EMPLOYMENT TRIBUNALS

Claimant: Miss L Taylor

Respondent: Amey Services Limited

HELD AT: Liverpool **ON:** 11, 12 and 13 June 2019

BEFORE: Employment Judge Horne

MEMBERS: Mrs J L Pennie
Mrs J E Williams

REPRESENTATION:

Claimant: In person
Respondent: Mr K Wilson, counsel

JUDGMENT having been sent to the parties on 19 June 2019 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

The claim

1. By a claim form presented on 20 August 2018 the claimant raised the following complaints:
   1.1. Unfair constructive dismissal, contrary to sections 94 and 98 of the Employment Rights Act 1996 ("ERA"); and
   1.2. Harassment related to age, contrary to sections 26 and 40 of the Equality Act 2010 ("EqA").
2. At the start of the hearing we granted permission to the claimant to introduce a claim for damages for breach of contract. Reasons for that decision were

announced orally at the time. Written reasons will not be provided unless a party makes a specific request in writing within 14 days.

3. Following a preliminary hearing on 31 October 2018, Employment Judge Ryan caused a helpful case management order to be sent to the parties. The order set out the basis upon which the claim was pursued. Relevantly, the order reads as follows:

"

1. The claimant was employed by the respondent from 3 April 2014 until 25 May 2018 when she resigned claiming constructive unfair dismissal and having given notice. She makes claims of constructive unfair dismissal and age discrimination by way of harassment. She has also indicated that she may seek an amendment to her claim to include a claim of breach of contract in respect of a learning agreement which is further clarified below.

2. The claimant alleges that the respondent breached the implied term of trust and confidence and that she resigned in consequence without any delay that could amount to an affirmation of the contract by the following conduct:

(1) In January 2018 an announcement was made at a HR event that the Expenses Audit was to be outsourced. This was an unexpected formal announcement and until that date the Audit had been managed by the claimant, who was not consulted about any restructuring and outsourcing.

(2) Having received a reassurance from Shirley Ferrier, the then interim Head of HR, that the announcement ought not be made and there would be no outsourcing without proper consultation, whereupon a decision would eventually be made one way or the other, the claimant worked on without protest but some three weeks later (in early February 2018) her line manager, Mr Gleeson, told her there was no point her carrying on with the Audit and she may as well just agree to outsourcing in any event.

(3) In March 2018 Mr Rimmer reinstated a payroll position, being a HR Business Partner, while the claimant was on annual leave, and this reinstatement was part of the outsourcing procedure in respect of which the claimant had still not been consulted and which she believed was pending a decision.

(4) The claimant relies on the allegations of harassment set out below as further breaches of the implied term of trust and confidence. She will say that the respondent did nothing about the concerns that she expressed to Mr Gleeson and Ms Ferrier about this harassment.

(5) The claimant met with Mr Gleeson on 25 April 2018 and offered her resignation, citing all the above and the allegations of harassment. Mr Gleeson tried to reassure her that matters would be resolved to her satisfaction and pleaded with her not to resign. He said he would return to her later to discuss the matter and she said

that she would reconsider her position and resignation. At approximately 4.00pm on the same day Mr Gleeson then told the claimant that no agreement had been reached and to her mind he went back on all the reassurances he had given. In the light of this the claimant confirmed her resignation of earlier that morning with notice to 25 May 2018.

3. The claimant also alleges harassment in respect of the protected characteristic of age in circumstances where she was 27 at the relevant time and her colleagues against whom she makes allegations were Nicola Gates (aged in her late 30s) and Mr Rimmer (aged in his 40s), where she says that they considered her to be less experienced because of her age. The claimant's allegations of harassment are in respect of the following incidents:

(1) The claimant raised with management that she had not received training on the payroll and her line manager did nothing about it, which the claimant says was age-related and amounted to harassment.

(2) When the outsourcing announcement was made at the HR event in January 2018 Nicola Gates is said to have made harassing comments to the claimant and to have undermined the claimant by saying that her (Nicole Gates') role was secure but the claimant was at risk of redundancy.

(3) When the HR Business Partner payroll position was reinstated during the claimant's leave period Nicola Gates again undermined the claimant, making her uncertain as to her future with the respondent company.

(4) Nicola Gates showed to the claimant an email between Mr Rimmer and a Mr Dennison about the implementation of the decision to reinstate the HR Business Partner role and about the budget. Nicola Gates was again, allegedly, undermining the claimant with the risk of redundancy.

(5) On 25 April 2018 the claimant met with Mr Gleeson to resign but he gave her assurances and then at the later meeting at 4.00pm he allegedly went back on his word; the claimant says that his conduct of that meeting, and in resiling from his earlier assurances, amounted to harassment.

(6) The claimant filed a grievance on 4 May 2018 which sets out allegations of harassing conduct against Ms Gates and Mr Rimmer between 25 April and 2 May 2018. "

4. In order to understand the sixth allegation of harassment, we had to look at the contents of the claimant's 4 May 2018 grievance. That document, so far as it related to the period between 25 April and 2 May 2018, appeared to be making a number of separate allegations. We summarise them as follows, with paragraph numbering to indicate their roots in Allegation 6:

(6.1) On 25 April 2018, when the claimant informed Ms Gates of her decision to resign, Ms Gates gave the claimant a hug and congratulated her; she did not seem shocked or surprised.

(6.2) On 26 April 2018, Ms Gates walked away from her desk as the claimant was informing the Payroll Team of her decision to resign.

(6.3) On 27 April 2018, Ms Gates' "behaviours and lack of respect continued".

(6.4) On 30 April 2018, the claimant worked from home and Ms Gates did not contact her.

5. The issues for us to determine were shaped by a list prepared by Mr Wilson for the respondent. We re-worded it slightly and identified the issues as follows:

Harassment

5.1. Did the respondent subject the claimant to the alleged unwanted conduct?

5.2. Was that conduct related to the claimant's age?

5.3. Did the conduct have the purpose or effect of violating the claimant's dignity and/or creating an intimidating, hostile, degrading, humiliating or offensive environment for her?

Unfair constructive dismissal

5.4. Did the respondent conduct itself as alleged?

5.5. Did the respondent have reasonable and proper cause?

5.6. Was the conduct calculated or likely to destroy or seriously damage the relationship of trust and confidence?

5.7. Did the claimant resign in response to the breach?

5.8. Did the claimant affirm her contract during her first meeting with Mr Gleeson on 25 April 2018?

Breach of contract

5.9. Was the claimant constructively dismissed as above?

5.10. If so, did the respondent breach the claimant's contract of employment and/or the Learning Agreement by demanding repayment of sums advanced under that agreement? (We did not understand the claimant to have taken any issue with the amount of money demanded: the dispute was one of principle about whether Mrs Ferrier was entitled to demand any repayment at all.)

