



EMPLOYMENT TRIBUNALS

Claimant: Ms K Horton

Respondent: Barbican Holdings (UK) Limited

Heard at: Manchester

On: 2 and 3 July 2019

Before: Employment Judge Ross

REPRESENTATION:

Claimant: Miss G Crewe, Counsel

Respondent: Mr G Baker

JUDGMENT

The judgment of the Tribunal is that:

1. The claimant resigned from the respondent's employment on 17 July 2018.
2. The claimant's claim for unfair dismissal is not well-founded and fails.
3. The claimant's alternative claim for unfair (constructive) dismissal is not well-founded and fails.
4. The claimant's claim for wrongful dismissal is not well-founded and fails.
5. In any event the claimant's claim for unfair dismissal, given the effective date of termination was 17 July 2019, was presented out of time and it was reasonably practicable for the claim to have been presented within time. Accordingly, the Tribunal did not have jurisdiction to hear the claim in any event.

REASONS

1. The claimant worked for the respondent from 1 November 2010. During the course of her employment with the respondent the claimant raised concerns about a number of other employees.

2. An incident took place in the office on 17 July 2017 which culminated in the claimant leaving at 3.00pm, before the end of the working day. She said she was resigning. The claimant never returned to work. The respondent wrote on 19 July 2018 accepting her resignation.

3. The claimant brought a claim to this Tribunal.

4. The claimant's claim was that she had been dismissed by the respondent. In the alternative she alleged she had been constructively dismissed by the respondent. She also alleged wrongful dismissal.

5. For the respondent it was alleged the claimant had simply resigned and there was no unfair dismissal, whether actual or constructive.

6. The following issues were agreed at the outset of the hearing:

- (1) Did the claimant resign or was she dismissed by the respondent?
- (2) If so, on what date?
- (3) Does the Tribunal have jurisdiction to hear the claim? (If the dismissal or resignation was on 17 July 2018 the respondent stated the claim was presented out of time because the claim was presented on 17 October 2018, just outside the primary limitation period).
- (4) There was a further issue about the ACAS early conciliation certificate. The claimant relied in her claim form on the certificate on page 2 of the bundle. However, she also had obtained a certificate at page 1 of the bundle. What was the effect, if any, of those certificates on the time limits?
- (5) If the claimant was dismissed, the respondent accepted there was no fair reason advanced for her dismissal and accordingly the dismissal would be unfair.
- (6) In the alternative, if the claimant resigned was she constructively dismissed? The claimant relied on an implied duty of trust and confidence.
- (7) What were the alleged breaches? The claimant relied on the respondent's continuing failure to deal with her grievances and complaints as identified in paragraph 9 of the claim form, namely:
 - (i) In August 2014 the claimant had raised a grievance regarding being bullied by Ms Denise Mercer (Underwriting Manager for the respondent). The respondent failed to investigate the claimant's grievance. No action was taken by the respondent to prevent the claimant from being subject to further bullying by Ms Mercer;
 - (ii) In August 2017 the claimant raised concerns regarding being bullied by Ms Sarah Joy (also known as Lind) (BBS Manager for

the respondent) and Ms Mercer. The respondent again failed to investigate the claimant's complaints; and

(iii) On 16 July 2018 Ms Morris and Ms Burrows had asked the claimant to withdraw her grievance raised regarding being bullied and harassed by Natasha Ryder (Underwriter for the respondent). The claimant was again denied the opportunity to have her grievances investigated in accordance with the respondent's grievance procedure.

- (8) Did the claimant show these allegations were factually correct?
- (9) Did the allegations amount to conduct calculated or likely to destroy the implied duty of trust and confidence between the claimant and the respondent?
- (10) Did the claimant resign because of the breach(es)?
- (11) Did she delay too long and affirm the contract?

Remedy

- (12) If the case proceeds to remedy there is an issue regarding contributory fault. Should the Tribunal reduce the basic award pursuant to section 122(2) ERA 1996 on the basis of culpable or blameworthy conduct?
- (13) Should the Tribunal reduce any compensatory award pursuant to section 123(6) ERA 1996 on the basis of culpable or blameworthy conduct which caused or contributed to the claimant's dismissal?
- (14) Should there be any reduction by reason of the principle in **Polkey v A E Dayton Services Limited**?

