



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4100415/2018

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Held in Glasgow on 24, 25 and 26 July 2018

Employment Judge: Declan O'Dempsey

10 **Mrs S McAughtrie**

**Claimant
In Person**

15 **Tesco plc**

**Respondent
Represented by:
**Mr C Georgiou -
Solicitor****

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

20 The claimant's claim for unfair dismissal was dismissed in a judgment of 13
September 2018. Oral reasons were given at the end of the hearing on 26 July 2018.
Below are the written reasons for that judgment.

REASONS

- 25 1. The claimant was employed as a customer's assistant in the respondents
Irvine "Extra" store from 15 September 2001 until 18 December 2017. There
is a tragic background to this case involving events which are known to both
parties within the claimant's life and which may have resulted in the claimant
experiencing post-traumatic stress disorder. I do not intend to rehearse those
matters which were in any event a matter of agreement between the parties.
- 30 2. I gave oral reasons for my decision at the hearing. For the purposes of these
written reasons I start by setting out the legal principles I have to apply in this
case. I must apologise to the parties for the delay in producing these reasons.

The law

E.T. Z4 (WR)

3. In order to bring a claim for unfair dismissal in circumstances in which it is the employee who has terminated the contract of employment (with or without notice), the employee needs to show that there was a dismissal. She must show that the terms of section 95 of the Employment Rights Act 1996 are satisfied:

“95 Circumstances in which an employee is dismissed

(1) For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2) ..., 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.”

4. Lord Denning in **Western Excavating (ECC) Ltd v Sharp [1978] ICR 221** set out the test which the claimant must satisfy: "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 the employer's conduct. He is constructively dismissed."

5. So the claimant must show that the evidence demonstrates that certain facts occurred. These facts must show:

- (i) A breach of some term of the contract of employment;
- (ii) That the breach must “go to the root of the contract” or show that the employer no longer intends to be bound by an essential term of the contract;
- (iii) That the resignation was because of the breach by the employer.

6. In addition the claimant must show that she did not “waive” the breach. This means that after the breach of contract on which she relied she did not do something which shows that she relied on the terms of the contract. A classic example of this is the employee who delays, without good reason, before

resigning in response to the breach and in the meantime relies on the terms of the contract.

7. **Kaur v Leeds Teaching Hospitals NHS Trust [2018] EWCA Civ 978** gives the following applicable guidance:

- 5 (i) What was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, his or her resignation?
- (ii) Has he or she affirmed the contract since that act?
- (iii) If not, was that act (or omission) by itself a repudiatory breach of contract?
- 10 (iv) If not, was it nevertheless a part (applying the approach explained in *Waltham Forest v Omilaju* [2004] EWCA Civ 1493) of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a repudiatory breach of the implied term of trust and confidence? (If it was, there is no need for any separate
15 consideration of a possible previous affirmation, because the effect of the final act is to revive the right to resign.)
- (v) Did the employee resign in response (or partly in response) to that breach?
- (vi) An employee can resign in response to a series of breaches of contract
20 or a course of conduct by their employer which, taken cumulatively, amounts to a breach of the implied term of trust and confidence. In *Kaur v Leeds Teaching Hospitals NHS Trust* [2018] EWCA Civ 978 the Court of Appeal referred to this as "conduct that crosses the Malik threshold", referencing the case of **Malik v Bank of Credit and
25 Commerce International SA [1998] AC 20**.

8. An employee can resign in response to a series of breaches of contract or a course of conduct by their employer which, taken cumulatively, amounts to a breach of the implied term of trust and confidence. In *Kaur v Leeds Teaching
30 Hospitals NHS Trust* [2018] EWCA Civ 978 the Court of Appeal referred to this as "conduct that crosses the Malik threshold", referencing the case of **Malik v Bank of Credit and Commerce International SA** [1998] AC 20.

9. The Malik case gave a correct and definitive statement of the nature of the implied term of trust and confidence. Most recently it was reiterated in **James-Bowen and others v Commissioner of Police of the Metropolis UKSC [2018] UKSC 40** at paragraph 16: “The mutual obligation of employer and employee not, without reasonable and proper cause, to engage in conduct likely to destroy or seriously damage the relationship of trust and confidence required between employer and employee is a standardised term implied by law into all contracts of employment rather than a term implied from the particular provisions of a particular employment contract (Malik v Bank of Credit and Commerce International SA [1998] AC 20, per Lord Steyn at p 45D). It was described by Lord Nicholls in Malik at p 35A, as a portmanteau concept....The implied term has been held to give rise to an obligation on the part of an employer to act fairly when taking positive action directed at the very continuance of the employment relationship (Gogay v Hertfordshire County Council [2000] IRLR 703; McCabe v Cornwall County Council [2004] UKHL 35; [2005] 1 AC 503; Bristol City Council v Deadman [2007] EWCA Civ 822; [2007] IRLR 888; Yapp v Foreign and Commonwealth Office [2014] EWCA Civ 1512; [2015] IRLR 112; Stevens v University of Birmingham [2015] EWHC 2300 (QB); [2016] 4 All ER 258). Furthermore, any decision-making function entrusted to an employer must be exercised in accordance with the implied obligation of trust and confidence (Braganza v BP Shipping Ltd [2015] UKSC 17; [2015] 1 WLR 1661).”
10. The test is whether, viewed objectively, the course of conduct showed that the employer, over time, had demonstrated an intention to no longer be bound by the contract of employment. In particular I have to ask the question: even if in practice the employer’s behaviour did undermine trust and confidence of this employee, did the employer have reasonable and proper cause for those actions?
11. In **Waltham Forest v Omilaju [2004] EWCA Civ 1493**, the Court of Appeal gave the following guidance on how tribunal’s should approach “final straw” cases.

