



EMPLOYMENT TRIBUNALS

BETWEEN

Claimant

Miss Jennifer Eden

AND

Respondent

Aspire Academy Trust

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT Bodmin

ON

22 and 23 July 2019

EMPLOYMENT JUDGE N J Roper

Representation

For the Claimant: In person

For the Respondent: Mr Johns of Counsel

RESERVED JUDGMENT

The judgment of the tribunal is that the claimant's unfair dismissal claim is dismissed.

REASONS

1. In this case the claimant Miss Jennifer Eden claims that she has been unfairly constructively dismissed. The respondent contends that the claimant resigned, that there was no dismissal, and in any event that its actions were fair and reasonable.
2. I have heard from the claimant, and I have heard from Mrs Louise Moore on her behalf. For the respondent I have heard from Mrs Kirsty Liddicoat, Mrs Susan Costello, Mr Dan Kay and Mrs Hilary Palmer. I was also asked to consider statements from Mrs Steph Perkin and Mrs Rachel Fulker on behalf of the claimant, but I can only attach limited weight to these because they were not here to be questioned on this evidence.
3. There was a degree of conflict on the evidence. I have heard the witnesses give their evidence and have observed their demeanour in the witness box. I found the following facts proven on the balance of probabilities after considering the whole of the evidence, both oral and documentary, and after listening to the factual and legal submissions made by and on behalf of the respective parties.
4. The claimant Miss Jennifer Eden commenced employment as a teacher at St Uny School in Cornwall on 1 September 2015 ("the School"). The School was a Church of England

- Voluntary Aided Junior School until 1 August 2016 at which stage it became an Academy when it was taken over by the respondent, the Aspire Academy Trust. The claimant's employment transferred to the respondent at that time.
5. The respondent also manages approximately 25 other schools and academies, one of which was at nearby Connor Downs in Cornwall. Mr Dan Kay, from whom I have heard, worked across these two sites, but was acting Head of School for the School for the academic year from September 2016 until July 2017. Mrs Kirsty Liddicoat, from whom I have also heard, replaced Mr Kay as Acting Head of School with effect from July 2017. Her name at that stage before she married was Miss Kirsty Lamb, and she is referred to as Miss Lamb in this judgment. Mrs Susan Costello, from whom I have also heard, is a Director for the respondent and was Executive Head Teacher for a large number of schools, including both Connor Downs, and the School. I have also heard from Mrs Helen Palmer, who at all material times was employed by the respondent as its Special Educational Needs Coordinator to cover both Connor Downs and the School.
 6. One of the children in the claimant's class, and whom she was required to teach, exhibited challenging behaviour and was both disruptive and occasionally dangerous. He has been referred to in these proceedings as Child A. The claimant asserts that she was provided with insufficient support to deal with Child A, and that the respondent should have obtained a report from an Educational Psychologist to assist.
 7. The claimant sent an email to Mrs Palmer on 21 March 2017, which was copied to her line manager Ms Hipson, expressing concerns about Child A's behaviour and enquiring about additional support. She asked for guidance on how best to support him.
 8. The claimant sent another email dated 13 June 2017 to Mr Kay, who was then Acting Head, which was copied to her line manager Mrs Hipson, and also Mrs Palmer. It was a detailed two-page email expressing the claimant's concerns about Child A's safety and lack of progress, and the safety of other children in the class and the impact of his disruptive behaviour. The claimant also enquired whether she might be given "some form of training" with regard to restraint issues, and noted that another employee namely Tom had received "Team Teach" training in this area, but that he was usually outside in the school grounds and might not always be on hand to assist. A formal risk assessment was then carried out on 14 June 2017, which confirmed that Child A could be high-risk, and a report from an Educational Psychologist was also obtained. Mr Kay also offered to meet with the claimant to discuss the concerns which she had raised to him her email of 13 June 2017, but the claimant declined.
 9. The evidence of Mrs Palmer, Mr Kay and then Miss Lamb is that throughout the relevant time extra support was provided in the Claimant's class, which was both appropriate for the circumstances, and which was increased during 2017, as the situation became more difficult. Mrs Palmer has produced a schedule of the additional support provided to cope with Child A from the autumn term of 2016 until the summer term of 2018. Other agencies apart from the respondent were involved. This included the Local Authority by way of social workers, family support workers, and other specialist services. The more serious episodes of Child A's behaviour were apparently linked to family difficulties, and a joint approach was discussed, agreed and reviewed. In the summer of 2017 Child A was excluded for three days following dangerous behaviour and his circumstances were again reviewed. Throughout this time additional support by way of Teaching Assistants was provided by the respondent in the classroom. It would never be possible to provide sufficient cover all of the time to ensure there could never be any further possible challenging behaviour. It was more a matter of assessing the risk and putting in place appropriate support in the absence of limitless resources and by agreement with other agencies.
 10. The claimant also asserts that her position was undermined by the respondent's refusal to allow the claimant to attend Child in Need meetings for Child A on the basis that she did not have the appropriate training. This seems to follow from a disagreement between the claimant and Mrs Palmer and Mrs Palmer's view was that it was inappropriate for the claimant to attend because the meetings necessarily involved discussions of other aspects of Child A's family which were confidential and not in the public domain. Another difficulty