Evidence

6. We considered documents in an agreed bundle running to 223 pages.

7. During the course of the hearing, the respondent sought to make an addition to the bundle. The new document consisted of a slide presentation, headed, "GSSS Structure 2018". Initially the claimant opposed the introduction of this document on the ground that its authenticity was doubtful. She drew our attention to features of the document that, in her view, tended to suggest that it had been prepared significantly earlier than the purported date of the slide presentation. Following some discussion, the claimant agreed that we should

examine the slides for ourselves and make up our own minds, in the light of the claimant's observations, about whether or not the document was reliable.

8. The claimant gave oral evidence on her own behalf and called Miss H Jewell as a witness. Mr M Gleeson, Miss N Gates and Mrs S Ferrier were called as witnesses for the respondent.

9. This is a convenient opportunity for us to describe, in broad terms, the impressions that the witnesses' evidence made on us.

   9.1. Generally, we found the evidence of the respondents' witnesses to be reliable. This is a controversial finding. The claimant highlighted two factors which, she said, undermined the credibility of the respondents' witnesses. The first was that they made changes to their witness statements at the start of their oral evidence. We did not think that this was as much a cause for alarm as the claimant said it was. The witnesses made the changes before confirming the truth of their statements on oath. The claimant's second argument on credibility was that the respondent had not complied with various case management orders. This is a serious point – orders of the tribunal are there to be obeyed – but the respondent's non-compliance did not tell us much about the honesty or accuracy of its witnesses.

   9.2. Some parts of the claimant's evidence we found difficult to accept. For example, we thought it unlikely that Ms Gates had alerted the claimant to the existence of a particular e-mail, as the claimant alleges. We also rejected the claimant's evidence about a remark that Ms Gates had allegedly made to her about her age. Our findings of fact explain why we took this view. Having rejected some specific pieces of evidence, we decided that, in general, where the evidence of the claimant clashed with that of the respondent's witnesses, we preferred the latter evidence.

Facts

10. The respondent is a large company which employs workers within the group of companies known as the Amey Group. The Group has a Shared Services function which includes Human Resources and Payroll. At least some of the Shared Services function is based at the Matchworks in Liverpool, following a move from Oxford.

11. Shared Services has its own internal management structure, with a hierarchy of roles and grades. One such role is Human Resources Manager, or HR Manager for short. By way of historical background, the respondent had previously employed people in the role of Human Resources Business Partner (HRBP), which sat above HR Manager in the structure. By the time of the events giving rise to this claim, the HRBP roles had been deleted. (We were unsure exactly when this had happened, but it must have been prior to January 2018).

12. The claimant was born on 19 November 1990. At the time of the events relevant to this claim she was 27 years old. She started working for the respondent on 30 June 2014 and moved to Matchworks on 10 August 2015. At Matchworks, the claimant worked alongside Ms Gates, who had joined the respondent in August 2014.

13. The claimant and Ms Gates both understood their job title to be Payroll Manager. Whether or not this was the formal title of their role, their grade was undoubtedly

HR Manager. Both of them were jointly responsible for managing the Payroll team. Although operationally they had joint responsibility, they were each individually responsible for line managing named individuals within the team. From the autumn of 2017 both the claimant and Ms Gates reported to Mr Mike Gleeson, Head of HR Shares Services, who at the time was 35 years old.

14. The claimant and Ms Gates had differing areas of expertise. The claimant tended to lead on expenses claims and Ms Gates tended to lead on running the payroll itself. Support with the technical aspects of the payroll software was provided by a technical team that reported directly to Mr Gleeson.

15. A small part of the Payroll Manager role involved running expenses audits. That was something for which the claimant was primarily responsible. Initially it took about an hour of her time every week. This work was essentially supervisory: the actual work on the audit was done by members of the Payroll Team.

16. Over the years the claimant and Ms Gates became good friends in work, Although they did not socialise outside work, they sent each other text messages or app-based equivalents. The messages were friendly and open.

17. On 27 July 2017 the claimant entered into a Learning Agreement with the respondent, whereby the respondent agreed to fund the claimant for a foundation degree course in Payroll Management. The cost to the respondent was £2,495 plus VAT. At Section 7, the Learning Agreement provided:

> "Amey agrees to provide funding for your development on the condition that you will not end your employment for a period of twelve months from the date of completion of the development activity. If any of the situations in the table below apply before the end of the payback period, you agree to repay all costs incurred by Amey in funding your development, based on the following:

You voluntar[il]y resign from Amey	100% of current year's costs plus 100% previous year's costs minus one twelfth of previous year's costs for each month of employment completed since end of previous year.

> …
>
> You hereby authorise Amey to recover such repayments in whole or in part by deduction from your salary…"

18. At some point, Ms Gates applied unsuccessfully for training, but was subsequently accepted and signed a Learning Agreement of her own.

19. Shortly after Mr Gleeson became their manager, both the claimant and Ms Gates told him that they would each like to learn more about how the other carried out their role. For her part, the claimant wanted in particular to be able to manage the payroll run. In response, Mr Gleeson facilitated Ms Gates to train the claimant informally on the payroll system. Following that informal training, the claimant could generally run the payroll independently whilst working from home. There were still gaps in her knowledge. For example, she still lacked the technical expertise to process some BACS payments and to rectify errors. The more technical the problem, the more likely it was to be the responsibility of the Technical Team rather than of the claimant or Ms Gates.

20. In late 2017 there was a perception amongst Shared Services management that the expenses audit system was not working adequately. The claimant started working alongside Mr Glenn Russell, the HR Project Manager, to process-map and implement expenses audits. This work involved approximately an additional hour per week of time sitting down with Mr Russell. Even taking this extra work into account, her overall time on expenses audits was no more than two hours a week.

21. On 16 January 2018 the respondent hosted an HR event. One of the topics was potential outsourcing. Broadly the same presentation was made multiple times to different teams within Shared Services. The claimant and Ms Gates attended a session in the morning. One of the sessions was also attended by Mrs Shirley Ferrier, who had just started in her role as interim Head of HR for Shared Services. (It may well be that Ms Ferrier attended the same session as the claimant and Ms Gates, but we did not need to make a definitive finding about that).