7. I heard from the claimant. For the respondent I heard from Ms J Burrows and Mr J Moran.

The Relevant Law

8. The relevant statutory law is section 95 and section 97 Employment Rights Act 1996. I was also provided with a helpful bundle of authorities from the parties which consisted of:

- Ali v Birmingham City Council EAT (Unreported) 27 October 2008
- Kaur v Leeds Teaching Hospital NHS Trust [2019] ICR 1
- Kwik Fit v Lineham [1992] ICR 183
- Omilaju v Waltham Forest Council [2005] ICR 481
- Secretary of State for Justice v Hibbert (Unreported) EAT 30 July 2013

- Sothern v Franks Charlesly & Co [1981] IRLR 278
- Sovereign House Security v Savage [1989] IRLR 115
- Willoughby v CF Capital PLC [2011] EWCA Civ 1115
- Gisda Cyf v Barratt [2010] UKSC 41

Findings of Fact

I find the following facts:

9. The claimant worked for the respondent from 1 November 2010. In August 2014 the claimant submitted a formal grievance against her manager. The grievance related to the fact that the claimant had asked permission to work through lunch and leave one hour early. Denise Mercer, a senior manager, from whom the claimant asked permission, shouted at the claimant in front of the office. Unfortunately the respondent has been unable to find a copy of the written grievance, although it has found a copy of the response from Ms Mercer (see pages 68A-C). I find the respondent never formally responded to that grievance. However, the claimant agreed she had a meeting in January 2015 with Mr William Johnstone about her concerns regarding Ms Mercer. Notes of the meeting are at pages 69-71.

10. The claimant agreed she told Mr Johnstone that she wanted to draw a line under the matter and move on. Although the claimant suggested in cross examination that the issues discussed in January 2015 were not the same as the issues raised concerning Ms Mercer in the formal grievance, there was no suggestion that she had reiterated the 2014 concerns to the respondent. In addition, much later when she requested a meeting with Sue Morris in 2018 where she was still raising concerns about Ms Mercer she expressly stated to Ms Morris she “just wants the notes putting on her file”. She did not request any action.

11. Meanwhile in August 2015 the claimant had a new manager, Sarah Lind (formerly known as Sarah Joy). The claimant stated that initially her relationship with Ms Lind was reasonable but it later deteriorated. The claimant’s witness statement sets out various complaints about Ms Lind.

12. The claimant agrees she did not make any formal complaint in August 2017 about Sarah Lind. Her witness statement does not expressly refer to a complaint made to HR about Sarah Lind in August 2017. The claimant said she had a meeting on 3 March 2017 with Sue Morris to express her concerns (see paragraph 18 of the claimant’s statement and page 82) and when the claimant was asked at that meeting what she would like to happen she said, “spend time learning more about the job I do, more involvement with Sarah and Becky. All I want is to be a valued member of team and if needed they could rely on me” (page 82).

13. The claimant applied for a promotion in May 2017. Sarah Lind conducted the second interview and the claimant was unsuccessful.

14. The claimant states in her statement that from June 2017 Jamie Moran was appointed as her manager. In evidence Mr Moran says he was not appointed the claimant’s manager until January 2018. I find his recollection of when he was

appointed the claimant's manager is more likely to be accurate and accept the date given by him.

15. The claimant was signed off work with work related stress, a viral illness, fatigue and headaches, from 29 January 2018 until 16 March 2018 (see pages 98-100). She returned to work on a phased return. She had previously been absent from work with stress in June 2016 until 17 August 2016.

16. The claimant also attended a meeting with Sue Morris of HR on 11 May 2018 (see pages 117-119). The claimant expressed her concerns about Denise Mercer and Sarah Lind at that meeting, but agreed in cross examination she told Ms Morris she did not want any action taken.

17. In July 2018 the claimant was receiving work from Natalie Larkin and Natasha Ryder that she considered to be outside her team's remit. On one occasion after she had returned the work via Jennifer Burrows the claimant says Natasha Ryder approached Jennifer's desk then on her return to her own desk bumped into the claimant's desk, glared at the claimant and said, "for Christ's sake this is getting fucking ridiculous". The claimant said she made both Jennifer Burrows and Sue Morris aware of what occurred. She also complained Natasha Ryder had bumped into her that day.

