or destroy the relationship of trust and confidence that existed between itself and the claimant. For that reason there was no fundamental breach of contract and the claimant was not constructively dismissed.

Employment Judge A Frazer

Dated: 8th July 2019

JUDGMENT AND REASONS SENT TO THE PARTIES ON

……10 July 2019……

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