22. The presentation was given by Mr Ian Dennison, Group HR and Communications Director. During the presentation, Mr Dennison announced that the expenses audit function would be outsourced to a third party provider known as Concur. That announcement was not strictly true. Concur was the provider of proprietary software capable of being run either in-house or operated externally as part of a managed service. By the time of the announcement, no decision had been made as to which if any of those options would be chosen.

23. The claimant and Ms Gates were immediately fearful that the outsourcing decision might have an impact on their own roles. Their suspicions were fuelled immediately after the presentation when Mr Russell approached them and apologised for the announcement having been made in that way.

24. On the same day or the following day (and to our minds it does not matter which) the claimant and Ms Gates spoke to Mr Gleeson. He told them that no decision had yet been made on outsourcing and they should carry on working on the project with Mr Russell. In the same meeting he told them that their roles were not at risk. The claimant and Ms Gates also spoke to Mrs Ferrier. She reiterated that no decision had yet been made on outsourcing and nor could it be made unless there had been proper consultation.

25. Mr Gleeson subsequently arranged for the claimant and Ms Gates to go to Concur's premises to be shown how the new system would work. Although the visit equipped them with the knowledge required to run the new system themselves, they were not particularly comforted by the session, because the impression they got was that Concur were demonstrating how they themselves would run the system rather than teaching the claimant and Ms Gates how to do it in-house.

26. At a subsequent one-to-one meeting, or possibly more than one, the claimant and Ms Gates started telling Mr Gleeson that they thought the other was getting preferential treatment. The claimant for her part believed that Ms Gates was deliberately keeping some of her own knowledge of the payroll system to herself and not sharing it. She mentioned this to Mr Gleeson. What she did not say, either at this one-to-one meeting, or at any other, was that Ms Gates' behaviour in holding back know-how was creating any kind of offensive, hostile, degrading or intimidating environment for her. We find it significant that the claimant did not

report any such feelings to Mr Gleeson at that time. In our view, whilst it is right to acknowledge that the claimant was feeling anxious about the effect of outsourcing on her role, and suspicious of Ms Gates possibly trying to make herself indispensable, the claimant did not actually think that Ms Gates was creating any harassing environment for her by keeping her payroll expertise to herself. Nor did the claimant believe at the time that Mr Gleeson was creating that kind of environment for her by failing to provide the training that would have bridged the gap in knowledge. We also find that Ms Gates and Mr Gleeson were not trying to create an adverse environment for the claimant in relation to experience of payroll. Mr Gleeson kept trying to reassure the claimant that her job was safe during this period. Until April 2018 the claimant and Ms Gates continued to be mutually supportive in work.

27. At one of these one-to-one meetings, following the Concur visit, Mr Gleeson told the claimant that he had an assurance from the HR Director that the expenses audit outsourcing would not change the team. He tried to make the claimant see the potential benefits. The gist of his argument was that the respondent had an opportunity to have an external company doing things that they had previously been doing themselves on different bits of paper. Why not, he rhetorically asked, just let them do it and free the team to do other things? The remark was well-intentioned, but the claimant took it to mean that she was being told to give up the audit expenses project on which she had been working with Mr Russell. She felt undervalued and anxious that the cessation of the project would have an adverse impact on her role. At no stage in this meeting did Mr Gleeson say anything to suggest a connection between his comments on outsourcing and the claimant's age.

28. In February or March 2018 (we were not sure which) the claimant went on annual leave. On her return, she found out that, during her absence, an announcement had been made by Mr Rimmer, Director of Shared Services. The announcement was that the respondent would be restoring the previously-deleted HRBP roles. As before, the HRBPs would sit just above HR Manager in the structure. Shortly afterwards a number of HRBP vacancies were advertised. One of them was for an HRBP in Payroll.

29. The claimant discussed the announcement and the new vacancies with Ms Gates. The tone of the discussion was mutually supportive. The claimant encouraged Ms Gates to apply for the vacant role, which she did. The claimant herself did not apply.

30. On 26 March 2018 the claimant discovered an e-mail which she found deeply alarming. Before setting out the e-mail's contents, we need to explain a little about how the e-mail came to the claimant's notice.

31. The e-mail was stored on a shared platform known as "Remedy". The platform was accessible to a wide group of Human Resources staff, including all HR Managers and members of the Payroll Team. Documents, including e-mails that were otherwise private, could be shared with relevant HR staff by uploading them onto Remedy and allocating them a case number. Any Remedy user who inputted the correct case number would then be able to see them.

32. Someone told the claimant that this e-mail was on Remedy. The claimant discussed the e-mail with Ms Gates, who, at the claimant's request, texted the claimant with the case number.

33. We now have to make a finding about the person who first alerted the claimant to the existence of the e-mail. Whoever that person was, it was not Ms Gates. In making this finding, we preferred Ms Gates' evidence to that of the claimant, so we had better explain why. Part of our explanation involves looking ahead to the grievance that the claimant subsequently raised against Ms Gates. As part of the investigation into that grievance, the claimant was interviewed on 22 May 2018. During the course of that interview she discussed the e-mail. In her grievance letter, and during that discussion, she referred to the source of the e-mail as "anonymous". This was at a time when it would have improved her prospects of a successful grievance outcome to name Ms Gates as the person who had drawn the e-mail to her attention. It was not until 31 October 2018 that the claimant first identified Ms Gates as the alleged source.

34. The email itself was dated 16 January 2018, the same day as the presentation given by Mr Dennison. It was addressed to Mr Dennison from Mr Rimmer. Essentially, it set out the business case for the reintroduction of HRBP roles. Relevantly, the e-mail read (with our emphasis):

> "Please find attached a proposal for the wider Group Shared Support Service structure to take us through 2018 and beyond.
>
> …
>
> The document details some structural changes I would like to propose that reinforces our collective belief that [HRBP] roles are critical to the effective delivery of services …
>
> The proposal reintroduces [HRBP] roles across the function, including HR and central support functions embedded in the shared service offering.
>
> …the change only carries a cost (for 2018) of £37.5k plus employment costs, as all other changes are being funded through our existing recharge model or through changes to HR structures to reflect the [HRBP] role implementation (**ie we will lose some [HR Manager] roles**)."

35. Attached to the email was a PowerPoint presentation with the file name "Shared Service Structure 2018.pptx". That precise slide deck has never been shown to us. For ease of reference, we will call it "the original presentation".