18. On 16 July 2018 the claimant asked Natalie Larkin about a piece of work she had sent over the team. The claimant approached Natalie Larkin and asked her a question about the work. Natasha Ryder overheard and as the claimant repeated her enquiry Natasha Ryder aggressively said, "yes, I heard you". When the claimant said there was no need for that response Natasha Ryder shrugged her shoulders. The claimant said she returned to her desk in a distressed state. She sent an email to Sue Morris, Jennifer Burrows and Jamie Moran headed "Formal Grievance" about the way Natasha Ryder had spoken to her (see pages 124-125).

19. The claimant received a reply almost immediately from Sue Morris asking if the claimant was free to talk. The claimant said that she was (see page 126) and there was a meeting between the claimant and Sue Morris. I did not hear evidence from Ms Morris. I accept the claimant's evidence that Ms Morris suggested to her she should withdraw her formal grievance and engage in mediation. I find the claimant refused.

20. I have had regard to the respondent's grievance policy at page 198A of the bundle. The grievance process at page 198B identifies both informal grievances and a formal grievance. It suggests that an informal grievance is the most effective way to resolve most grievances.

21. Meanwhile, Natasha Ryder had agreed to mediation (see page 131). I find Ms Morris asked Jennifer Burrows to speak to the claimant. However, the email from Sue Morris to Jo Hayes (another person in HR) says, "Will do, I've spoken to Jen and I've said that if Kate is adamant that she doesn't want to speak with Natasha don't force it and I'll pick it up tomorrow" (see page 129).

22. Shortly afterwards Ms Jennifer Burrows ("Jen") asked the claimant ("Kate") to have a discussion with Natasha Ryder. I accept Ms Burrows' evidence that at the

point she asked she did not know that Ms Morris had already asked the claimant this question.

23. I find Ms Burrows asked the claimant if she would consider discussing her grievance “before it becomes formal”. She accepted the claimant's answer that she wanted to keep it formal (see page 134 and her contemporaneous notes at page 141).

24. I find Mr Moran was supportive and informed the claimant he was comfortable with her raising a formal grievance and would not pressurise her into withdrawing it.

25. The claimant attended work on 17 July 2018. At 13:57 Ms Burrows sent her a routine email asking her to do a piece of work (page 137). The claimant accepted in cross examination she had no problem with that email although she felt she was not the appropriate person to do the task. The piece of work was not a new matter and had been completed previously but Natalie Larkin had deleted the original piece of work in error and it needed to be re-worked. Whilst the claimant had been absent from work on sick leave between January 2018 and March 2018 the procedure to do that work had changed. The claimant says no-one had shown her how to do that work. She says she had previously asked Ms Burrows to be shown the procedure. Ms Burrows said the first time she was aware the claimant did not know how to do the task was when she came over to speak to her about it. The claimant says she said to Ms Burrows “you know what, Jen, I can't stand this any longer, you can have my resignation” and was crying. Ms Burrows agrees the claimant says that she was “sick of it and had had enough”. She agrees the claimant said, “you can have my resignation”.

26. I find that Ms Burrows followed the claimant to her desk to talk her through the process she would need to complete the task. She then saw that the claimant had started to take out carrier bags into which she started packing her personal belongings from her desk drawers and the cupboard behind her desk. I find Ms Burrows signalled to team leader, Jamie Moran, that he should come over to the claimant's desk. Mr Moran is the other BBS team leader in the office and the person to whom the claimant reported.

27. Both Mr Moran and Ms Burrows agree that as he approached and asked the claimant what she was doing she replied, “I'm fucking sick of this place and I've fucking had enough. I'm leaving and resigning”. The claimant could not recall using swear words but did not dispute that she had done so. She did not dispute that she had packed up some of her personal belongings.

