EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		**Respondent**
Miss N Donovan	AND	Inspiratus Senior Care Ltd T/A Home Instead Senior Care

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT Bristol **ON** 1 & 2 October 2019

EMPLOYMENT JUDGE J Bax

Representation

For the Claimant: **Miss N Donovan (in person assisted by her sister Mrs Humphreys)**
For the Respondent: **Mr D Jones (Counsel)**

JUDGMENT

1. **The Respondent's name is amended by consent to Inspiratus Senior Care Limited T/A Home Instead Senior Care.**

2. **The judgment of the tribunal is that the Claimant's claim of unfair dismissal is dismissed.**

3. **The Respondent breached Regulation 12 of the Working Time Regulations 1998 in respect of the Claimant's rest breaks and shall pay compensation the sum of £1,000 to the Claimant.**

REASONS

1. In this case the Claimant, Miss Donovan, claimed that she was constructively unfairly dismissed and that her entitlement to rest breaks under Reg. 12 of the Working Time Regulations 1998 had been infringed The Respondent contended that the Claimant resigned, that there was no dismissal, and in any event that its

actions were fair and reasonable. The claim under the Working Time Regulations was also denied.

Preliminary matters and the issues.

2. At the start of the hearing the Claimant agreed that the Respondent's identity should be Inspiratus Senior Care Ltd T/A Home Instead Senior Care and it was amended by consent.

3. The parties were asked to confirm the issues. In relation to constructive dismissal, it was agreed that it was alleged that there had been a breach of the implied term of trust and confidence and that specific allegations of breach contract were: that the Claimant's job had been changed, her desk was moved, she was moved to a desk without a telephone and she was not provided with support for a radio interview. Although bullying had not been raised in the claim form, the Respondent did not object to the Claimant including it as part of her claim. The Claimant confirmed that the matters she relied upon were those set out in her witness statement and her Timeline of Events [p170-173]. The Claimant clarified that she was relying on all of the alleged conduct and that the final straw was that she was called to the office about a breach of confidentiality on 30 January 2019 and/or that she was not supported for a radio interview on 5 February 2019. The Claimant said that there was a separate claim in relation to rest breaks.

4. I then took time to read the witness statements, during which time Counsel for the Respondent took instructions from his client in relation to the bullying allegations. On resumption, Counsel for the Respondent said he needed additional time to take instructions and he was concerned that he was being asked to hit a moving target and that he might seek an adjournment. The Claimant said that she wanted to conclude the matter in the current listing. It was pointed out to the Respondent that its solicitors, by e-mail dated 26 September 2019, said that it had received the statements and all matters would be concluded in 2 days. The Claimant clarified again that all the matters relied upon were contained in her witness statement and Timeline. Counsel for the Respondent was given an additional time to determine his instructions and whether he would seek an adjournment. After 10 minutes the parties were spoken to and Counsel for the Respondent confirmed that if the hearing recommenced at 01:00 pm he would have sufficient time to take instructions and that his cross-examination of the Claimant would be concluded within 2 hours. The Claimant agreed that 2 hours would be sufficient for her to cross-examine the Respondent's witnesses. It was agreed that all of the evidence would be concluded by the end of the day.

5. After determining the issues and prior to commencing reading, I suggested to the Claimant that she considered the questions that she might want to ask the Respondent's witnesses during the time that reading in took place. The Claimant was also given a further opportunity to consider the questions she wanted to ask the Respondent's witnesses during the 15 minute break between the respective cases. The Claimant's sister, in closing submissions, said that the Claimant would have asked more questions if she had been legally represented. The Claimant had the morning of the first day and the 15 minutes between the parties' cases to consider questions she wanted to ask the Respondent's witnesses. When giving

evidence I gave the Claimant assistance by asking if she wanted to ask about specific key allegations made in her witness statement and Timeline, that she had not raised. I also asked questions on significant allegations not addressed by the Claimant and assisted her by reformulating some of her questions. Counsel for the Respondent also suggested areas of cross-examination to the Claimant.

6. At the conclusion of the evidence the Claimant confirmed, that in relation to the constructive dismissal claim the only breach of contract relied upon was the conduct of her colleagues towards her. She did not rely upon the rest breaks as a breach of contract and said that she did not resign because of this. Before the parties made submissions on 2 October 2019, the Claimant consulted her sister and confirmed that her position remained was the same as the day before and stated that she did not leave her employment because of the rest breaks and that it was due to her colleagues conduct towards her.

The evidence

7. I heard from the Claimant, and from Mr Kirk (franchise owner), Ms T Morley (line manager) and Ms C Morley (colleague) for the Respondent.