36. What we have been shown, however, is the slide presentation to which we referred at paragraph 7 above. The filename of this document is "Shared Service Structure 2018 v2 (003) [1].pptx". We are satisfied that this is essentially the same document as the original presentation. This is another disputed finding, so we give our reasons for it briefly here:

    36.1. We took into account the fact that the respondent's searches for documents had not apparently revealed the existence of the new iteration until the hearing. Whilst we found that fact surprising, it was capable of being explained by the fact that it was ultimately retrieved from Mr Gleeson's own e-mails rather than the obvious source, which was the e-mail accounts of Mr Dennison and Mr Rimmer.

    36.2. We accepted Mr Gleeson's evidence that he had personally drafted the content of much of the slide deck for Mr Rimmer and recognised its contents.

    36.3. The claimant sought to cast doubt on the authenticity of the document by referring us to the names of individuals mentioned in the organisation

charts within it. Her account was that these individuals had ceased to be employed by the respondent by 16 January 2018. If that was correct, the inclusion of these ex-employees in the proposed structure tended to show that the slide presentation had actually been prepared at a much earlier date. The respondent quickly met this argument head-on. Records drawn directly from the respondent's database showed that, in fact, the named employees were all still employed in January 2018, albeit some of them were on long-term sick leave.

36.4. The filename itself suggested to us that the slide deck was a later iteration of the original presentation.

37. One slide within the deck was an organisation chart showing how Mr Rimmer's proposal would affect the structure within the Payroll function. It showed the new HRBP role sitting just above two HR Manager roles and having line management responsibility for them. Underneath the role titles of the HR Manager roles were the names of the two post-holders. The names were those of Ms Gates and the claimant.

38. There was nothing elsewhere in the slide deck to indicate that those roles would change or be at risk.

39. The claimant, possibly not having read or absorbed the attachment to the email, latched upon the phrase "reduction in the number of HR Managers". Mistakenly, but quite genuinely, she saw the reference to a reduced number of HR Managers as meaning that her own role would be at risk. As it happened, there were other ways in which HR Manager roles could be reduced without any effect on the claimant's role. For example, some of the HR Manager roles within Shared Services were vacant: these roles could simply be deleted with no loss of headcount. The claimant did not consider this possibility. She thought her role was at risk and that Mr Gleeson had lied to her when he had told her that her job was safe.

40. The claimant discussed the e-mail with Ms Gates. They were both worried. In order to protect her own financial security, and also that of her family, the claimant started looking for another job. She and Ms Gates both applied for the same role with an external company. Ms Gates' application was unsuccessful at the first stage of the recruitment process. By contrast, the claimant was offered the role and was given a draft contract on 24 April 2018.

41. In the meantime, Ms Gates was still waiting to hear the outcome of her internal promotion application to be an HRBP. On 5 April 2019, she was approached by a recruitment agency. The agent asked her if she was interested in a role within the respondent's organisation. When the role was described to her, Ms Gates found it to be very similar to the HRBP role for which she had recently applied. Putting two and two together, Ms Gates assumed that the respondent had decided to invite new applications for the role, which, to her mind, implied that the respondent was unhappy with the quality of the existing field, including herself. She confided in the claimant about what had happened. They exchanged messages. One of the messages betrayed Ms Gates' scepticism of any reassurance that Mr Gleeson could offer her about the HRBP role. In our view there are other telling features of this message exchange. One is that Ms Gates was revealing her own lack of confidence in the safety of her own role with the respondent. Another is that there was nothing about these messages to suggest

that the working relationship between the claimant and Ms Gates was strained or uncomfortable at that time. They continued to trust each other, even if they felt they could not trust management.

42. We now come to a number of disputes of fact about which the evidence is given in quite general terms, but which we must nevertheless resolve.

    42.1. It is possible, we find, that Ms Gates might have told the claimant on occasion that she had more experience in running the payroll than the claimant did. Whether she said this or not, we are satisfied that Ms Gates never said to the claimant that her reason for having more experience was because she was older than the claimant. (Had Ms Gates made that comment, we would have expected the claimant to have mentioned it in her witness statement, claim form or her grievance. The alleged remark went to the very heart of her age discrimination claim and would have established an obvious connection between her age and the conduct that she was complaining about.)

    42.2. We have considered whether Ms Gates said something to imply essentially the same message. Did she say something to leave the claimant with the impression that Ms Gates had more experience because she was older? We also think that this is unlikely. The gap between the claimant's experience and that of Ms Gates was largely technical. Put simply (as Ms Gates did in her evidence), Ms Gates had more experience of using the computer system than the claimant did. It is, of course, quite possible that an older person would have more experience of computer technology than a younger person, but it would not be a natural assumption to make. Many parents of school-aged children would say it was the other way around. Boasting of superior computer proficiency (if that is what Ms Gates did) is hard to interpret reasonably as boasting about older age.

    42.3. Ms Gates did not tell the claimant that her own job was safe or that it was safer than that of the claimant. The claimant may have subjectively believed that the difference in experience might give Ms Gates an advantage if the claimant ever had to compete for the same role as Ms Gates, but that is not what Ms Gates told the claimant. Ms Gates did not actually believe that her own job was safe. Had she thought that, it is unlikely that she would have applied for the same external job that the claimant successfully obtained.

43. On 23 April 2018 Ms Gates found out that her HRBP application had been unsuccessful. For a time afterwards she became demoralised and withdrawn. Her interactions with the claimant over the next week or so became sullen and silent.

44. The next day, 24 April 2018, was the day when the claimant received the draft contract from her new employer. She wasted no time. In the morning of 25 April 2018 she met with Mr Gleeson, handed him a pre-written letter and announced her resignation. The letter gave four weeks' notice. It also listed the claimant's reasons for resigning. Relevantly, the list read:

    "Recent e-mail that was brought to my attention regarding the HR Manager Roles being at risk of reduction once the [HRBPs] have been implemented,

> this has broken all my trust with Amey and I need to ensure security for myself and my children.
>
> Expenses audit to be outsourced which was announced unexpectedly at the HR event by Ian [Dennison] …After further discussions you then advised it would be better for it to be outsourced, this left me feeling undermined…
>
> Lack of development and trust within the management and senior management…I … believe management do not have confidence in me to allow me to be more involved in tasks such as running the payroll alone…
>
> I feel that the standard 2% annual increase has been demoralising as last year the standard was 1% but I was awarded a higher percentage for my personal attributes…"

45. This was the first time that the claimant had raised the subject of the 16 January 2018 e-mail with Mr Gleeson or with anyone in a management position.