- was that if the claimant attended then the respondent would have to provide further cover for her absence from the classroom.
11. In July 2017 Mrs Costello discussed this with Mrs Palmer, who as Deputy Safeguarding Lead for the School did not consider it appropriate for Claimant to attend because of the information which was being shared by other agencies in these case meetings. Effectively the Claimant did not have "Tier 3 multi-agency training" and some of the information was confidential. The claimant continued to insist that she wished to attend the meetings, and when the level of the case was subsequently downgraded, Mrs Costello checked with the social services department of the local authority who were then able to write to confirm that the Claimant could now attend. In addition, any information which the Claimant as Child A's class teacher needed to know was then shared by Mrs Palmer.
 12. In general terms the claimant was perceived by the respondent to be a well-respected, valued and experienced teacher. However, there were a number of apparently minor conduct and performance related issues which came to the respondent's attention from the spring term of 2017. They were all dealt with informally by the respondent, and none of them were escalated to any formal disciplinary or capability procedure. Nonetheless the claimant now complains that the treatment she received amounted to intimidation, bullying and harassment.
 13. One such example relates to a meeting with the School Council in March 2017. The School Council was led by the claimant and its aims included supporting pupils to become community focussed, and to raise funds for charities. However, the respondent became concerned that the claimant was using the forum to promote her own complaints about the respondent. Ms Hill, the Key Stage 2 leader, reported to Mrs Costello that she had heard the claimant complaining to other staff. This concern was supported by the claimant's line manager Ms Hipson (the Acting Head Teacher at Key Stage I) who reported that she had heard the claimant making unprofessional comments to parents regarding the introduction of mixed age classes in Key Stage I, which were not supportive of the policies and practices of the respondent.
 14. The claimant was challenged about this, and was advised that if the children raised concerns at that forum which were not part of its remit then the School Council was not the right venue to discuss it. The claimant now alleges that she should not have been taken to task for reporting this feedback.
 15. Another occasion involved a potentially serious safeguarding breach when the claimant failed to report to gate duty on time as required. A parent complained that she had seen two children walking back out of the school gates at 8:40 am which the claimant should have been supervising from 8:30 am. Mrs Costello sent an email to all staff reminding them of their need to safeguard pupils' well-being. The claimant attended at her office at morning break to apologise for being late. No further action was taken, although the respondent could have progressed the matter to a disciplinary investigation if so advised. The claimant now asserts that she was undermined, intimidated and harassed by the respondent in this respect, and complains that Mr Kay had been equally culpable on one occasion and not taken to task. I accept Mrs Costello's evidence that she wrote to all staff on this occasion reminding them of their obligations, and accepted the claimant's apology without taking the matter any further. I do not find that there was any intimidation or harassment by the respondent in connection with this incident, for which the claimant was clearly at fault, and as a result of which she was dealt with leniently and professionally.
 16. In March 2017 there was an exchange between the claimant and Miss Lamb just before a parents' evening was due to commence. They had a disagreement about Miss Lamb removing the children's artwork which was on display in the classroom. Miss Lamb asserts that the claimant called her "a bitch" and she complained to Mrs Costello. The claimant denies this. In any event Mrs Costello met with the claimant about this, and although the claimant denied the insult, she accepted that her tone might have been inappropriate and agreed to apologise to her. There is an exchange of emails between the claimant and Mrs Costello on 30 and 31 March 2017. Mrs Costello wrote: "I've just fed back to Kirsty regarding our conversation and she claims that you haven't yet apologised to her ... I know you are keen to apologise and move on so please do. It will be good for her to know that

- you didn't mean anything negative towards her." The claimant replied: "I'm keen to move on and will apologise when I get the chance ... I will find her today and make sure she knows I am very sorry." The claimant did then apologise by email.
17. The claimant asserts that subsequently, on about 22 May 2018, Mrs Costello informed the claimant that she then believed the claimant's version of events, and that she had not needed to apologise to Mrs Lamb, and that Mrs Costello apologised to the claimant for this misunderstanding. Mrs Costello's evidence is that she apologised over another misunderstanding concerning Miss Lamb, and not this one. When the claimant had attended the meeting on 9 February 2018 (at which she later resigned), she had been told that Mrs Eddy was only present because she and Miss Lamb had been car sharing. The real reason was that she (Mrs Eddy) was supervising Miss Lamb as part of her professional development. Miss Lamb did not tell the claimant this, when she should have done. When Mrs Costello discovered this, she apologised for that reason, and not in relation to the earlier incident between the claimant and Miss Lamb.
 18. The claimant asserts that she was effectively forced against her will to apologise to Miss Lamb when she had no need to do so, and it was implied in her exchange of emails with Mrs Costello that she was expected to do so and that there would be detrimental consequences if she failed to do so. I find that assertion to be entirely far-fetched. Mrs Costello's evidence is supported by the contemporaneous exchange of emails which are not aggressive nor intimidatory. They support Mrs Costello's recollection that the claimant offered to apologise and was happy to do so. I reject the assertion that the claimant was in some way forced to apologise or otherwise intimidated in this respect.
 19. A further instance of unsatisfactory conduct on the part of the claimant occurred in June 2017. This related to year 1 examination papers for phonics. They concerned sensitive information concerning children, and following completion of the tests should have been locked away in a cupboard. The claimant failed to do this in respect of some papers in her class. Equally, the same oversight was committed by two of the claimant's colleagues. This failure was discovered by a local authority monitoring visit carried out by Mrs Molt. This oversight has been referred to as "maladministration" by the respondent, and the claimant objects to this terminology. The claimant asserts that Mrs Molt supports her in her contention that the oversight was not sufficiently serious to amount to "maladministration" which is much more serious.
 20. In any event the respondent took advice on how it should deal with the staff involved, including the claimant. Mrs Costello considered a range of options but decided to deal with the matter informally, and without commencing any disciplinary process. She agreed with Mr Kay that there should be an informal meeting at which the claimant was reminded about maintaining the security of test papers.
 21. The claimant now complains that she was undermined and harassed in this respect and that there was never any "maladministration". Nonetheless she accepted at this hearing that she was at fault by not securing the papers. In addition, the three members of staff involved (including the Claimant) were treated equally, the matter was dealt with informally by the respondent when it could have progressed the matter to a more serious level. I reject the allegation that there has been any intimidation, undermining or harassment in this respect.
 22. The claimant also complains of a lack of feedback from the respondent's Senior Leadership Team. The matter was referred to Mrs Costello, who discussed the matter with the Heads of School. The School was subject to monitoring visits every term from within the respondent organisation, and the monitoring visit at the School in the summer term of 2017 had been externally observed. Mr Kay recalls that the claimant was provided with verbal feedback after each such monitoring visit, and that the feedback was positive. Mr Kay also had additional notes confirming his feedback to the claimant from less formal "learning walks" when he supervised teaching in his capacity as Head Teacher. There was no documentary evidence of this in the agreed bundle of documents for this hearing, because it apparently became lost when Mr Kay changed email accounts on leaving the School. In addition, there are monitoring files for the 2017/2018 completed by Miss Lamb showing feedback given to individual teachers including the claimant.