8. I was provided with a 200 page bundle of documents. References in square brackets are references to page numbers in the bundle.

9. There was a degree of conflict on the evidence. I heard the witnesses give their evidence and observed their demeanour. The Claimant, when giving her evidence, did not always appear sure of what she was saying and tended to make an assertion of a pattern of behaviour, but was then unable to provide more than one example. Further the Claimant's oral, witness statement and her Timeline of events were not always consistent.

The facts

10. 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.

11. The Respondent is a provider of private home care to the elderly and is a franchise of Home Instead Senior Care UK Limited. The Claimant commenced employment on 23 November 2015 as an administrator, her role later changed to Networking and Recruitment Lead. The Claimant's contract [p28 & 35] provided that she worked 40 hours per week and that she was entitled to a 30 minute unpaid break for lunch.

12. In Autumn 2017 the Claimant, as Networking and Recruitment Lead, was asked to provide a presentation at a national meeting; this issue was not pleaded or referred to in the Claimant's witness statement or Timeline, although she cross examined the Respondent's witnesses about not being supported. Ms T Morley said that the Claimant was asked to read out the data on PowerPoint slides so that other delegates could compare the information to their own statistics. The Claimant was unable to create the PowerPoint presentation and therefore Ms

Taylor was asked to do this for her, based on the data that the Claimant had collated. The Claimant was worried about giving the presentation and Ms T Morley suggested practised by reading the slides out loud. I accept Ms T Morley's account. On the balance of probability Ms T Morley provided support and assistance to the Claimant and was trying to allay her fears.

13. The Claimant suggested in her witness statement that an incident of bullying was that Ms C Morley always had the air-conditioning on, making it very cold. In cross-examination the Claimant said that it was an issue in the summer months of the last 2 years of her employment and that someone would turn it off and then someone else would turn it back on. On the balance of probability, different people in the office preferred different temperatures. It is highly unlikely that the temperature of the office was directed at the Claimant and there was no evidence given as to who would turn it on.

14. In August 2018 the Respondent required a new role of Business Development Lead to be filled. The new role involved the appointee representing the Respondent in public and their performance would reflect on the service provided by the Respondent. Ms T Morley's evidence was that she had always been impressed by the Claimant's ability to connect with people and that her success as networking lead made her an obvious candidate. She said that after discussing it, the Claimant accepted the new role and the Claimant never suggested that she did not want to undertake it. Ms T Morley said that she then approached Robyn Taylor to see if she wanted to take over the Claimant's old role. The Claimant said that she was forced into the role, in that if she did not accept the change of role that things would be made awkward for her. The Claimant said in cross-examination that she did not object to the change and that she agreed she had a long conversation with Ms T Morley about it. The Claimant said Ms Taylor told her that she had signed her contract a couple of days before the Claimant was asked to sign her own contract and she only signed it because her job had gone to Ms Taylor. The Claimant's new contract was signed Ms Morley on 17 August 2018 and the Claimant signed it on 23 August 2018 [p39]. I was provided with a copy of Ms Taylor's contract and it was signed on the same dates as the Claimant's contract. I also took into account that with effect from 1 November 2018 the Claimant's salary was increased from £20,000 to £22,000, strongly suggesting that it was a genuine role. On the balance of probability Ms T Morley's version of events is more likely to be correct. The Claimant accepted the new role before Ms T Morley signed the new contract of employment [p39] and the Claimant was given a copy shortly after the initial meeting. The Claimant accepted the new position before Ms T Morley spoke to Ms Taylor. There is a dispute between the parties as to when Ms Taylor signed her contract, to the extent that it is relevant it is likely that Ms Taylor signed hers before the Claimant did, however it was on the same day. The Claimant's evidence was that before the change of role she could not recall any incidents in which she had been treated badly at work and therefore it is unlikely that the Claimant believed that if she refused to accept the job things would be made awkward for her.

15. The Claimant's new role required her to network in the community for most of her time. There was a dispute as to the amount of time the Claimant spent in the office once she had started her new role. Ms T Morley estimated that it was on average about 7 hours per week. The Claimant's oral evidence was that she spent 2 to 3

whole days per week in the office. In paragraph 8 of her witness statement, the Claimant said that she went out into the community and had been told that she was going to the same places too often, but that she no longer felt part of the team. The Claimant's position in paragraph 8 was inconsistent with her being in the office for 2 to 3 days per week. Ms T Morley, in cross-examination, accepted that there were 2 weeks when the Claimant was called into the office because the Respondent was short staffed, but denied that the Claimant being in the office for 2 to 3 days per week was a regular occurrence. On the balance of probability, once the Claimant had started her new role, her regular working pattern meant that she was in the office for about 7 hours per week. There was a 2 week period in which the Claimant was required to return to the office, rather than working in the field and there were some occasions that she spent a full day in the office. I accept the Claimant's evidence that the last full day she spent in the office was on 4 February 2019