46. Mr Gleeson attempted to talk the claimant through her reasons for resigning. Although there was no mention of it in her resignation letter, the claimant told Mr Gleeson about problems in her working relationship with Ms Gates. Having heard the claimant, Mr Gleeson attempted to reassure her that he considered her to be a valued employee, that he did not want to lose her and that he had an idea that might enable the two of them to continue working together. His plan, which he was putting together on the hoof, would have involved a proposed change of role for Ms Gates, reducing the need for the claimant and Ms Gates to interact. Needless to say, for Mr Gleeson's plan to get off the ground, Ms Gates would at least have to be consulted. This is what Mr Gleeson attempted to do. After meeting with the claimant, Mr Gleeson had a conversation with Ms Gates. We do not know exactly what they said to each other, but we know that afterwards, Mr Gleeson reverted to the claimant and told her that his earlier proposal was unfortunately not viable. He asked her whether, in those circumstances, she wished to proceed with her resignation. The claimant said that she did.

47. Nothing in the conversations that took place that day had anything to do with the claimant's age. There was no pre-existing plan between Mr Gleeson and Ms Gates to try and secure the claimant's exit from the business, either because of her age or for any other reason. Had there been a plot of this kind, Mr Gleeson would not have attempted to put together a rescue plan for the claimant's job. Nor would he have attempted to persuade her to stay.

48. This brings us to the claimant's reasons for resigning. Predominantly, we find, the claimant's reason for resigning was that she thought that her job was at risk. That was based on the email and the outsourcing announcement. That was combined with her sense that she thought that her managers were not being honest with her. The last straw came on 26 March 2018 when she discovered the 16 January 2018 e-mail. As she saw it, that e-mail had exposed Mr Gleeson as a liar when he had told her that her job was safe. She was also demoralised by her disappointingly low pay rise. To a much lesser extent, the claimant resigned because of the lack of opportunity to learn how to do aspects of Ms Gates' role, We find that this was a much lesser factor because she did not mention it when she was interviewed about it as part of the grievance investigation when directly asked why she felt that she was constructively dismissed. A contributing factor, but again a minor one, was the claimant's difficulty in her working relationship

with Ms Gates. At the time of resigning the claimant was not significantly motivated by any perception on her part that management had failed to address complaints about Ms Gates' behaviour. We come to that view because the claimant did not mention any management failings of this kind when asked directly about the reason for considering herself constructively dismissed. Nor did she raise these failings in her resignation letter.

49. Once the claimant had confirmed to Mr Gleeson that she was resigning, she told the news to Ms Gates. They hugged and Ms Gates congratulated her. In doing so, Ms Gates was not trying to violate the claimant's dignity or create an unpleasant environment for her. Ms Gates may well have looked unsurprised, as she already knew that the claimant believed her job was at risk. If she did show a lack of surprise it had nothing to do with the claimant's age.

50. The next day, 26 April 2018, the claimant broke the news of her resignation to the Payroll Team. There are some disputes of evidence about precisely what occurred. We accept Ms Gates' account that she got up to make everyone in the team a cup of tea and, when she returned, she found the claimant in a meeting room with all the team members who had been in the main office. It may be that the claimant had already started speaking to some members of the team (such as her direct reports) about her resignation by the time Ms Gates first left her seat. Whether or not this is the precise chain of events, we are satisfied that Ms Gates' conduct that morning was not aimed at violating the claimant's dignity or making an unpleasant environment for claimant and, moreover, it was completely unrelated to the claimant's age. If Ms Gates' actions in leaving the room came across as unfriendly, Ms Gates had reasons for finding it difficult to show the claimant any warmth at that time. She was still disappointed in the outcome of her HRBP application and, to make matters worse, she was jealous of the claimant for having successfully obtained the external job for which Ms Gates had unsuccessfully applied. Neither of these reasons had anything to do with age.

51. On 27 April 2018, the claimant met with Mrs Ferrier to discuss problems with her working relationship with Ms Gates. Mr Gleeson was unavailable as he was on leave. Mrs Ferrier agreed to look into the issues that the claimant raised. We heard no specific evidence about what Ms Gates did or did not do on this day. It is hard to make any finding about her behaviour. There is nothing, however, to suggest that Ms Gates' conduct on that day was age-related.

52. On 30 April 2018 the claimant worked from home. Ms Gates did not make any contact with her. Again, our finding is that the claimant's age was not a factor here and, to the extent that Ms Gates avoided telephoning or e-mailing the claimant at home, the reason was most probably Ms Gates' personal disappointment about her two unsuccessful job applications. The claimant believed that Ms Gates was shunning her in order to violate her dignity or to create a hostile environment for her, but that is not what Ms Gates was trying to do.

53. By 2 May 2018, the claimant considered that the working relationship had broken down. She decided that she did not want to continue working her notice. Although there are some discrepancies about the precise order in which conversations took place, it is common ground that on this day the claimant reached an agreement with Mrs Ferrier whereby the claimant would be placed on garden leave for the remainder of her notice period. During the same meeting,

Mrs Ferrier reminded the claimant about the Learning Agreement. The claimant's resignation meant that she was liable to repay £2,493.00 to the respondent. Mrs Ferrier informed the claimant that this amount would be deducted from her final salary. Making a deduction of that magnitude would have caused severe financial difficulties for the claimant. When she pointed this fact out, Mrs Ferrier agreed with the claimant that the claimant would repay the sums due under the Learning Agreement at the rate of £200.00 per month.

54. The claimant raised a grievance about primarily how she had been treated by Ms Gates. That grievance was investigated. The outcome was unfavourable to the claimant. We have not found any particular need to look into any perceived shortcomings in the quality or timeliness of that investigation. It is not part of the claim.

Relevant law

Harassment

55. Section 26 of EqA relevantly provides:

> (1) A person (A) harasses another (B) if—
>
> (*a*) A engages in unwanted conduct related to a relevant protected characteristic, and
>
> (*b*) the conduct has the … effect of—
>
> (i) violating B's dignity, or
>
> (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.
>
> (4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—
>
> (a) the perception of B;
>
> (b) the other circumstances of the case;
>
> (c) whether it is reasonable for the conduct to have that effect.