23. The claimant is correct to point out that there is no evidence in the agreed trial bundle of any written feedback following observations of her teaching. The claimant also complains that she was not given any formal appraisal during Mr Kay's year as Acting Head, nor by Miss Lamb in the period before the claimant's resignation. This is not disputed by the respondent. Nonetheless Mr Kay, Miss Lamb and Mrs Costello are consistent in their evidence to the effect that there were normal and ongoing discussions with the claimant about her performance which included feedback from any monitoring (both positive and occasionally critical).
24. One of the claimant's responsibilities was teaching phonics to Year 1 pupils, and in June 2017 the results for Year 1 phonics were lower than national expectation, with the School having the lowest phonics results of all the schools in the respondent's organisation. The Assistant Headteacher for Key Stage I was the claimant's line manager Ms Hipson. She had monitored the claimant, and concluded that the claimant needed additional support in this area in order to manage the increased expectations of a mixed class of Year 1 and Year 2 pupils. Nonetheless the claimant was often late handing in planning and completing assessments. In addition, Ms Hipson raised a concern to the Senior Leadership Team in the summer term 2017 that during her supervision of the claimant, she was a victim of bullying and aggressive behaviour from the claimant. As a result of the claimant's aggressive conduct towards her, Ms Hipson had decided to resign and had tendered her resignation. She confirmed that the claimant's behaviour towards her was a contributory factor in her decision. Ms Hipson was dissuaded from resigning, and declined to pursue a formal grievance against the claimant in the hope that the matter might resolve itself without formal escalation.
25. Miss Lamb then took over as Head Teacher with effect from September 2017. This was the first time at which she had acted in this capacity and not surprisingly needed a little time to become accustomed to the role. After a short period of time in about September/October 2017 she decided to act on the poor phonics results. Following Ms Hipson's concerns about the week phonics results and her conclusion that the claimant needed additional support, Miss Lamb decided to put in place a support plan to assist the claimant. This involved allocating a qualified teacher to the claimant's class as a Teaching Assistant to provide support. In addition, Miss Lamb arranged for Key Stage I teachers to be involved in an externally led school improvement project based on the weak phonics results in order to help raise standards.
26. This support plan was also designed to help the claimant improve her general conduct and to address the issue of bullying which had led to Ms Hipson's complaint against her. Miss Lamb decided to include the subject of professional relationships in the support plan in the hope the claimant would behave in a more professional manner towards Ms Hipson. The respondent did not commence any more formal procedure, such as a capability or disciplinary process, and no such indication was ever given to the claimant that such a process would ever commence.
27. The documentary evidence with regard to the support plan is rather confusing. The copy of the support plan in the agreed trial bundle is dated 30 October 2017 and is typed. The main areas of improvement identified were these: "improvement in phonics teaching and attainment of the children you work with; fulfil wider professional responsibilities; have proper professional regard for the ethos, policies and practices of the school". One column shows what action areas are to be worked on for each week from the end of October 2017, and the dates when that action would be reviewed.
28. The claimant now complains that this document is a fabrication. She asserts she was only ever shown a rough manuscript copy in the time leading up to her resignation, and that some of the dates in question refer to Fridays when there were no discussions or reviews with her because she was busy teaching. She asserts that the typed version now relied upon by the respondent must be a fabrication by Miss Lamb. The respondent asserts that the support plan was effectively successful, and completed by Christmas of 2017. The claimant (quite correctly) asserts that there is no documentary evidence that the support plan was ever "signed off", and she therefore disputes that she was ever informed that the support plan had effectively been successfully concluded.