16. In September 2018 the Claimant was asked to move desks. The Claimant said at paragraph 4 of her witness statement, that although she agreed to the move, she saw it as a demotion. In the Claimant's Timeline [p171] the Claimant said that she willingly gave up her desk because it made more sense for Ms Taylor to sit there. In cross examination she accepted that there was nothing objectionable about being asked to move desks and accepted that it was the best desk for the recruitment co-ordinator to use due to its position in front of the door so that the postholder could make direct eye contact with visitors. There is an inconsistency in the Claimant's accounts. On the balance of probability, the Claimant freely agreed to sit at a different desk.

17. At some point Sam Crew returned to work for the Respondent. The Claimant was unable to remember the time, but recalled that she was present in 2019. The Claimant said that Ms Crew and Ms Taylor had 'butted heads' when they had previously worked together, and she raised this with Ms T Morley. In the Timeline of events it is suggested that Ms T Morley said that the Claimant and Ms Taylor would 'have to suck it up.' This was denied by Ms T Morley. In cross-examination the Claimant said that she had nothing against Ms Crew and changed her evidence to that Ms T Morley said that 'Ms Taylor would have to suck it up'. On the balance of probability Ms Morley did not act in an improper manner towards the Claimant and was not oppressive or aggressive in the discussion. Considering the evidence as a whole, I am not satisfied that Ms T Morley said, 'suck it up'.

18. After Ms Crew returned to work for the Respondent, the Claimant was requested to move desks again, however she refused. The Claimant suggested that this was so that Ms C Morley could sit next to Ms Crew. Ms T Morley says that the request related to telephone access, in that there were a limited number of telephones in the office and because the Claimant's role was largely field based, it was not necessary that she had a desk phone and that this made business sense. In oral evidence the Claimant said that she went to the office a couple of days later and that the telephone had been moved. I accept Ms T Morley's evidence and it is more likely than not, that the reason why the Claimant was asked to move desks and that the telephone was moved was that it gave the business better use of the resources it had.

19. The Claimant said that during the discussion Ms C Morley had referred to her as 'she' and that the Claimant could sit elsewhere. In cross-examination Ms C Morley denied being aggressive. Ms C Morley also said that she and the Claimant had been close and had helped each other when respective relationships had ended with partners, the Claimant did not dispute this. On the balance of probability Ms C Morley referred to the Claimant as 'she' when discussing the matter with Ms T Morley, however she was not aggressive towards the Claimant.

20. At about Christmas 2018 the Claimant spoke to Ms C Morley about a concern that a caregiver's hours were low and had therefore resorted to a foodbank. Ms C Morley's advised the Claimant to take the caregivers off her personal telephone and social media account, because Mr and Mrs Kirk had been clear that they should not contact caregivers from their personal telephones. Ms Morley gave this advice because in the past she had got too close to a caregiver and it had caused her a problem and she did not want the Claimant to be in a situation where their line manager intervened. On the balance of probability Ms C Morley was being supportive and helpful to the Claimant. Ms C Morley also told the Claimant that operations matters were not the Claimant's responsibility, which, on the balance of probability was accurate.

21. The Claimant followed Ms Morley's advice and removed the Caregivers from her social media account, however she also removed all her colleagues from the office, apart from Ms T Morley. This was far beyond the suggestion of Ms C Morley. The Claimant said in evidence that at the operations meeting, the following Friday, people rolled their eyes at things she said and made noises, however in her Timeline of events she said that she was given negative feedback. When questioned about the apparent inconsistency the Claimant said that both things happened. The Claimant said that thereafter Ms C Morley was hostile towards her and provided an example that she had tried to congratulate Ms C Morley when she heard about the results of a weight watcher's weigh in, but had been blanked. Ms C Morley's evidence was that she was unaware that the Claimant had congratulated her and denied being hostile. The Claimant's witness statement suggested that these incidents lasted about a week. Subsequently, on 21 January 2019 the Claimant was invited to Ms C Morley's birthday party, which she attended on 30 January 2019. On the balance of probability, the Claimant's office based colleagues were taken aback at having been removed from her social media account and reacted to that, by being cooler with the Claimant for about a week. The Claimant did not complain about the matters at the time to the Respondent. Further on assessing the evidence of the witnesses, I prefer Ms C Morley's evidence in relation to this issue.