56. Subsection (5) names age among the relevant protected characteristics.

57. In deciding whether conduct had the proscribed effect, tribunals should consider the context, including whether or not the perpetrator intended to cause offence. Dignity is not necessarily violated by things said or done which are trivial or transitory, particularly if it should have been clear that any offence was unintended. While it is very important that employers, and tribunals, are sensitive to the hurt that can be caused by racially offensive comments or conduct (or indeed comments or conduct related to other protected characteristics), it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase: *Richmond Pharmacology Ltd v. Dhaliwal* [2009] IRLR 336.

58. In *Pemberton v. Inwood* [2018] EWCA Civ 564, Underhill LJ gave the following guidance in relation to section 26:

> "In order to decide whether any conduct falling within sub-paragraph (1)(a) of section 26 EqA has either of the proscribed effects under sub-paragraph (1)(b), a tribunal must consider both (by reason of sub-section 4(a)) whether

> the putative victim perceives themselves to have suffered the effect in question (the subjective question) and (by reason of sub-section 4(c)) whether it was reasonable for the conduct to be regarded as having that effect (the objective question). It must also take into account all the other circumstances (subsection 4(b)).''

59. If it was not reasonable for the conduct to be perceived as having the proscribed effect, it must not be found to have done so: *Ahmed v. Cardinal Hume Academies* [2019] UKEAT/0196/18.

Burden of proof

60. Section 136 of EqA applies to any proceedings relating to a contravention of EqA. By section 136(2) and (3), if there are facts from which the tribunal could decide, in the absence of any other explanation, that a person contravened the provision concerned, the tribunal must hold that the contravention occurred, unless A shows that A did not contravene the provision.

61. In *Igen v. Wong* [2005] EWCA Civ 142, the Court of Appeal issued guidance to tribunals as to the approach to be followed to the burden of proof provisions in legislation preceding EqA. They warned that the guidance was no substitute for the statutory language:

> (1) … it is for the claimant who complains of … discrimination to prove on the balance of probabilities facts from which the tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed an act of discrimination ... These are referred to below as "such facts".
>
> (2) If the claimant does not prove such facts he or she will fail.
>
> (3) It is important to bear in mind in deciding whether the claimant has proved such facts that it is unusual to find direct evidence of … discrimination. Few employers would be prepared to admit such discrimination, even to themselves. In some cases the discrimination will not be an intention but merely based on the assumption that "he or she would not have fitted in".
>
> (4) In deciding whether the claimant has proved such facts, it is important to remember that the outcome at this stage of the analysis by the tribunal will therefore usually depend on what inferences it is proper to draw from the primary facts found by the tribunal.
>
> (5) It is important to note the word "could" in s. 63A(2). At this stage the tribunal does not have to reach a definitive determination that such facts would lead it to the conclusion that there was an act of unlawful discrimination. At this stage a tribunal is looking at the primary facts before it to see what inferences of secondary fact could be drawn from them.
>
> (6) In considering what inferences or conclusions can be drawn from the primary facts, the tribunal must assume that there is no adequate explanation for those facts.
>
> (7) These inferences can include, in appropriate cases, any inferences that it is just and equitable to draw …from an evasive or equivocal reply to a [statutory questionnaire].

> (8) Likewise, the tribunal must decide whether any provision of any relevant code of practice is relevant and if so, take it into account in determining, such facts…This means that inferences may also be drawn from any failure to comply with any relevant code of practice.
>
> (9) Where the claimant has proved facts from which conclusions could be drawn that the respondent has treated the claimant less favourably on the ground of sex, then the burden of proof moves to the respondent.
>
> (10) It is then for the respondent to prove that he did not commit, or as the case may be, is not to be treated as having committed, that act.
>
> (11) To discharge that burden it is necessary for the respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of sex, since "no discrimination whatsoever" is compatible with the Burden of Proof Directive.
>
> (12) That requires a tribunal to assess not merely whether the respondent has proved an explanation for the facts from which such inferences can be drawn, but further that it is adequate to discharge the burden of proof on the balance of probabilities that sex was not a ground for the treatment in question.
>
> (13) Since the facts necessary to prove an explanation would normally be in the possession of the respondent, a tribunal would normally expect cogent evidence to discharge that burden of proof. In particular, the tribunal will need to examine carefully explanations for failure to deal with the questionnaire procedure and/or code of practice.

62. The initial burden of proof is on the claimant: *Ayodele v. Citylink Ltd* [2017] EWCA Civ 1913, *Royal Mail Group Ltd v. Efobi* [2019] EWCA Civ 18.

63. It is good practice to follow the two-stage approach to the burden of proof, in accordance with the guidance in *Igen v. Wong,* but a tribunal will not fall into error if, in an appropriate case, it proceeds directly to the second stage. Tribunals proceeding in this manner must be careful not to overlook the possibility of subconscious motivation: *Geller v. Yeshrun Hebrew Congregation* [2016] UKEAT 0190/15.

64. We are reminded by the Supreme Court in *Hewage v. Grampian Health Board* [2012] UKSC 37 not to make too much of the burden of proof provisions. They will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. But they have nothing to offer where the tribunal is in a position to make positive findings on the evidence one way or the other.

Constructive dismissal

65. Section 95 of the Employment Rights Act 1996 (“ERA”) relevantly provides:

> 95 Circumstances in which an employee is dismissed
>
> (1) For the purposes of this Part an employee is dismissed by his employer if (and… only if)—

> … (c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct. …

66. An employee seeking to establish that he has been constructively dismissed must prove:

    66.1. that the employer fundamentally breached the contract of employment; and

    66.2. that he resigned in response to the breach.

    (*Western Excavating (ECC) Ltd v. Sharp* [1978] IRLR 27).

67. An employee may lose the right to treat himself as constructively dismissed if he affirms the contract before resigning.

68. It is an implied term of the contract of employment that the employer will not, without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between employer and employee: *Malik v. BCCI plc* [1997] IRLR 462, as clarified in *Baldwin v Brighton & Hove CC* [2007] IRLR 232.

69. Section 95(1)(c), *Western Excavating* and *Malik* all raise the question of whose conduct counts as the conduct of "the employer"? That question was addressed in *Hilton International Hotels (UK) Ltd v. Protopapa* [1990] IRLR 316. A person's conduct can breach the contract even if they do not have contractual authority to dismiss the employee. Knox J also observed:

> "In relation to repudiatory conduct by what I will call a supervisory employee of the employer, the question whether the conduct binds the employer is governed by the general law of contract. If the supervisory employee is doing what he or she is employed by the employer to do and in the course of doing it he or she behaves in a way which if done by the employer would constitute a fundamental breach of the contract between the employer and the applicant, then, in our judgment, the employer is bound by the supervisory employee's misdeeds."