- (i) The final straw must contribute something to the breach, although what it adds might be relatively insignificant:
- a. The final straw must not be utterly trivial.
 - b. The act does not have to be of the same character as earlier acts complained of.
- (ii) It is not necessary to characterise the final straw as "unreasonable" or "blameworthy" conduct in isolation, though in most cases it is likely to be so.
- a. An entirely innocuous act on the part of the employer cannot be a final straw, even if the employee genuinely, but mistakenly, interprets the act as hurtful and destructive of their trust and confidence in the employer. The test of whether the employee's trust and confidence has been undermined is objective.
- (iii) If one party commits a repudiatory breach of the contract, the other party can choose either to affirm the contract and insist on its further performance or accept the repudiation, in which case the contract is at an end. The innocent party must at some stage elect between these two possible courses. If they affirm the contract, even once, then they will have waived their right to accept the repudiation.
12. Lord Denning also dealt with the question of when an employee 'affirms' the contract in *Western Excavating v Sharp*: "the employee must make up his mind soon after the conduct of which he complains. If he continues for any length of time without leaving, he will be regarded as having elected to affirm the contract and will lose his right to treat himself as discharged."
13. Affirmation of the contract may be express or implied. It will be implied if:

(i) The claimant calls on the employer for further performance of the contract, since such conduct is only consistent with the continued existence of the contractual obligation.

5 (ii) The claimant acts in a way which is only consistent with the continued existence of the contract. Such acts normally show affirmation of the contract.

14. In **W E Cox Toner (International) Ltd v Crook [1981] IRLR 443**, the EAT recognised a more flexible approach in employment cases, referring to **Marriott v Oxford Co-operative Society [1970] 1 QB 186**: if the employee makes clear their objection to what is being done, they are not to be taken to have affirmed the contract by continuing to work and draw pay for a limited period of time after the breach, even if their purpose is to enable them to find alternative work. The Court of Appeal in **Buckland v Bournemouth University Higher Education Corporation [2010] EWCA Civ 121** by a majority took the view that tribunals could take a "reasonably robust" approach to affirmation. The claimant who fails to make their position clear at the outset cannot ordinarily expect to continue with the contract for very long without losing the option of termination, at least where the employer has offered to make suitable amends (paragraph 44).

20 15. I must consider the reason behind the delay, if the claimant gives any (**Adjei-Frempong v Howard Frank Ltd UKEAT/0044/15**). If, on the other hand, the claimant's evidence is that after a particular date nothing that the employer could have said would have made any difference, that is a factor which I must take into account.

25 16. The claimant does not lose any right she may have to rely earlier acts or omissions as part of a last straw argument (**Kaur v Leeds Teaching Hospitals NHS Trust [2018] EWCA Civ 978**). If the claimant previously affirmed the contract, but then the respondent's conduct was continued by further acts, the claimant can revive the right to terminate based on the totality of the respondent's conduct. If I consider the respondent's conduct as a whole to have been repudiatory and the final act to have been part of that conduct, I should not normally be concerned whether the conduct had already become

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repudiatory at some earlier stage: even if it had, and the claimant had affirmed the contract by not resigning at that point, the effect of the final act will be to revive his or her right to do so.

5 17. In **Wright v North Ayrshire Council** UKEAT/0017/13, the EAT stated that the repudiatory breach must have "played a part" and be "one of the factors relied upon" in the claimant's resignation.

10 18. In the present case the claimant must be able to show that there was a breach of one or more terms of her contract of employment by her employer. The following are the eligible contractual clauses, as far as I was able to discern them on the facts before me:

- (i) the implied term that the employer will not without good cause act in a manner which is likely to undermine or seriously damage the relationship of trust and confidence which ought to exist between the employer and employee;
- 15 (ii) the implied term that the employer will carry out a reasonable and prompt investigation of the employee's grievances.
- (iii) The employer has a duty to take reasonably practicable steps to provide a safe system of work and to investigate complaints relating to health and safety promptly and reasonably (see **British Aircraft Corporation Ltd v Austin [1978] IRLR 332 (EAT)**).
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Facts

19. I heard evidence from the claimant, Mr Allan Muir, Ms K Leitch. I make the following findings of fact.

1 September 2017

25 20. On 1 September 2017 there was an incident concerning a discount card and the claimant's daughter. The claimant was on a tea break when this happened. Ann McIntyre reported the claimant's daughter for using a discount card which it was said she should not have been using. At the time it was alleged that it was the claimant's club card which was being used.