29. Miss Lamb's evidence is that the support plan was discussed with the claimant on a weekly basis by her line manager Ms Hipson, and occasionally with Miss Lamb herself. She said that there were constant conversations which she confirmed by jotting down notes on "post-it" notes, and that these conversations were completed by Christmas 2017. In addition, in the spring term of 2018, the claimant agreed to have a student teacher placed with her for four weeks. Miss Lamb says this would not have been offered, nor accepted by the claimant, if there was still an active support plan in place. Although there is no signature to prove the support plan was "signed off", Miss Lamb's evidence is that it was the clear understanding of the claimant, Ms Hipson, and her that the support plan was successfully concluded.
30. I accept the claimant's evidence that she had not seen the typed version of this support plan before her resignation, and it is not in dispute that there is no signed confirmation that the support plan was concluded and "signed off". I reject the assertion that Miss Lamb has dishonestly and retrospectively altered the dates on the plan. They seem to me to refer to dates of weekly targets rather than necessarily the dates of specific meetings which may or may not have occurred. I also find on balance that it was a general understanding of Miss Lamb Ms Hipson and the claimant as at the start of 2018 that the support plan was concluded not least because it was no longer discussed, and the claimant had been allocated a student teacher, which otherwise would not have happened.
31. The claimant cites this support plan as another example of her being intimidated, undermined, bullied and/or harassed. I reject that allegation which again I find to be far-fetched. There was clear databased evidence to support the respondent's contention that the claimant's performance in teaching phonics was unsatisfactory. There was also evidence to support the contention that the claimant was lacking in professional responsibilities to colleagues, which worryingly included the allegation of bullying from Ms Hipson and the fact that Ms Hipson had resigned in response. The respondent chose not to pursue a formal capability or disciplinary process, but instead put in place an informal support plan which involved additional teaching support, an externally led support project, and weekly discussions and encouragement. It is true that the paperwork might have been more thoroughly handled, in the sense that it would have been advisable to have had an audit trail of a typed support plan as agreed by all parties, with signed confirmation when it was concluded. Nonetheless to suggest that this course of action by the respondent was intimidation or harassment rather than supportive and constructive is in my judgment far-fetched and unsupported.
32. It seems to the neutral observer that the claimant was offended to have had her performance challenged in this way. Nonetheless she did not raise any formal grievance to any of the School's senior leadership team. The claimant did however wish to discuss her position with someone senior in the respondent organisation, and in November 2017 she requested a private meeting with Miss Bragg, who is a director of the respondent. They were eventually able to meet in January 2018, and did so confidentially at a neutral venue. The claimant says that she expressed concerns about her position to Miss Bragg. Miss Bragg explained the various procedures in place, including the grievance and whistleblowing procedures, but the claimant declined to raise any formal complaint under these procedures, and requested that Miss Bragg kept their discussions confidential between them, which she did. Other members of the respondent's senior management team were therefore unaware that the claimant had raised these concerns.
33. On 7 February 2018 there was then a monitoring visit when the work undertaken by the respondent's teachers was reviewed by a team of six reviewers, two of whom were from outside of the School. They agreed that they had concerns about some aspects of the claimant's work, which was not to the same professional standard as that of some of her peers. Miss Lamb decided to have an informal meeting with the claimant about this, and the respondent asked her line manager Mrs Eddy to accompany her and supervise her at that meeting as part of Miss Lamb's professional development. Miss Lamb emailed the claimant on 7 February 2018 saying: "After today's monitoring visit, myself and Jan Eddy would like to meet with you at 4:15 pm tomorrow to feed back some findings. Kind regards". Although Miss Lamb was to be accompanied by her line manager, she did not suggest to

- the claimant that she might wish to have a companion or representative present at the meeting.
34. The claimant responded: "Thank you for your email. Yes, that is fine. Would it be possible to meet with you beforehand at all? I know you are not in today but I have something I was hoping to talk to you about today before the half term break ..." The claimant confirmed in her evidence at this hearing that she had already decided to resign at that stage, and wished to discuss this with Miss Lamb.
 35. Approximately 15 minutes before the meeting was due to start on 8 February 2018, the claimant asked Miss Lamb for a private discussion. The claimant was tearful and stated that the respondent was effectively "too big a company" and she did not like the way it was operating and that she intended to hand in her resignation. Miss Lamb said words to the effect "that's a shame" and tried to comfort her. They then proceeded into the meeting. They had a conversation by way of feedback for the monitoring and explained why some of the claimant's work was not perceived to be of the required standard. The claimant then repeated that she was resigning and made it clear verbally that she was terminating her employment but would work out her notice until the end of the summer term so that her resignation would be effective at the end of August 2018. Miss Lamb asked her to confirm her resignation in writing.
 36. The claimant then prepared a very detailed email which runs to six pages and after obtaining advice from her union representative she sent this to Miss Lamb on 17 February 2017. That email complained of a number of matters, all of which related to the performance criticisms of the claimant, except for the first point. In summary the points raised were these: the claimant argued that she should have been entitled to have had a colleague or representative to attend with her at the meeting; she did not see why a support plan was necessary because the areas which were highlighted contradicted her feedback on those subjects; she requested written feedback on an earlier English lesson observation (which was perceived as very good); given that her observation feedback had been good and that she was asked to be a mentor for a trainee teacher, she was confused as to why a support plan was put in place; she objected to the conclusion that the children in her class were making no progress or were regressing simply from the sample of books which were examined; she objected to the reference to the phonics data in the support plan because she had not been informed of any problems with her phonics teaching; that she should not have been put on an action plan in the autumn term; and that by reason of these performance criticisms she felt that she was being bullied and harassed. The claimant also confirmed that she was terminating her employment with effect from 31 August 2018 "for a large number of reasons so this is written confirmation of that." This detailed email made no mention of Child A or any alleged lack of support in that respect.
 37. The claimant subsequently confirmed her resignation by way of formal letter dated 19 February 2018, in which she stated: "Please accept this as formal notice of my resignation from the position of Class Teacher. I will continue to work until the end of the summer term so my last day of employment will be 31 August 2018. This gives more than the required notice period detailed in my contract of employment. I thoroughly enjoyed working with the children, parents, and friends I have made among the staff team. I would like to thank you for the opportunity of working at St Uny C of E Academy"
 38. Miss Lamb informed Mrs Costello of these developments, but Mrs Costello was unable to investigate the concerns raised by the claimant in her email of 17 February 2018 before she confirmed her resignation in writing for a second time on 19 February 2018. Nonetheless Mrs Costello was concerned at the claimant's allegations in her email to Miss Lamb that she was being bullied or harassed, and wrote to the claimant to ask her if she wished to escalate her complaint and make it more formal. The claimant replied that she did not wish to take the complaint any further. In addition, the claimant had never raised any concerns to Mrs Costello about being bullied harassed or intimidated by any of the senior leadership team (that is to say Mrs Costello herself, Miss Hill, Ms Hipson, Mr Buxton Dean, Mrs Palmer and Mr Kay).
 39. Mrs Costello did pursue investigations with regard to Miss Lamb's previous conduct of the claimant's support plans and discussed these with Miss Lamb. In short Mrs Costello