28. I find Mr Moran asked the claimant to go into a private meeting room to have a discussion. The previous conversation had taken place in an open plan office in front of other team members. I accept Mr Moran's recollection that he tried to persuade the claimant not to resign. I find the claimant explained to him she was angry because she did not know how to complete a piece of work that she had been asked to do and that she was angry with Mark Hicks, Insurance Technician, Natalie Larkin and Natasha Ryder, and called them “fat lazy bastards” and “fat lazy bitches”. I find Mr Moran asked the claimant to keep her voice down because although they were in a private meeting two of the individuals concerned were only ten metres away. The claimant also stated to Mr Moran she felt that the respondent wanted to

brush her grievance under the carpet. I find the claimant ended the conversation by stating she had had enough, was sick of the company and felt the company was trying to make her poorly. She then left the room and walked in the direction of her desk. I find Mr Moran then spoke to Sue Morris.

29. I find in the meantime the claimant had returned to her desk and continued to pack her belongings. I find Mr Moran overheard the claimant stating to another employee, Leanne, that she was leaving and had made her mind up.

30. There is no dispute that the claimant left her passes required to enter the department and the building on her desk. She left the building with the belongings she had packed. I find that Sue Morris and Mr Moran tried to persuade the claimant to stay at work but she declined to do so. I find Mr Moran asked the claimant whether she would like to leave the office, calm down and discuss the issues off-site but she declined.

31. I find that at 2.45pm Ms Morris and Mr Moran followed the claimant into the communal area. I find Ms Morris asked the claimant not to resign while she was angry. I find Sue Morris told the claimant in accordance with company policy she would require a written resignation letter. I find the claimant responded that as she had been waiting for two months for notes from a meeting she was expecting from Sue Morris, Sue Morris could wait for her resignation letter.

32. I find that Mr Moran then told Sue Morris he intended to try one more time to encourage the claimant to reconsider. He followed the claimant outside the building and Ms Morris returned to the office. Outside the building I find Mr Moran asked the claimant to come back inside to resolve the situation. I find the claimant again declined. I find that Mr Moran suggested that the claimant should sleep on her decision and the next day telephone him to discuss further. This is consistent with the answers he gave in cross examination. It is also consistent with the text message he sent after the claimant had left at 15:15 hours (see page 138), "give me a ring tomorrow morning and let me know how you're feeling, thanks, Jamie". The claimant responded promptly, "will do but at present I feel that Barbican have backed me so far into a corner that the only option left to me is go". This version is consistent with Mr Moran's contemporaneous notes: "JM asked KH to give JM a ring on 18.07.2018 to check if KH is ok and if KH has any other thoughts or changes in decision" (see page 150). The note also states later, "KH agreed KH would call JM to discuss further the following day" (see page 151).

33. I find Mr Moran to be a clear and honest witness. He gave concessions when giving his evidence and thought carefully before giving replies. He agreed in cross examination that after the claimant had left the office he told Patrice Gleeson, his line manager what had happened. I find he was advised by HR to hold a team meeting. Mr Moran confirmed he had done this in an email at page 139:

"Hi both, I've told the team that Kate has now left us and will not be returning. Most had already overheard her say this multiple times so it came as no surprise."

34. I find there had been a hardening of attitude by the more senior management when Mr Moran had informed his manager of what had occurred. In an email at 16:21

shortly before the team meeting which occurred at 16:30 Patrice Gleeson wrote to Sue Morris, Jo Hayes and the Managing Director, Neil McGeachie:

“Following KH’s earlier resignation can we please proceed with acceptance terminating her employment as requested.”

She goes on to say her behaviour and conduct cannot be tolerated, and “I do not want KH returning to the team” (see page 144).

35. The reply later that evening from the Managing Director was more thoughtful, “I suspect following overnight reflection Kate may seek to retract tomorrow”.

36. In fact the claimant heard from one of her colleagues about the team meeting via text. The claimant did not retract.

37. I find the claimant did not attend work the following day. I find the claimant did not contact Mr Moran despite his invitation to her outside the building on 17 July. The claimant did not provide a fit note or self-certify her absence. Instead she telephoned Nicola Campen, HR in London on 17 July 2018. She left a voicemail asking how the respondent expected her to be able to return to work given that her team had been told she had resigned. The claimant then emailed Nicola Campen when Ms Campen did not reply on 18 July 2018 (see pages 159-160). She did not retract her resignation, rather she said, “I feel I was pushed into making a rash decision to leave the office...”.