However the claimant was able to prove that (and I accept) it was not her card.

8 September 2017

21. On 8 September the claimant's daughter again came to the store and there
5 was a further incident. This involved what the claimant, and her daughter
appeared to think was Ms McIntyre ignoring the daughter. Eventually the
claimant's daughter shouted at Ms McIntyre who said that she had not seen
the claimant's daughter. There was an altercation. The claimant's daughter
referred to the earlier altercation. Ms McIntyre apparently threw down the
10 shopping handset and said "I don't have to put up with this." and brought
Alison Gibson to do the check. It is clear that Ms McIntyre and the claimant's
daughter continued the row with some verbal vigour.

22. About an hour later the claimant was asked to come to her manager's,
Charlene Malcolmson's, office. Charlene and Alan Muir the manager were
15 present.

The meeting

23. At this point, according to the claimant, Ms Malcolmson started shouting at
her. There are notes relating to this meeting (page 32). The claimant was told
that this was an investigation. During the meeting Ms Malcolmson went
20 through what had happened at the incident recounted above. Ms Malcolmson
said that they had seen the CCTV footage and that the claimant had "stood
there" during the incident, and had done nothing.

24. The claimant said that the notes of the meeting starting on page 32 were
accurate save that the respondent had changed "investigation" to "informal
25 meeting". The notes of the meeting run from page 32 to page 36. The
claimant says that during this meeting Charlene's tone was aggressive
because she raised her voice and was emphatic. The claimant told me that
she thought back to the way Charlene had previously treated her.

25. This was a reference to Ms Malcolmson's alleged behaviour in 2016 that the
30 claimant was bringing morale down within the store. The claimant said this

was because according to the claimant, in Charlene's eyes, she was not "full of the joys of spring". The claimant said that she said to herself "I am not doing this anymore." Her evidence was that she told herself to breathe.

5 26. The question that the claimant said was objectionably repeated was to the effect of "what could you have done?" The claimant says that Ms Malcolmson was spreading her hand towards the claimant and opening her eyes wide and baring her teeth. The claimant says that Ms Malcolmson's tone throughout the meeting was making her uncomfortable and that Charlene was moving backwards and forwards and repeatedly asking the question what the claimant could have done differently. The claimant says she got no answer from any question that she asked Charlene.

10 27. When the claimant was taken to the document and it was noted how many times the claimant was asked the same question she said that the question was asked many times but it was not always written down. The claimant says that during that meeting she herself did not raise her voice. The claimant says that Alan Muir at one stage said "whoa". She says that this was in relation to something that had been said. The claimant says that she said to Mr Muir "but you're allowing Charlene to shout at me."

15 28. The claimant says that the change from investigation to informal meeting occurred at the end of the meeting when Mr Muir said that it was an informal statement. The claimant sets some significance on the fact that this change occurred when she asked for the notes.

20 29. The claimant explains that after Mr Muir left the room Charlene tried to make conversation with her by asking whether she was going on holiday this year.

25 30. Although the claimant feels strongly about this meeting it is clear to me having heard the evidence, that Ms Malcolmson's behaviour was not as extreme as the claimant has described. Ms Malcolmson tried to bring the claimant to see what she could have done to defuse the situation, but the claimant would not approach this issue. I accept that she was employing a specific technique of interviewing (LASER) for this purpose.

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31. The claimant explained to me that when she left the building she went out to her car crying and called her husband. She said to him that she could not do this any more and asked him whether he minded if she quit. He said that she should get out of the situation. She phoned Charlene to say that she was not coming back.

32. The claimant accepted that in that meeting she did not refer to any historical bullying and the only thing that she was concerned with was the card. The claimant, before me said that she linked this behaviour to bullying which she alleged against Ms Malcolmson from a much earlier period. However I reject these allegations had substance. The respondent conducted a fair investigation of these allegations and the claimant did not produce any evidence to show that such bullying had taken place. The respondent found that it had not taken place. I find that there was no such bullying on a balance of probabilities. I accept that the claimant felt alienated from her fellow workers.

The call after the meeting

33. The claimant looked at page 38 of the bundle. This was a note of the conversation later that day. The claimant says that the notes are not accurate in that she did not say anything about her uniform. She accepted that there was no mention of bullying in that conversation. She said that all she had said was that she was quitting and that there was no conversation and that she simply hung up after telling the respondent that she had quit. However she does remember that when she got home it is possible that someone had called her and that she had called them back.

34. The claimant recalls that she told Charlene that she was not coming back. Charlene said words to the effect of "why not have a bath and a cup of tea to see how you feel in the morning". However the claimant says that she told Charlene "you know I am not coming back this time.". This was not her true intent at the time as can be seen from her behaviour immediately following the conversation. She wrote a long complaint to the CEO of the respondent.