- concluded that the communication could have been better, and made recommendations to improve communication on such issues in the future. Mrs Costello continued to check whether the claimant wished to make any formal complaints or raise a formal grievance but the claimant declined. The claimant continued working and continued to thank Mrs Costello for her support. She confirmed to Mrs Costello in about June 2018 that she wished to pursue a career change to youth work or nurseries and that she was unsure whether she wished to continue working for a large institution. The claimant's employment subsequently terminated by reason of her resignation on 31 August 2018.
40. Having established the above facts, I now apply the law.
 41. Under section 95(1)(c) of the Employment Rights Act 1996 ("the Act"), an employee is dismissed if she terminates the contract under which she is employed (with or without notice) in circumstances in which she is entitled to terminate it without notice by reason of the employer's conduct.
 42. If the claimant's resignation can be construed to be a dismissal then the issue of the fairness or otherwise of that dismissal is governed by section 98 (4) of the Act which provides "... the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) – (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and – (b) shall be determined in accordance with equity and the substantial merits of the case".
 43. I have considered the cases of Western Excavating (ECC) Limited v Sharp [1978] IRLR 27 CA; Malik v Bank of Credit and Commerce International SA [1997] IRLR 462 HL; Courtaulds Northern Spinning Ltd v Sibson [1987] ICR 329; Kaur v Leeds Teaching Hospital NHS Trust [2018] EWCA; Omilaju v Waltham Forest London Borough Council [2005] IRLR 35 CA; Woods v WM Car Services (Peterborough) Ltd [1981] ICR 666 CA; Buckland v Bournemouth University Higher Education Corporation [2010] IRLR 445 CA; Tullett Prebon PLC and Ors v BGC Brokers LP and Ors [2011] EWCA Civ 131; Claridge v Daler Rowney [2008] IRLR 672; Sainsbury's Supermarkets Limited v Hitt [2003] IRLR 23 CA; Lewis v Motorworld Garages Ltd [1985] IRLR 465; Nottingham County Council v Meikle [2005] ICR 1 CA; Abbey Cars (West Horndon) Ltd v Ford EAT 0472/07; and Wright v North Ayrshire Council [2014] IRLR 4 EAT; Leeds Dental Team v Rose [2014] IRLR 8 EAT; Hilton v Shiner Ltd - Builders Merchants [2001] IRLR 727 EAT.
 44. I have also considered section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992, and in particular section 207A(2), (referred to as "s. 207A(2)") and the ACAS Code of Practice 1 on Disciplinary and Grievance Procedures 2009 ("the ACAS Code").
 45. The best known summary of the applicable test for a claim of constructive unfair dismissal was provided by Lord Denning MR in Western Excavating (ECC) Limited v Sharp [1978] IRLR 27: "If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment; or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract; then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of his employer's conduct. He is constructively dismissed. The employee is entitled in these circumstances to leave at the instant without giving any notice at all or, alternatively, he may give notice and say he is leaving at the end of notice. But the conduct must in either case be sufficiently serious to entitle him to leave at once. Moreover, he must make up his mind soon after the conduct of which he complains: for, if he continues for any length of time without leaving, he will lose his right to treat himself as discharged. He will be regarded as having elected to affirm the contract."
 46. In Tullett Prebon PLC and Ors v BGC Brokers LP and Ors Maurice Kay LJ endorsed the following legal test at paragraph 20: "... whether, looking at all the circumstances objectively, that is from the perspective of a reasonable person in the position of the innocent party, the contract breaker has clearly shown an intention to abandon and altogether refuse to perform the contract."