70. In our view, for conduct to break the implied term of trust and confidence, it must have been done by someone who stands in the position of employer in relation to the employee. A colleague employed at the same grade with no supervisory responsibility for the employee would not count as the employer for this purpose.

71. The serious nature of the conduct required before a repudiatory breach of contract can exist has been addressed by the EAT (Langstaff J) in *Pearce v. Receptek* [2013] ALL ER (D) 364.

> 12. ...It has always to be borne in mind that such a breach [of the implied term] is necessarily repudiatory, and it ought to be borne in mind that for conduct to be repudiatory, it has to be truly serious. The modern test in respect of constructive dismissal or repudiatory conduct is that stated by the Court of Appeal, not in an employment context, in the case of *Eminence Property Developments Limited v Heaney* [2010] EWCA Civ 1168:

> "So far as concerns of repudiatory conduct, the legal test is simply stated ... It is whether, looking at all the circumstances objectively, that is, from the perspective of a reasonable person in a position of the innocent party, the contract breaker has clearly shown an intention to abandon and altogether refuse to perform the contract."
>
> 13. That has been followed since in Cooper v Oates [2010] EWCA Civ 1346, but is not just a test of commercial application. In the employment case of *Tullet Prebon Plc v BGC Brokers LP* [2011] EWCA Civ 131, Aikens LJ took the same approach and adopted the expression, "Abandon and altogether refuse to perform the contract". In evaluating whether the implied term of trust and confidence has been broken, a court will wish to have regard to the fact that, since it is repudiatory, it must in essence be such a breach as to indicate an intention to abandon and altogether refuse to perform the contract.

72. A fundamental breach of contract cannot be “cured”, but if an employer takes corrective action the employer may prevent conduct from developing into a breach of the implied term of trust and confidence: *Assamoi v. Spirit Pub Co Ltd* [2012] ALL ER (D) 17.

73. It is not uncommon for an employee to resign in response to a “final straw”. In *Omilaju v. Waltham Forest London Borough Council [2005] EWCA Civ 1493,* [2005] IRLR 35*,* the Court of Appeal held that where the alleged breach of the implied term of trust and confidence constituted a series of acts the essential ingredient of the final act was that it was an act in a series the cumulative effect of which was to amount to the breach. It followed that although the final act may not be blameworthy or unreasonable it had to contribute something to the breach even if relatively insignificant. As a result, if the final act was totally innocuous, in the sense that it did not contribute or add anything to the earlier series of acts, it was not necessary to examine the earlier history.

74. Where an employee affirms earlier repudiatory conduct, they may nevertheless subsequently rely on that conduct as contributing to the overall breach of trust and confidence, if they later resign in response to a final straw. In *Kaur v. Leeds Teaching Hospitals NHS Trust* [2019] ICR 1, Underhill LJ observed at paragraph 51:

> ‘an employee who is the victim of a continuing cumulative breach *is* entitled to rely on the totality of the employer’s acts notwithstanding a prior affirmation; provided the later act forms part of the series (as explained in *Omilaju*) it does *not* “land in an empty scale”.’

75. Whether or not an employee has affirmed the contract of employment depends on the context and is essentially a question of conduct rather than time: *Chindove v. William Morrisons Supermarkets Ltd* [2014] UKEAT/0201/13 at paragraphs 24-27. The employee must resign within a reasonable period of time according to the circumstances. Attendance at work is a relevant factor. So are the employee’s own personal circumstances.

Conclusions - harassment

<u>Allegation 1 – payroll training</u>

76. The claimant did tell Mr Gleeson that she wanted to be trained on aspects of the payroll and Mr Gleeson understood that that was her wish. The alleged conduct is that Mr Gleeson "did nothing about it". This allegation is incorrect. Mr Gleeson did facilitate the claimant to be trained on the payroll. To the extent that the training still left the claimant unable to do some of the payroll tasks that Ms Gates could do, the failure to provide further training had nothing to do with the claimant's age. In coming to this conclusion, we have borne in mind that, generally, the claimant and Ms Gates were treated in similar fashion when it came to training, despite them being of different ages. Both obtained funding under Learning Agreements and both were sent to the Concur training session. Even if there was age-related unwanted conduct here, we have found at paragraph 26 above that Ms Gates and Mr Gleeson did not act with the proscribed purpose and that claimant did not perceive that their conduct actually had that effect. For good measure we would add that in our view any such perception would have been unreasonable.

Allegation 2 – Ms Gates' comment about role security

77. The alleged unwanted conduct did not happen: see our finding at paragraph 42.3. We also rejected the central allegation of fact upon which the claimant relied in support of her argument that the unwanted conduct was related to age: see paragraphs 42.1 and 42.2.

Allegation 3 – reinstatement of HRBP

78. The third allegation of harassment is to do with the announcement of the reinstatement of the HR Business Partner role. We find that the alleged conduct did not happen. Ms Gates did not do anything to undermine the claimant as alleged. The claimant and Ms Gates had a mutually supportive conversation and the claimant encouraged Ms Gates to apply for that vacant role. There was nothing about that conversation that could be reasonably interpreted as creating an offensive or intimidating or hostile or otherwise environment as otherwise described in section 26. There was nothing about that conversation that had anything to do with the claimant's age.

Allegation 4 – the 16 January 2018 e-mail

79. The fourth allegation of harassment concerns the 16 January 2018 e-mail. The alleged conduct did not happen. Ms Gates was not the one to bring the e-mail to the claimant's attention (see paragraph 33 above). She did send the claimant the case number to enable her to see it on Remedy. It might be said that, by doing so, she "showed" the e-mail to the claimant, but this was at the claimant's request, so that conduct was not unwanted. As for the e-mail itself, the claimant did genuinely perceive its existence as creating an intimidating environment for her: she thought it showed that not only was her role at risk but that Mr Gleeson had been lying to her. But it was not reasonable for the claimant to perceive it that way, for the reasons we give at paragraphs 37 to 39 above.

80. In any case, neither the e-mail itself, nor Ms Gates' sending the claimant the case number, had anything to do with the claimant's age.

Allegation 5 – conversations on 25 April 2018

81. The fifth allegation of harassment relates to the events of 25 April 2018. We have already recorded our finding (paragraph 47) that this was completely unrelated to the claimant's age.