35. When looking at page 38 the claimant agreed that she probably did say that she could not play games anymore. She did not think that she had said that she would call the following day because she knew she was not coming back. I find that she misremembered this and that she did say that she would call
5 the following day. She had not at that point reached a firm intention of leaving.

The email to the CEO

36. It was at this stage that she says she emailed the head office. She says that she sent pages 464 – 7 at 6.40pm on the same day.

37. The claimant gave evidence concerning the meeting with Mr Russell Heuston
10 which took place on 14 September 2017 at the local coffee outlet. She was happy that the notes on page 43 were an accurate summary of that meeting. However she complained that contrary to what was said in that note, she never went to general merchandising.

38. She gave evidence that "they let me humiliate myself.". This is far from how
15 what happened appears when viewed objectively. It appears that if there was ever a promise that she should go back to General Merchandising, this was not something capable of causing a breach in trust and confidence when viewed objectively in the circumstances of this case.

27 September 2017

20 39. The claimant explained when cross examined that she was supposed to be sent to non-food business. She had written about this complaining, not to be dramatic but because, she was "sick of Tesco's". She said that this was because they kept changing the goalposts. I have to say that it does not appear how the respondent was "moving the goalposts". Even if a promise
25 had been made to send her to non-food, I do not regard a change of plan as constituting an unfair or undermining change in the circumstances of this case.

40. On 27 September the claimant was due to return to work. The claimant was cross-examined on her assertion that she was sent to the wrong place when
30 she returned to work and that this was humiliating for her. She accepted that

she had not spent any time in clothing. She said it was not her evidence that she went to clothing but nobody thought that she should be working there. Her complaint was that the manager, Jamie, did not know that she was supposed to be coming. She was supposed to go to non-food rather than clothing. Non-food knew that she was coming. When she spoke to Jamie he said he had no idea what she was talking about. He had found Sharon Fitzpatrick one of the managers and asked her whether she knew anything about the claimant. Sharon Fitzpatrick said that she did not know anything about the claimant but said that she was sure that the claimant was down to go to clothing. The claimant then said that she was supposed to go to non-food. Jamie stated that she definitely was not supposed to be coming to non-food. Sharon Fitzpatrick said that the women working in clothing said that the claimant was definitely supposed to be going to clothing.

41. It was at this point the claimant said that she was going home. Subsequently (page 255) there was a message with Katie Leach during which an apology was issued. I find it difficult to understand the claimant's reaction. This was a very minor confusion as to where she was supposed to be going. The claimant did not indicate that there was any significance over whether she would be working in one place or another. Moreover the fact that the women working in clothing claimed an awareness of where she was supposed to be working does not hold any significance. Although the claimant says that it was known before she returned, the evidence she gives of what happened on the day indicates solely that on the day she was due to start, those who she was due to be working with were aware that she was supposed to be working with them. There seems nothing untoward in that.

42. The claimant said that when she went home someone was supposed to phone her but nobody did. She did not go to work the following day and Ms Leitch (page 257) said that she would pick up this matter when she came back from holiday. The claimant complained that Ms Leach had apparently told the managers but not the claimant where she was supposed to be working.

43. Katie Leitch told the claimant that Mr Muir did not want to work with her.

44. Eventually she was moved, by agreement, to the "dot.com" part of the business. This was a temporary move designed to protect her whilst the matters that she had raised were investigated. I do not consider that this move could be said to be a detriment to the claimant or that it forms singly or together with other material a breach of the implied term of trust and confidence. There was good and proper cause for the respondent's behaviour.
45. The claimant complains that she was supposed to be on the same hours as previously. However she says that her hours changed to 6 – 2. There was no evidence before me that the number of hours changed or that the claimant complained with any force about this change. In any event, in the circumstances of a temporary move whilst matters were investigated, it does not seem to me to have been conduct which was without good and proper cause.
46. The claimant also said that after her daughter's complaint against Mr Muir had been made, Mr Muir was mean to her. Apparently Mr Muir had been told by his manager to stay away from the claimant. However these events were a long time in the past. They had taken place, as the claimant put it "roughly 2012".
47. The claimant was asked about the return to work plan on page 49 of the bundle and the meeting that had taken place on 20 October. She accepted that adjustments had been agreed for her and that she had said that dot.com was enjoyable (page 50). She accepted that she said that it was enjoyable and she was enjoying the new challenge.
48. When she was asked what had changed up to 4 December she said that by the end of that period she knew the job and the picking of items was no longer a challenge but was in fact extremely boring. Whilst this may have been true for her, nothing in this indicates that the respondent had without good and proper cause engaged in behaviour which was likely to undermine the relationship of trust and confidence.