47. In Courtaulds Northern Spinning Ltd v Sibson it was held that reasonable behaviour on the part of the employer can point evidentially to an absence of significant breach of a fundamental term of the contract. However, if there is such a breach, it is clear from Meikle, Abbey Cars and Wright, that the crucial question is whether the repudiatory breach “played a part in the dismissal” and was “an” effective cause of resignation, rather than being “the” effective cause. It need not be the predominant, principal, major or main cause for the resignation.
48. With regard to trust and confidence cases, Dyson LJ summarised the position thus in Omilaju v Waltham Forest London Borough Council [2005] IRLR 35 CA: The following basic propositions of law can be derived from the authorities: 1. The test for constructive dismissal is whether the employer’s actions or conduct amounted to a repudiatory breach of the contract of employment: Western Excavating (ECC) Limited v Sharp [1978] 1 QB 761. 2. It is an implied term of any contract of employment that the employer shall not without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee: see, for example Malik v Bank of Credit and Commerce International SA [1998] AC 20, 34H – 35D (Lord Nicholls) and 45C – 46E (Lord Steyn). I shall refer to this as “the implied term of trust and confidence”. 3. Any breach of the implied term of trust and confidence will amount to a repudiation of the contract, see, for example, per Browne-Wilkinson J in Woods v WM Car Services (Peterborough) Ltd [1981] ICR 666 CA, at 672A; the very essence of the breach of the implied term is that it is calculated or likely to destroy or seriously damage the relationship. 4. The test of whether there has been a breach of the implied term of trust and confidence is objective. As Lord Nicholls said in Malik at page 35C, the conduct relied on as constituting the breach must: “impinge on the relationship in the sense that, looked at objectively, it is likely to destroy or seriously damage the degree of trust and confidence the employee is reasonably entitled to have in his employer”.
49. This has been reaffirmed in Buckland v Bournemouth University Higher Education Corporation [2010] IRLR 445 CA, in which the applicable test was explained as: (i) in determining whether or not the employer is in fundamental breach of the implied term of trust and confidence the unvarnished Malik test should be applied; (ii) If, applying Sharp principles, acceptance of that breach entitled the employee to leave, he has been constructively dismissed; (iii) It is open to the employer to show that such dismissal was for a potentially fair reason; (iv) If he does so, it will then be for the employment tribunal to decide whether the dismissal for that reason, both substantively and procedurally (see Sainsbury’s Supermarkets Ltd v Hitt [2003] IRLR 23 CA) fell within the range of reasonable responses and was fair.”
50. The same authorities also repeat that unreasonable conduct alone is not enough to amount to a constructive dismissal (Claridge v Daler Rowney [2008] IRLR 672); and that if an employee is relying on a series of acts then the tribunal must be satisfied that the series of acts taken together cumulatively amount to a breach of the implied term (Lewis v Motorworld Garages Ltd [1985] IRLR 465). In addition, if relying on a series of acts the claimant must point to the final act which must be shown to have contributed or added something to the earlier series of acts which is said, taken as a whole, to have broken the contract of employment (Omilaju v Waltham Forest London Borough Council [2005] IRLR 35 CA).
51. The judgment of Dyson LJ in Omilaju has recently been endorsed by Underhill LJ in Kaur v Leeds Teaching Hospital NHS Trust. Having reviewed the case law on the “last straw” doctrine, the Court concluded that an employee who is the victim of a continuing cumulative breach of contract is entitled to rely on the totality of the employer’s acts notwithstanding a prior affirmation by the employee.
52. In addition, it is clear from Leeds Dental Team v Rose that whether or not behaviour is said to be calculated or likely to destroy or seriously damage the trust and confidence between the parties is to be objectively assessed, and does not turn on the subjective view of the employee. In addition, it is also clear from Hilton v Shiner Ltd - Builders Merchants that even where there is conduct which objectively could be said to be calculated or likely to

- destruction or seriously damage the trust and confidence between the parties, if there is reasonable and proper cause for the same then there is no fundamental breach of contract.
53. This case has always been presented by the claimant on the basis that the respondent has committed a fundamental breach of the implied term that the employer shall not without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee. As this case progressed, the claimant has also made it clear that she feels that she was “forced to work in an unsafe working environment which threatened the safety of myself, children in my care and other staff.” There is also an implied term in a contract of employment that an employer will not act in breach of its reasonable and statutory obligations to protect the health and safety of its employees.
54. The claimant has confirmed that she relies upon the following alleged breaches of contract. The first are three issues which are related and concern Child A: they are failing to support the claimant when she requested assistance with regard to Child A; failing to arrange Team Teach training to assist; and not permitting the claimant to attend the Child in Need meetings because it was deemed that she did not have the appropriate training. Secondly, the claimant complains about being placed on the support plan in September/October 2017 which she alleges Miss Lamb completed by fabricating the dates of meetings. The third is that the claimant was taken to task for passing on feedback from students at the School Council. The fourth is related to the second issue of the support plan, and is that Mr Kay failed to provide any written observation feedback to the claimant during his year as Acting Head, and/or failed to provide any formal appraisal. The fifth is that the claimant was forced to apologise by Mrs Costello in relation to her disagreement with Miss Lamb. The sixth is that the claimant was repeatedly called to meetings by her managers without being provided with an agenda for that meeting, or being offered the opportunity to be accompanied by a representative. The seventh is that the claimant was wrongly accused of “maladministration” with regard to the phonics examination papers.
55. In addition, the claimant asserts that the totality of this treatment, viewed in the round, amounts to “unfair treatment, harassment, bullying, and total disregard for my duty of care and my health safety and welfare” with the result that she was forced to resign from her role. The claimant asserts that this course of conduct arose as a direct result of her drawing health and safety matters relating to Child A to the respondent’s attention, and its commencement was contemporaneous with her having done so.
56. I deal with each of these alleged breaches of contract in turn as follows.
57. First, with regard to Child A, I have no doubt that his behaviour was often challenging and disruptive, and that this created difficulties for the Claimant who was his class teacher. I accept the claimant’s evidence that she passed on concerns verbally, and in any event it is clear that she sought advice and support from Mrs Palmer in email on 21 March 2017. It is also clear that the claimant sent a more detailed email on 13 June 2017 to Mr Kay, Ms Hipson and Mrs Palmer expressing in clear terms the claimant’s concern about Child A’s safety and the safety of other children in the class. She also enquired about restraint issues and Team Teacher training.
58. The evidence of Mrs Palmer, Mr Kay and Mrs Costello was consistent to this effect. First, it is impossible with limited resources to put in place an action plan for every child in the respondent’s academies such as to guarantee the absence of any challenging or disruptive behaviour. Sadly, such behaviour will always remain a possibility. There is a balancing act to be struck which involves the provision of reasonable support from those who have been adequately trained. It is simply not possible to have a counsel of perfection. Against this background the claimant’s concerns were addressed and she was provided with increasing levels of support and cover during 2017 which was at a time when child A’s behaviour became progressively more difficult. This involved the provision of Teaching Assistants, (one of whom was fully qualified as a teacher), and also involved other statutory agencies and social workers. A risk assessment was completed and an Educational Psychologist’s report was obtained. Although the claimant asked for further training, and mentioned Team Teach training in restraint issues, there was no requirement for the respondent to provide this for her if other reasonable steps were already in place. Similarly, the respondent was