Allegation 6 – Ms Gates' conduct from 25 April 2018 to 2 May 2018

6.1 Hug and congratulation without apparent surprise

82. In our view, assuming that Ms Gates' conduct was unwanted, it falls considerably short of what would be reasonable to perceive as violating dignity or creating the environment described in section 26. Ms Gates did not do it for the proscribed purpose (paragraph 49). It was unconnected with the claimant's age.

6.2 Walking away from the desk

83. We found that Ms Gates did not act with the proscribed purpose (paragraph 50). The claimant did genuinely perceive that Ms Gates was creating a hostile environment for her. We did not reach a conclusion about whether that perception was reasonable or not, because were quite satisfied that Ms Gates' conduct was completely unrelated to the claimant's age (also at paragraph 50).

6.3 27 April 2018 "behaviours and lack of respect"

84. We were unable to make any findings about what Ms Gates' actual conduct was on 27 April 2018 and there are no facts that would enable us to conclude that it was related to age (paragraph 51).

6.4 Working from home

85. The alleged conduct occurred: Ms Gates did not try to contact the claimant whilst she was working from home. We have our doubts about whether it was unwanted: the state of the working relationship between Ms Gates and the claimant had deteriorated by then to the point where we are not sure that the claimant would have welcomed Ms Gates trying to make contact with her. The claimant did not try to make contact with Ms Gates. Be that as it may, we did not make a positive finding about whether the conduct was unwanted. The claimant perceived that Ms Gates was creating a hostile environment. We did not make a finding about whether or not that perception was reasonable. This is because, again, we found that there was no link between Ms Gates' lack of communication and the claimant's age.

Harassment conclusion

86. The complaint of harassment is therefore not well-founded.

Conclusions – unfair constructive dismissal and breach of contract

Final straw

87. We find that the final straw that prompted the claimant to resign was her discovery of the email on 26 March 2018. That email was not completely innocuous. It showed that, on 16 January 2018, the same day as the announcement about outsourcing, the respondent was planning a restructure of the payroll function. The claimant's role was safe, but it was not unaffected: under the proposed structure the claimant would report to an HRBP instead of Mr Gleeson. The email demonstrated that fact, and brought home to the claimant that she had not been consulted about the proposed change. This was capable in our view of adding cumulatively to an overall deterioration in trust and

confidence, albeit to nothing like the extent that the claimant thought it did. (It certainly did not demonstrate that her job was unsafe and it did not demonstrate that anybody in a management position had been dishonest with her.) We must therefore look to the totality of the respondent's conduct, so far as it had a bearing on the claimant's decision to resign.

Allegation 1 – the HR event

88. Mr Dennison's announcement about outsourcing at the HR event could have had the effect of harming the trust and confidence relationship. The announcement was clumsily handled: it gave the false impression of a final decision having been reached with no prior consultation. In our view, however, it was not nearly enough on its own to destroy or seriously damage the relationship of trust and confidence. This is because the damage was quickly repaired by the prompt assurances that no final decision had been taken, that consultation would take place and that the claimant's job was safe.

Allegation 2 – "may as well just agree"

89. The gist of Mr Gleeson's remark, as we found it at paragraph 27, was substantially the same as that which is alleged by the claimant. In our view, it had only a relatively minor effect on the trust and confidence relationship. It is true to say that his remark was likely to dent the claimant's professional pride: she had put substantial investment of her time and energy into working on a project alongside Mr Russell, and now she was being told that she might as well let somebody else do it. Even so, the comment was relatively harmless. It did not have a substantial impact on the vast majority of the claimant's role and it was an attempt to help the claimant see the potential benefits to herself as well as to the respondent.

Allegation 3 – reinstatement of HRBP without consultation

90. We have dealt with this point under the heading of the "final straw".

Allegation 4 – harassment by Ms Gates

91. As we have already concluded, Ms Gates did not harass the claimant in relation to age.

92. We must also remind ourselves that, in the context of a complaint of unfair constructive dismissal, the repudiatory conduct must have been done by the employer. Ms Gates did not stand in the position of employer in relation to the claimant. She was employed at the same grade and, as regards the claimant, had no supervisory responsibility at all.

93. If the above conclusion were wrong, and Ms Gates' actions fell to be attributed to the respondent, we would have found that Ms Gates' conduct prior to 25 April 2018 did undermine the relationship of trust and confidence to a small extent, in that she was protective of some of her knowledge with regard to payroll. But that should not have been seen as a serious cause for concern in circumstances where there was no realistic possibility of the claimant and Ms Gates having to compete against each other for their existing roles.

No breach of contract

94. We now step back and attempt to assess the totality of the respondent's conduct. Did it cumulatively demonstrate an intention to abandon and utterly refuse to

perform the contract? We find that the conduct of the respondent falls a considerable way short of that high hurdle.

95. The claimant was therefore not entitled to resign without notice and not entitled to regard herself as constructively dismissed.

Affirmation

96. Even if the respondent had repudiated the contract, we would have found that the claimant lost the right to accept that repudiation. She left it too late to resign. As we have found, the "final straw" was the claimant's discovery of the 16 January e-mail on 26 March 2018. She did not resign until 25 April 2018. During that time she worked without any complaints to anybody in a management position, actively carrying out her role and drawing her salary. We take into account that the claimant was job-hunting for at least some of that time. But objectively the claimant's conduct demonstrated to the respondent that she was prepared to put up with everything that had gone before.

97. The claimant's resignation, therefore, does not amount to a constructive dismissal.

Unfair dismissal

98. As the claimant was not dismissed, her complaint of unfair dismissal must fail.

Claim for damages for breach of contract

99. There is another important consequence of our finding that the claimant was not constructively dismissed. The claimant must be regarded as having voluntarily resigned within the meaning of the Learning Agreement. She was therefore liable to repay to the respondent 100% of the current year's course fees plus 100% of those for the previous year, subject to a pro-rata reduction for her service since the completion of the course. This meant that Mrs Ferrier was entitled to demand repayment of the money on 2 May 2018 and to inform the claimant that it would be deducted from her final pay in the absence of an agreement to pay by instalments. Mrs Ferrier did not breach the contract and the claim for damages must also be dismissed.

Employment Judge Horne

24 July 2019

REASONS SENT TO THE PARTIES ON

8 August 2019
FOR THE TRIBUNAL OFFICE