49. The claimant accepted that the record on page 54 was a pretty accurate record and that Ms Leitch was “fine” with her. The claimant accepted that Ms Leitch interviewed 17 or 18 people whilst investigating the grievance. However she says that two people were omitted and these omissions were significant.
50. She was cross-examined on the witness statements that were gathered in respect of her grievance and which are at pages 69 – 173 of the bundle. A number of points of detail were put to her. However the claimant's complaints appear to amount to the fact that although people said, when interviewed, that events had either not occurred or they had not witnessed them, the events had occurred.
51. During cross-examination she accepted that the witness statements reflected what the witnesses thought was the truth. She accepted that a number of witnesses said that there were no problems related to Ms Malcolmson engaging in bullying and that the claimant was not hard-working. She said that those statements were however not true. They related to matters that had taken place some time ago.
52. Some of the witness evidence reflected the fact that people were upset by the amount of time that the claimant was taking up talking about the personal tragedy which had befallen her family. The claimant complained that she was not part of a significant group of women at the store. There was a group consisting of an Macintyre, Ann Bernie, Marie McWhirter, Laura Collins, Erin, and this was the group from which she felt excluded. The claimant accepted that Alison Gibson had described her as a troublemaker and had said that she fell out with everyone. I make no finding that the claimant's character is properly described in this way. The respondent did not develop this point in cross examination. However on the claimant's own evidence it is clear that she kept herself to herself within the work place.
53. The claimant accepted that everyone said nothing about Ms Malcolmson acting as a bully with the exception of one person. The claimant said however that those statements were not true. In relation to Ms Malcolmson's statement

on page 125 about the meeting that triggered these events, the claimant said that what had happened had been misrepresented by Ms Malcolmson. I heard from Mr Muir and the claimant about this meeting and have made findings on it above. In essence Ms Malcolmson's behaviour was not without good and proper cause, and was not such as to undermine the relationship of trust and confidence.

54. When asked how she was excluded she explained that she would be left in the SAYS shop (scan as you shop). However if she was there then this group of women would be on the other side of the checkout. In essence this group of women would go to that part of the shop where the claimant was not in order to avoid her.

55. Whilst being questioned about Ms Malcolmson's statement the claimant said that she does not trust people but that she does not accept that this is a barrier to personal relationships. She explained that she did not go into the canteen to have tea which is where all the chitchat happens. She said "I don't want to be involved in all that stuff.". She also said that at breaks she would have breaks by herself. She would go outside to smoke or go to her car. She said that she felt uncomfortable standing around and that sometimes people would come to her car. On the other hand she also said that she would go to the check outs and chat to the women who worked on the checkouts. From her own evidence it appears to me likely that the claimant was keeping herself to herself and, in conjunction with her understandable feelings about the personal tragedy, it was difficult for the other staff to relate to her. However I can see nothing in the evidence that suggests that there was any form of deliberate exclusion of the claimant.

56. The claimant in essence accepted that a full investigation was carried out. She was not happy with the outcome. However before it had come out she had decided to leave the respondent's employment.

The meeting on 4 December 2017

57. The claimant saw the outcome report from her grievance on 4 December 2017. The outcome report is on page 183 and following in the bundle. There

was also a meeting, notes of which are on page 189 of the bundle. The claimant was very clear "Katie's behaviour is not one of the things I am complaining about. She was investigating.". When cross examined she said that she had no difficulties with Katie Leitch within the Irvine store because
5 Ms Leitch walked the store on a daily basis. Nevertheless she said that management were not approachable. She explained that this was because she did not trust them. When pressed on this point she said she did not trust anybody in the Irvine store and that this had been going on since 2010 – 11.

10 58. In relation to the investigation, the claimant says that there was plenty of CCTV material that could have been looked at in relation to the allegation that she had been excluded. However this appears to me to be completely disproportionate, and does not appear to have been suggested with any precision at the time of these events.

15 59. At the meeting the claimant was questioned about the allegation that she had used inappropriate language. This was referring to somebody as "wee bastard". The claimant was also criticised for a remark she was supposed to have made to the effect that Mr Muir should not carry out a staff search or that she would not participate in a staff search carried out by him because he had sexually harassed the claimant's daughter.

20 60. The claimant denied that she had said that she would not let Mr Muir search her because of the daughter, but she did accept that she had told Ms McIntyre many years ago something to this effect. However that was shortly after an allegation of harassment was still current.

25 61. The claimant complains that she had no warning that she was going to be investigated about these issues. It is plain to me that she was not being investigated during the meeting, and the whole point of what was said in the meeting was to put her on notice that she was going to be, or might be, investigated. There is nothing improper about that.

30 62. After that meeting on 4 December 2017 the claimant again said that she was leaving. She complained that she believed that the respondent was manipulative, that the respondent lies and that the individuals cover each

other's backs. I find that there is no evidence that the respondent was manipulative, or that any of the witnesses before me for the respondent told lies. It may be that individuals within the respondent "cover each other's backs". However there was no evidence of this before me, and the claimant did not put any examples of any of this sort of behaviour to any of the respondent's witnesses who she cross examined.

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63. She explained to me in evidence that what she was concerned about was the behaviour of the individual managers. For example she thought that Mr Muir had "turned a page". She changed her mind on that when he said that he had issues with her. It was plain, however, that she did not have to work with Mr Muir again, if she did not wish to do so.

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64. There is substantial disagreement over the timing of the (investigated but unproved) allegation of harassment, and over the event for which Mr Muir had issues with the claimant. I am not going to reproduce the allegation in this judgment, because Mr Muir was not given the opportunity before me to reply to the allegation as it was not put to him.