- entitled to refuse to allow the claimant to attend Child in Need meetings when effectively she was not authorised to do so. When Child A's position improved, and there were less sensitive family issues to be discussed, at which stage the Local Authority confirmed that the claimant would have permission to attend such meetings, the respondent allowed her to do so despite the fact have to arrange further cover for absence at such meetings.
59. I am satisfied that the circumstances surrounding Child A had been considered in detail by the relevant personnel and senior managers within the School and the respondent's wider organisation, as well as by third-party agencies, and that they had in place a structure of support which was as safe as could be reasonably achieved in the circumstances. The respondent was entitled to refuse to attend Child in Need meetings when she was not authorised to attend, was not required to provide further training to the Claimant when other support structures were already in place. I do not accept that the respondent was in breach of its duty of care to the claimant to take reasonable care of her health and safety, and I cannot find that the respondent acted in breach of the implied term that the employer shall not without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee. Accordingly, I reject these first three allegations of breach of contract by the respondent.
60. The second and fourth allegations are related, and the claimant complains about being placed on the support plan in September 2017 which she alleges Miss Lamb completed by fabricating the dates of meetings and that Mr Kay failed to provide any written observation feedback to the claimant during his year as Acting Head, and that she was not given a formal appraisal by the respondent.
61. The respondent does not dispute that during the time that Mr Kay and Miss Lamb were Head Teachers of the School and before the claimant had resigned, she was not given a formal appraisal system. Whether an employer chooses to implement a formal appraisal system, on a yearly basis or otherwise, is a matter for that employer. There was no contractual right on the part of the claimant to receive one, and there is no evidence that she requested a formal appraisal. There is no evidence the claimant was treated differently or less favourably than any other member of staff in this respect. The claimant is correct to point out that there is no evidence and the agreed trial bundle of any written feedback to her from monitoring or other performance assessments. I accept Mr Kay's evidence that this was generally done verbally, in the normal course of discussions between professional colleagues, but with some confirmation and feedback given by email, copies of which have been lost when he necessarily had to change email accounts. If it is the claimant's assertion that she had to struggle on with her duties despite complaints and without support and/or feedback, I reject that assertion as being both improbable and unsupported by any contemporaneous documentary evidence.
62. As far as the support plan is concerned, and whether it was appropriate conduct on the part of the respondent to put this in place, there was clear databased evidence to support the respondent's contention that the claimant's performance in teaching phonics was unsatisfactory. There was also evidence to support the contention that the claimant was lacking in professional responsibilities to colleagues, not least because of the allegation of bullying from Ms Hipson and the fact that Ms Hipson had resigned as a result. The respondent chose not to pursue a formal capability or disciplinary process, but instead put in place an informal support plan which involved additional teaching support, an externally led support project, and weekly discussions relating to performance, training, and generally by way of encouragement. It is true that the paperwork might have been more thoroughly handled, in the sense that it would have been advisable to have had an audit trail of a typed support plan as agreed by all parties, with signed confirmation when it was concluded. Nonetheless to suggest that this course of action by the respondent was intimidation or harassment rather than supportive and constructive is in my judgment far-fetched and unsupportable.
63. I do not accept therefore that the respondent was in breach of its duty of care to the claimant to take reasonable care of her health and safety, and I cannot find that the respondent acted in breach of the implied term that the employer shall not without

- reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee. Accordingly, I also reject the second and fourth allegations of breach of contract by the respondent.
64. The third allegation is that the claimant was taken to task for passing on feedback from students at the School Council. In my judgment the respondent was entitled to challenge the claimant about her apparent negativity towards the respondent's policies and practices and to ensure that the claimant did not involve the School Council to raise or promote any such concerns because it was not the correct forum. It is not the case the claimant was unfairly or wrongly criticised merely for passing on comments from the School Council. The respondent was entitled to draw to her attention reasonably that she should not publicly undermine the respondent's position with other staff, parents or pupils. The respondent decided not to escalate the matter to a potential disciplinary investigation, and decided to take the matter no further. I reject the allegation that the claimant was undermined, bullied or harassed in any way in this context. I do not accept that the respondent was in breach of its duty of care to the claimant to take reasonable care of her health and safety, and I cannot find that the respondent acted in breach of the implied term that the employer shall not without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee. Accordingly, I also reject this third allegation of breach of contract by the respondent.
65. The fifth allegation is that the claimant was forced to apologise by Mrs Costello in relation to her disagreement with Miss Lamb. For the reasons set out in the findings of fact above I reject this allegation which is not factually correct. I cannot find that the respondent acted in breach of the implied term that the employer shall not without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee. Accordingly, I also reject this fifth allegation of breach of contract by the respondent.
66. The sixth allegation is that the claimant was repeatedly called to meetings by her managers without being provided with an agenda for that meeting, or been given the opportunity to be accompanied by a representative. In my judgment there is a clear distinction to be drawn between formal meetings, which might be of a disciplinary nature, and other informal meetings. There is a statutory right to be accompanied by a companion or representative at grievance and disciplinary hearings, and the respondent's procedures reflect the same. However, where a proposed meeting is not of a formal grievance or disciplinary nature, there is no such requirement. It is entirely reasonable for senior managers to email colleagues and asked them to attend meetings, including to discuss day-to-day management and/or performance issues, without the need to provide a formal agenda or to allow a companion or representative to attend. Failure to do so does not of itself amount to intimidation, bullying or harassment.
67. Having said that, I agree to a limited degree with the claimant's criticism of the email from Miss Lamb on 8 February 2018. It followed a monitoring session, and it would have been more helpful to have told the claimant that it was not a formal meeting, and confirmed that Mrs Eddy was only present in a training capacity. The claimant says that she was intimidated by this email, although her contemporaneous reply does not support this. Nonetheless the email can be said to be terse and limited in its information, and Mrs Costello subsequently apologised to the claimant for this. The claimant was also refused a companion on the basis that the meeting was not intended to be a formal meeting under grievance or disciplinary procedures.
68. In my judgment the respondent had reasonable and proper cause to call the claimant to an informal management meeting to discuss the earlier monitoring, and did so in an informal capacity without commencing any disciplinary investigation or procedure. As such there is no requirement either under statute or the respondent's procedures to treat the matter as a disciplinary meeting and to provide full information in advance together with the right to be accompanied and/or represented. I agree that the email could have been worded more helpfully and informatively, but I cannot find that the respondent acted in breach of the