38. On 19 July 2018 the claimant received a letter from Nicola Campen confirming the respondent’s position was that she had verbally resigned on 17 July 2018 (see page 158).

39. The claimant also received an email of 21 July 2018 which she had requested from Lorna Flanders giving her account of the meeting on 17 July 2018. Mr Moran agreed in cross examination that a number of team members had raised queries which suggested they were unaware that the claimant had resigned and considered it out of character.

Conclusions

40. I turn to consider the issues in this case.

41. There is a dispute between the parties as to whether the claimant was dismissed or whether she resigned. There is a further dispute: if she did resign whether she was constructively dismissed.

42. I turn to the case law. The general rule is that unambiguous words of resignation may be taken at their face value without the need for any analysis of the surrounding circumstances (see **Sothorn v Franks Charlesly & Co [1981] IRLR 278**).

43. In this case there were clearly unambiguous words of resignation. The claimant admits she told Ms Burrows that she could have her resignation. I find she also said to Mr Moran, “I’m fucking sick of this place” and “I’ve fucking had enough I’m leaving and resigning”.

44. However, in the case of **Sothern** the Court acknowledged there may be circumstances where it is appropriate to investigate the context in which the words were spoken in order to ascertain what was really intended and understood. This situation of “special circumstances” was also identified by the Court of Appeal in **Sovereign House Security Services Limited v Savage [1989] IRLR 115**. What might constitute special circumstances? In the **Sothern** case it was decisions taken in the heat of the moment or involved an immature employee, or an employee being jostled into a decision by the employer.

45. The claimant is not an immature employee. She is an experienced person who had worked for the respondent for many years. She was not being jostled into a decision by the employer. On the contrary, Ms Morris and Mr Moran made repeated efforts to persuade her to stay in the building and not to resign on that afternoon.

46. It is possible that the claimant may have been acting in the heat of the moment. She appeared distressed to Mr Moran. Ms Burrows accepted she had tears in her eyes. The claimant said she was crying.

47. The claimant's representative sought to suggest that because the claimant had two periods of sick leave due to stress and had previously been under the care of the Occupational Health doctor then that might suggest special circumstances.

48. It is true that the claimant had been absent from work on two previous occasions. However, she had recently seen the Occupational Health department on 15 May 2018 who advised the claimant was “enjoying her role” and was fit for it (page 120). This suggests the claimant was well and was not being affected by poor mental health. It therefore points against the special circumstances exception being engaged.

49. In considering whether special circumstances apply I have also taken into account the claimant's conduct. In addition to speaking unambiguous words the claimant's conduct suggested she was resigning. She packed up the majority of her belongings in carrier bags and left her passes needed to access the building on her desk. She left in the middle of the afternoon of the working day.

50. I have also considered the case of **Willoughby v CFC Capital PLC** relied upon by the claimant's representative. I remind myself that the essence of the special circumstances exception is that in appropriate cases the recipient of the notice will be well advised to allow the giver what is in effect a cooling off period before acting upon it. The case also states that:

“The true nature of the exception is rather that it is one in which the giver of the notice is afforded the opportunity to satisfy the recipient that he never intended to give it in the first place, that in effect his mind was not in tune with his words.”

51. There is no evidence in this case that the claimant did not intend to resign. Her letter to Nicola Campden does not suggest that. There is no retraction of her resignation. Instead she suggests the respondent has dismissed her.

52. For these reasons I am not satisfied the special circumstances exception applies.

53. However, in case I am wrong about that and special circumstances do apply I turn to consider the effect of that. In **Kwik Fit GB Limited v Lynham [1992] ICR 183** the EAT advised that where special circumstances exist the employer is not under a duty to reconsider events so that failure to satisfy that duty will necessarily lead to a finding that dismissal has occurred. Rather, where special circumstances arise (such as where words were spoken in the heat of the moment) apparently unambiguous words can be considered in the light of the surrounding circumstances so that it may be risky for an employer simply to accept what seems to be a resignation. The EAT added that a prudent employer would then allow a reasonable time to elapse before accepting a proposed resignation. If during this period facts arise which require further investigation an employer who does not investigate will risk the Tribunal drawing an inference of dismissal from the evidence.