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65. Because Mr Muir could not respond to the allegation I could not evaluate his responses. I am not prepared to make any findings on the alleged incident, save to find that there was an allegation against Mr Muir at some point, which was probably much earlier than 2016. This was investigated and was not substantiated.

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66. Mr Muir had feelings over it that made it difficult for him to work with the claimant on a one to one basis. He suggested that if she was sent to work in his department he would ask for a transfer. He did not ask for her not to come to his department. Mr Heuston made the decision that the claimant should go to a different department whilst the investigation was conducted. In the circumstances that seems to me to be a perfectly proper decision.

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67. When I asked the claimant why she did not say anything about the allegation that she had made against Mr Muir when challenged in December 2017 she said that Mr Muir had involved himself in the situation when she had written to head office about her situation. She also said that she did not think it was

relevant to say anything about the earlier allegations of harassment made to head office. I think that this indicates that in her mind it had nothing to do with the present situation. She had known, on her account, that Mr Muir had issues with her before the meeting on 4 December.

5 68. The claimant explained in evidence that, at this meeting, she had assumed that they would offer her old job again. Given the fact that she was claiming to have been bullied by a number of people and it was plain that she felt uncomfortable in that working environment (for whatever reason), this strikes me as unrealistic. She does not appear to ask for her old job again. However
10 the respondent was acting properly in removing her from a working environment which she plainly found irksome.

69. She complained that she had not been supposed to go to "dot.com" in the first place. She explained to me that she never raised the point that she felt insulted by being sent to another department. However she explained that
15 she felt it was a trick. I do not accept the claimant's evidence in this respect. I think that if she had had, at that time a complaint that being sent to another department was some sort of insult she would have raised it with Ms Leitch. I do not accept that at the time she regarded it as a trick. This may be something that she has come to believe since. However I can see nothing in
20 what happened to her over the move in September-October 2017 that undermined the relationship of trust and confidence, save actions for which the respondent had good and proper cause. They do not constitute singly or together a breach of the implied term. I should make it clear also that on the evidence that was before me, far from engaging in tricks against the claimant,
25 the respondent was trying much harder than many employers would have done to retain the claimant's services.

70. The claimant, in her evidence, explained to me that the root reason why she did not trust the respondent was that the managers were getting more protection than her because of the events that had happened earlier. She
30 later explained that the offer of the "dot.com" job was not really what had made her resign and that she would have gone in any event. This is because she does not trust what the respondent says. She explained that the lack of trust

went back many years. She had written to the respondent's management about Ms Malcolmson about 10 years previously, and about being left on her own in the store on Friday and Saturday nights. She explained that she had used the correct routes to challenge and complain about things but had been told, by Ms Malcolmson, that she could not write to head office. She was indicating to me that she did not trust the respondent from that point onwards. These events went back as far as 2009.

71. It is plain to me that the claimant had waived any breaches which had occurred at that time. The claimant said that she was prepared to put up with the incidents that had occurred then. She said that a manager called Kirsty Bell had told her in 2009 to "shut your mouth". It is plain that she worked on without any protest after that, until the incidents in September 2017. The incident with Ms Malcolmson, viewed objectively, was a trivial matter, viewed singly or even if the claimant was able to establish the earlier treatment she attributed to Ms Malcolmson, but for which she provided no evidence either to the employer or before me, beyond vague assertion.

72. The claimant said that lack of promotion was another issue that concerned her and she felt that if she complained she would not get promoted. She said that Kirsty Bell was a friend of Ms Malcolmson and that that was the reason Kirsty Bell protected the latter. This did not appear as part of any claim put before this tribunal by the claimant. No part of this was put to the respondent's witnesses, and I reject the claimant's suggestion that the respondent's managers were deliberately preventing her from getting promotion. There was no evidence before me of any occasion when the claimant sought and did not get promotion.

18 December 2017: the offer of working in different stores

73. The claimant was taken to parts of her exit interview which is on page 208 and took place on 18 December 2017. When she was taken to page 211 she explained that it was not going to be possible for her to accept the offer of working in a different store which the respondents made to her because Ms Malcolmson had friends (who she did not name) in all the different stores. She

explained that there would be a friend of a friend at the new store and people would talk about her from store to store. I do not accept that this was the case, even if the claimant believed it. It seems to me inherently improbable that Ms Malcolmson would have any such network of friends and even if she did, it does not follow that they would gossip about the claimant.

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74. She explained that mentally at that time she was not in a good place. She also explained that she did not consider trying to work in the other stores as an alternative to resigning. She explained that she did not want Ms Leitch to write down anything about her mental health at that time.

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75. She was concerned that the story about her conflict with Charlene would follow her. The basis for this was that when her family experienced the personal tragedy to which I have referred at the start of this judgement members of staff discussed the events. She said that, at the time of that tragedy, Charlene hounded her to come back to work. Again, this point was not put to the respondent's witnesses for their comment or foreshadowed in the claimant's case.