- implied term that the employer shall not without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee. Accordingly, I also reject this sixth allegation of breach of contract by the respondent.
69. The seventh and final allegation is that the claimant was wrongly accused of “maladministration” with regard to the phonics examination papers. For the reasons set out in the findings of fact above I reject this allegation. The claimant may well be correct to say that the misconduct in question was not sufficiently serious to amount to a formal charge of “maladministration”, but we did not hear any evidence of this hearing as to what exactly “maladministration” means. In any event in my judgment that is not the point. The claimant has accepted at this hearing that she was at fault by not securing the papers. In addition, all three staff involved (including the Claimant) were treated equally, and the matter was dealt with informally by the respondent when it could have progressed the matter to a more serious level. I reject the allegation that there has been any intimidation, undermining or harassment in this respect. The respondent had reasonable and proper cause to challenge the claimant and her colleagues about their conduct in this respect. I cannot find that the respondent acted in breach of the implied term that the employer shall not without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee. Accordingly, I also reject this seventh allegation of breach of contract by the respondent.
70. The claimant also asserts generally that this combined treatment, viewed in the round, amounts to “unfair treatment, harassment, bullying, and total disregard for my duty of care and my health safety and welfare” with the result that she was forced to resign from her role. The claimant asserts that this course of conduct arose as a direct result of her drawing health and safety matters relating to Child A to the respondent’s attention, and its commencement was contemporaneous with her having done so.
71. Alternatively (although this was not expressly clear) the claimant at one stage suggested that the email dated 8 February 2019 from Miss Lamb calling her to the meeting might have been “the last straw”, and that the respondent’s actions in this respect, if not a fundamental breach of contract in its own right, nonetheless contributed to the earlier set of circumstances so that the totality of her treatment amounted to a fundamental breach.
72. I find that the claimant’s allegations are simply unsupportable. It is not the case that the respondent only drew its concerns to the claimant’s attention after she had complained about the alleged lack of support and safety in a class concerning Child A. Earlier instances were brought to her attention, for instance with regard to the School Council and her being late to supervise the School gates. Throughout her short employment by the respondent there were a number of examples of conduct or performance related issues which the respondent quite clearly had reasonable and proper cause to draw to the claimant’s attention. At no stage did the respondent commence any more formal or disciplinary proceedings. The claimant was dealt with in a lenient and professional manner throughout.
73. It is also notable that the claimant never raised any informal or formal grievance against any of her senior management team. She did have a confidential meeting with Ms Bragg, the director of the respondent, who referred herto the relevant procedures if she wished to pursue a complaint, but the claimant chose not to do so. She only raised a complaint (effectively dealing with her performance management, and complaining apparently about Miss Lamb) after she had confirmed her resignation. Even at that stage the claimant declined to pursue any formal grievance, despite being offered the opportunity on a number of occasions by Mrs Costello to escalate the matter to a formal procedure if she thought that to be appropriate.
74. It is also clear from the claimant’s six page email which was composed after her verbal resignation on 9 February 2018, that the matters which concerned her at that time and which related to alleged bullying or harassment were limited to her complaint that she should have been afforded a representative at the meeting that day, and (in considerably more detail) her objection to the performance management, performance criticisms, and support plans which had been put in place. However, I find that it was entirely reasonable

- of the respondent to have dealt with the claimant's conduct and performance related issues in the way that it did. In my judgment, the respondent carried out management and supervision of the claimant's conduct and performance related issues in an informal but nonetheless supportive and constructive manner.
75. In conclusion, I do not accept that the respondent was in any way in breach of its duty of care to the claimant to take reasonable care of her health and safety, and I cannot find at any stage that the respondent acted in breach of the implied term that the employer shall not without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee. I reject that the allegation that the respondent acted in breach of contract, either fundamentally or otherwise.
76. In the absence of any fundamental breach of contract the claimant's resignation cannot be construed to be her dismissal. In these circumstances I find that the claimant resigned her employment, and was not dismissed. Accordingly, I hereby dismiss her unfair dismissal claim.
77. For the purposes of Rule 62(5) of the Employment Tribunals Rules of Procedure 2013, the issues which the tribunal determined are at paragraph 1; the findings of fact made in relation to those issues are at paragraphs 4 to 39; a concise identification of the relevant law is at paragraphs 41 to 52; how that law has been applied to those findings in order to decide the issues is at paragraphs 53 to 76.

Employment Judge N J Roper

Dated: 24 July 2019

Judgment sent to Parties: 21 August 2019

For the Tribunal Office