54. The respondent made efforts from when the incident blew up at around 2.30pm to persuade the claimant not to leave the building. Mr Moran tried to persuade her not to resign both in the office and then later as he stood with the claimant outside the building trying to persuade her not to leave. It is not disputed that he did afford the claimant the opportunity to contact him the following day if she wished to change her decision, "JM asked KH to give JM a ring on 18/7/18 to check if KH is ok and if KH has any other thoughts or changes in decision". The claimant did not call him.

55. Furthermore, even if special circumstances did apply this was not a situation where the respondent had a duty to reconsider events. Although Mr Moran was prepared to afford the claimant a further chance if she changed her mind, the attitude of senior management was firmer and they wished to act promptly to accept the claimant's resignation. However they did not do so until the letter dated 18 July 2018 was sent to the claimant on 19 July.

56. The claimant did not attend work on 18 July 2018. I find she phoned the respondent's London HR. However, she did not retract her resignation or reconsider as offered the opportunity to do so by Mr Moran. Rather she appears to have accepted from gossip from another team member that the respondent had already dismissed her. Accordingly, I find the "special circumstances" is not engaged but if I am wrong about that and they are engaged I find the respondent did not have a duty to reconsider the events on the particular facts of this case.

57. I am satisfied that all the evidence points to an unequivocal resignation by the claimant on 17 July 2018. It is entirely consistent with her words to the respondent, her actions in the office of clearing her desk and leaving her passes, and the fact that she never retracted her resignation. I am not satisfied that in her letter to Nicola Campen it is implicit that she has retracted her resignation.

58. I find that the text message the claimant sent to Mr Moran was consistent with resignation, "... at present I feel Barbican have backed me so far into a corner that the only option left to me is go". I do not accept the construction put on the text by the claimant's counsel that "at present" suggests the claimant might change her mind. I accept Mr Moran's evidence that he interpreted that to be final.

59. I find that Mr Moran did not accept the claimant's resignation on 17 July as he was still considering there was a possibility the claimant may change her mind.

However, I find that the attitude of senior management hardened and when the claimant did not call Mr Moran, nor clearly retract her resignation to Nicola Campen, a letter was sent by Sue Morris,HR accepting her resignation, dated 18 July but sent on 19 July.p141

60. Having found the claimant has resigned I turn to the next issue which is: what is the effective date of termination? I have found the claimant resigned.

61. So far as the effective date of termination in a constructive dismissal case is concerned, the decision to leave is that of the employee and the date of termination is when the employee communicates his or her decision in clear term to the employer. See **Sothorn v Franks**.

62. Section 97(1)(b) ERA 1996 states:

“Where an employee resigns without notice in response to a repudiatory breach of contract by the employer the EDT is the date on which the termination takes effect.” This means the date on which the claimant resigned.

63. The claimant informed the respondent on 17 July 2018 that she was resigning. She never returned to work after that date. Although she communicated with the respondent after that date she never indicated that she wished to retract the verbal resignation she had given so clearly on 17 July 2018. I therefore find 17 July 2018 was the effective date of termination.

64. The next issue is jurisdiction. Time limits in the Employment Tribunal are strictly applied. It is agreed that the primary limitation period expired on 16 October 2018.

65. The claimant relied in her claim form on ACAS certificate R329366/18/29 which was received by ACAS on 17 October 2018 and issued on the same day.(p2)

66. Neither of the provisions to extend time, whether the “stop the clock” provisions in section 207B(2) and (3) or the further extension in section 207B(4) ERA 1996 apply because the primary limitation period expired before the claimant contacted ACAS.

67. In the alternative the claimant sought to rely on the first ACAS certificate(p1). The claimant contacted ACAS on 6 September 2018 and the certificate was issued the same day. I rely on **HM Revenue & Customs v Garau [2017] ICR 1121 EAT** to find that EC provisions do not allow for more than one EC certificate per matter to be issued by ACAS.