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76. She accepted that she had been asked to reconsider. She was not able to explain what the respondent might have been able to do to keep her as an employee other than move her to retail banking. She accepted that it was fair to say that Russell Heuston was trying to do a good job and that he offered to support her by paying her for an additional week to enable her to look into moving to another store.

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77. The claimant said that she explained to the respondent that if she went to another store the Irvine store would tell people about her at the new store. The claimant very fairly said that Russell Heuston had responded to this concern and said that this type of gossip did not happen. However the claimant criticised him for not saying anything else about how her situation might be managed. I do not consider that it was incumbent on him to explain what management would do to ensure that the claimant would not be followed by such gossip. The respondent reasonably took the view, which the claimant

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reasonably did not share, that the gossip would not follow the claimant in this way.

The offer of mediation

5 78. The claimant rejected the idea of having mediation which was put forward by the respondent because the woman with whom her daughter had had the argument had called the police after the incident on 8 September. She said that she did not want to be mediating with someone like that. Nonetheless I find that the offer of mediation was a genuine one and represented yet a further attempt by the respondent to keep the contract alive: they wanted to
10 keep the claimant in employment with them.

79. The claimant said that she did not think about the option of the respondent instructing staff not to engage in this kind of gossip. However this was a very obvious option for the Respondent, albeit one which might simply draw attention to the claimant and cause people to make inquiries. The respondent
15 clearly took the view that the claimant could be properly protected by a low key approach to redeployment without comment.

80. The claimant said that she knew people who had suffered the consequences of things they have done in other store. However she did not provide any details. She did not put any such details to the respondent's witnesses for
20 their comments.

81. After 4 December and before 9 December the claimant had been talking to her union representative. The respondent still appears to have wanted the claimant to think about what she was doing very carefully. There was a proposal by Mr Heuston that the respondent might be able to find work for the
25 claimant at a different company, Tesco Bank, but this did not materialise.

82. The claimant's state of mind however did not assist her to consider things clearly, it seems to me. When Mr Heuston said to the claimant that she should wait to make a decision until after the New Year she explained in evidence to me: "mentally I needed just to go." She explained that she had felt that

30 (i) the situation had been going on since September and that

- (ii) Mr Muir would tell somebody else at any store that she was sent to
- (iii) she had complained about being victimised by the women she worked with but nothing was done about it.

83. It is clear that what had been happening since September was that the
5 respondent had been trying to investigate her extensive and historically
lengthy complaint, and at the same time trying to get the claimant back to a
conducive environment. It appears that after 2 October this may have been
a fruitless exercise, as the claimant says that she had determined to leave,
and nothing the respondent could have done after that point would have
10 deflected her from that course.

Discussion

84. I have considered all of the evidence which was presented before me. In
reality there was little active disagreement between the parties over the main
issues in this case. The claimant accepts that the respondent conducted a
15 reasonable investigation and she did not make any criticisms of the speed
with which it was carried out.

85. I have to consider whether there is a breach of the implied term of the contract
that the employer will not, without reasonable and proper cause, engage in
behaviour that is likely to destroy or seriously damage the relationship of trust
and confidence required between employer and employee. In that regard the
20 claimant relies on an email that she sent on 8th September 2017 to Dave
Lewis, the CEO of the respondent. In this she said that she was resigning
from her post at the Respondent. This was as a result of a meeting that she
had had on the same day at which she and Charlene Malcolmson and Mr
25 Allan Muir were present. The meeting was either an investigative meeting or
an informal meeting. The respondent's witnesses said that ultimately it was
an informal meeting concerning an incident that had taken place between a
member of staff and the claimant's daughter that day.

86. Charlene Malcolmson, at the meeting, repeatedly asked the question of what
30 the claimant could have done differently to defuse the situation, or variants of
that same question. Mr Muir told me that the question was repeated to see

what more the claimant could have done to defuse the situation. Reading the notes of that meeting carefully, it is apparent to me that although the claimant was giving perfectly proper answers to the question, Charlene Malcolmson was trying to get her to see what she could have done differently to defuse the situation. I accept Mr Muir's evidence that this was the explanation for asking the question.

87. I do not think that the behaviour of Charlene Malcolmson amounted to a breach of the contract. For the same reason I do not believe that it was a breach which was so fundamental that it was likely to undermine the relationship of trust and confidence. I also accept that there was good cause for asking the questions. However I also accept that the claimant perceived matters very differently. She perceived that she was being bullied by the repetitious asking of the question. That is very apparent from her responses during the meeting. I can understand why she had that view.

88. However I have to consider, not her subjective view (even if I believe it to be a rational view). I have to consider the situation objectively and characterise the behaviour objectively. From that point of view I cannot say that there has been a breach of the implied term of trust and confidence.

89. The claimant next relies on an incident which occurred after she had been absent from work and was due to return to work. She had had a discussion with Mr Russell Heuston and it was agreed that she would go to work in non-foods. The evidence reveals that Mr Heuston subsequently had a conversation with Mr Muir. Mr Muir said that he had an issue with the claimant relating to her having made an allegation that Mr Muir had previously harassed the claimant's daughter.

90. The claimant did not know that this was the content of the conversation, although she became aware later that Mr Muir said he had issues with working with her. When she attempted to return to work, she discovered that the place she thought she would be working in did not know she would be coming and apparently other members of staff working in the Clothing department thought she was coming to work with them. What appears to have happened is that

there was a failure to communicate with the claimant. The respondent can and should be criticised for this. However Looking at it objectively I cannot say that this behaviour was such as was likely to undermine the relationship of trust and confidence, and therefore I do not consider it, whether taken singly
5 or with other matters, to amount to a breach of the implied term of trust and confidence.

91. The claimant carried on working. At one stage in her evidence she said that nothing that happened after 2 October made any difference to her, but the evidence suggests to me that this was not the case, and in her closing
10 submission the claimant appeared to accept this. She continued to work whilst the investigation was carried out by the respondent.

92. In relation to the investigation she accepted that it was carried out properly. She also accepted that the respondent must act as a judge between the complainant and the subject of the complaint. She accepted that a witness to
15 the employer might be believed even if they were lying. She very fairly said that the contents of the witness statements taken by the respondent did reflect what the people making them said to Katie Leitch, the investigating personnel officer, but she said that the witnesses were not telling the truth. The employer has a duty to investigate. The employer does not breach the implied
20 term of trust and confidence when conducting an investigation simply because the investigation reaches a conclusion which may in fact be false, or which a complainant does not accept to be true.

93. In this case it is clear to me that the respondent's conclusions were reasonable. By that I mean that they were within a band of reasonable
25 investigations that could be carried out. I also take the view that viewed objectively they were sufficient and adequate to meet the requirement that the employer should not act in a manner likely to undermine trust and confidence. I also consider that the employer had good and proper cause in conducting the investigation in a manifestly fair and balanced way.

30 94. When the investigation results were given to the claimant there was a meeting on 4 December 2017 at which Katie Leitch went over the various outcomes

but she also said that the claimant was going to be investigated for two allegations that had been made against her. The claimant accepted in evidence that it is legitimate for an employer to investigate allegations even if those allegations are false. She accepted that it would be necessary for an employer to investigate even in those circumstances. At the meeting on 4 December 2017 the claimant said that she was resigning, but the respondent did invite her to look at alternative stores that she could work in and encouraged her to stay. She was offered her old position back (see p 197). Then she was also offered a job at the dot.com department but she decided round this time that this was not for her.

95. The evidence is that she had decided that she did not enjoy the dot.com work. However it is right to say that other jobs were offered to her. Taking all of that together, as I must, I have to consider whether that behaviour of the employer amounted to a breach of contract and if so, in the context of the implied term, whether it was likely to undermine the relationship of trust and confidence. I am driven to the conclusion that this behaviour cannot be characterised in this way.

96. The employer sought to maintain the employment relationship. The complaint before it was that there had been bullying at the particular store. The respondent offered alternative stores as well as the claimant's old position to her. The claimant's objection to the offers of alternative stores was that she felt that the news about her "would travel", which is how she put it at one point. The events that occurred at the old store would follow her to the new store.

97. I have to consider whether that is likely. I have reached the conclusion that it was unlikely that the news would follow her in this way. I accept that the claimant thought that it would. As a comment on her state of mind, I have to say that I do not think her belief was an unreasonable belief. However I have to evaluate the case objectively and it is on that basis that I find that it is unlikely that the news would have followed her.

98. Given that this is the case, I consider that the employer sought to preserve the relationship of trust and confidence and I cannot say that its behaviour in

making the offers and to maintain the employment relationship was likely to undermine the relationship of trust and confidence. I also consider that there was good and proper cause for conducting the investigation in the way it was conducted and there was good and proper cause for reaching the conclusions that the respondent reached. There was also good and proper cause for proposing to investigate the allegations against the claimant (which may well have been false allegations). Viewed objectively again the respondent's behaviour is the ordinary behaviour of the employer which does not constitute a breach of the implied term.

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10 99. For those reasons the claim fails. I should add that if the claimant had succeeded, I would need to consider whether the offers of alternative employment meant that her failure to accept them constituted a failure by the claimant to mitigate her loss. I reached the conclusion that such refusals of alternative employment would not constitute a failure to mitigate.

15 100. The compensatory element of the award for unfair dismissal is an award for loss which is caused by the dismissal. It is not compensation for the breach of contract. I would have to consider what the just and equitable sum would be in that situation; in that regard it would be right to take into account the fact that she had not accepted the offers of employment which were made to her.
20 I would have awarded no compensatory element, as the sum which is just and equitable would have been zero. The claimant could have accepted one of these (different) jobs and in those circumstances, there would have been no loss.

25 101. However for all of those reasons the claim is dismissed. I would like to add that it is obvious that it has taken some bravery for the claimant to bring this claim, given her circumstances, and I acknowledge that in this judgment.

Date of Judgment 18 April 2019

5 **Entered in register
and copied to parties** 23 April 2019