68. However, in any event the first certificate does not assist the claimant either. Section 207B(2)(a) states:

“Day A is the day on which the complainant or applicant concerned complies with the requirement in subsection (1) of section 18A Employment Tribunals Act 1996 (requirement to contact ACAS before instituting proceedings) in relation to the matter in respect of which the proceedings are brought.”

69. In this certificate found at page 1 of the bundle Day A is 6 September:

“Day B is the day on which the complainant or applicant concerned receives or if earlier is treated as receiving...the certificate issued under subsection (4) of that section.”

70. In this case Day B is the same date, 6 September.

71. Section 207B(3) states:

“In working out when a time limit set by a relevant provision expires the period beginning with the day after Day A and ending with Day B is not to be counted.”

72. The day after Day A (6 September) is 7 September. Day B is earlier, 6 September. The point of the “stop the clock” provisions is that the time spent with ACAS should not prejudice a claimant presenting proceedings. Where the claimant goes to ACAS and the receipt is issued on the same day there is no clock to stop. Accordingly there is no extension of the primary limitation period.

73. By agreement of the parties in this case section 207B(4) ERA 1996 is not engaged.

74. Accordingly the claim is out of time.

75. However, for the sake of completeness I turn to the merits of the claimant's claim for constructive dismissal. I remind myself that a breach of the implied duty of trust and confidence must be behaviour calculated or likely to destroy the implied duty of trust and confidence.

76. I turn to the three alleged breaches.

77. I find the claimant lodged a formal grievance of being bullied by Denise Mercer in 2014. The respondent did not provide a formal outcome to the grievance. I find this amounts to a breach of the implied duty of trust and confidence.

78. I turn to the second alleged breach. I am not satisfied that the claimant raised concerns about being bullied by Ms Lind in August 2017. She did not lodge a formal grievance in 2017. The evidence suggests her verbal complaints to Ms Morris about Ms Lind were made earlier that year. However, I find there was a failure by the respondent to fully investigate her complaints about Ms Lind in 2017.

79. However, by the point the claimant came to resign she had told the respondent she wanted no action taken by them in relation to her complaints about Ms Mercer and Ms Lind. At the meeting in May 2018, which she requested, she expressly stated she “just wanted notes putting on her file” and said in cross examination she stated she did not want any further action taken.

80. This is relevant to the next question: if there was a breach, has the claimant affirmed it? I find she has. She had confirmed to the respondent she did not want any action taken.

81. I turn to the final alleged breach of contract: that on 16 March 2018 Ms Morris and Ms Burrows asked the claimant to withdraw her grievance regarding being

bullied and harassed by Natasha Ryder, Underwriter for the respondent. The allegation is that the claimant was again denied the opportunity to have her grievances investigated in accordance with the respondent's grievance procedure.

82. The respondent's grievance procedure refers to an informal procedure as well as a formal procedure..

83. I find that it was reasonable for Ms Morris and Ms Burrows to ask the claimant if she was prepared to mediate her grievances and have them dealt with informally. The email chain from Ms Morris to Ms Hayes makes it clear that they wished to deal with the matter sensitively. I find Ms Burrows to be a careful and conscientious witness and I am satisfied that she asked the claimant sensitively and respected her reply.

84. The allegation that the claimant was denied the opportunity to have her grievance investigated in accordance with the respondent's grievance procedure is factually incorrect. The claimant had been asked if she was willing to have the matter dealt with informally. She had not been refused her grievances to be investigated. The claimant left the following day so the respondent had no opportunity to investigate the specific grievance against Natasha Ryder.

85. In conclusion I find there was a breach of the implied duty of trust and confidence in relation to allegation 1 and allegation 2 but the claimant had made it clear in relation to these historic matters that she did not wish the matter to be taken any further and she did not wish any action to take place, and she had therefore affirmed the breach.

86. Insofar as the third allegation is concerned, I find there was no breach. It is not behaviour calculated or likely to destroy the implied duty of trust and confidence to ask an employee to resolve a grievance informally via mediation. The claimant left before the respondent had time to investigate the grievance.

87. Her claim for wrongful dismissal fails because she was not dismissed by the respondent.

88. For all these reasons her claims fail.

Employment Judge Ross

Date 9 July 2019

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON

16 July 2019

FOR THE TRIBUNAL OFFICE

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