22. In January 2019 the cleaning rota was changed. The Claimant's evidence was that she told Ms C Morley that she could not do heavy lifting or hoovering because she had been in a car accident and had a frozen shoulder [see also paragraph 24 of her witness statement]. In cross-examination, the Claimant said that she was just getting over the frozen shoulder when she started working for the Respondent. Ms C Morley denied, in evidence, that the Claimant said that she could not do hoovering, but had said that she would not clean the toilets. Ms Morley's said that she cleaned the toilets because no one else wanted to. On the balance of probability, the frozen shoulder symptoms were minimal when the

Claimant started working for the Respondent, some 3 years before this incident, it is therefore highly unlikely that the Claimant mentioned it when discussing the cleaning rota. It is unlikely that the Claimant said that she was unable to do hoovering due to a physical problem she had.

23. In a 1:1 meeting with Ms Morley on 7 January 2019 [p45] it was recorded that the Claimant was feeling good and no concerns were reported.

24. On 30 January 2019 the Claimant was asked to speak to Ms T Morley about a breach of confidentiality regarding a caregiver. The Claimant says that she was called into the office on a false pretence, namely that a photograph had to be taken. Ms T Morley said in evidence that photographs were due to be taken and she became aware of the issue in between asking the Claimant to come in and her arrival. I accept Ms T Morley's evidence on this issue. Ms T Morley immediately discussed the matter with the Claimant and then sought advice from the Respondent's HR adviser. The Claimant was informed on the same day that no action would be taken, which was recorded in a letter of concern [p48(a)]. The Claimant complained that she was told that the matter was serious and that she could lose her job. In cross-examination the Claimant accepted that it was appropriate to investigate the allegation, find out her version of events, take advice and deal with it quickly. On the balance of probability Ms T Morley reasonably believed that it was appropriate to raise the issue with the Claimant and that it was potentially a serious matter.

25. On 5 February 2018 the Claimant gave a radio interview. The Claimant says that she was unsupported by her Manager, Ms T Morley in that Ms T Morley had promised to listen to her 10 minute talk before the interview. The Claimant said that she asked Ms T Morley on a number of occasions and that on the last day Ms T Morley left the office early to go on holiday. Ms T Morley says that she told the Claimant that she had no experience of giving radio interviews and suggested that she spoke to Mr Kirk, as he had such experience. She also advised the Claimant to contact the designated section at national Head Office, which was there to assist franchises. Ms T Morley said she agreed to listen to a 10 minute presentation once the Claimant had prepared it, but that the Claimant never told her she was ready. Head Office sent the Claimant a briefing note on how to do a radio interview, together with key points and messages to raise [p46(c) to 46(i). In Ms T Morley's interview as part of the grievance process she said that it slipped her mind that she would listen to the presentation, this tends to support Ms T Morley's account that the Claimant did not tell her that she was ready to give it. Considering the evidence as a whole, I prefer Ms T Morley's account that she was not told that the Claimant was ready to talk through her radio interview. The Claimant's evidence was that Ms C Morley also said she would listen to her talk, however Ms C Morley denied that she was party to such a conversation and I accept Ms C Morley's evidence. Mr Kirk's unchallenged evidence was that he fully supported the Claimant through the radio interview. On the balance of probability, the Respondent provided the Claimant with support in conducting the radio interview.

26. After the interview the Claimant was sent congratulatory messages.

27. On 6 February 2019 the Claimant was driving and had, what subsequently was diagnosed as, a panic attack. The reasons for the panic attack were in dispute. The sick notes provided by the Claimant's GP link the anxiety and depression to the menopause [p52-55, p60b and 60c]. The Claimant said that this was not the case and that it was due to issues at work, but that she asked her GP not to mention that her absence was work related and he agreed to only mention menopause. The Claimant said that she told the hospital that the reason was work related. The hospital record for 6 February 2019 said that the Claimant had been having some stressful incidents at work and on 11 February 2019 that she was still having work related stress. The medical records do not refer to bullying. On the balance of probability, the Claimant found the incident on 30 January 2019 and the radio interview stressful, however there were other stressors present too in terms of the menopause. The sick notes provided to the Respondent were misleading in that there was no suggestion of a work-related element.

28. The Claimant said that she was not supported whilst off sick and suggested that Ms T Morley was going through the motions. I was referred to the text messages that Ms T Morley sent to the Claimant [p56 to 60g]. The messages are supportive in tone: the first was sent on 6 February 2019 and they include offers of help, even after the Claimant's resignation. On the balance of probability, the sentiments expressed by Ms T Morley were genuine and the Respondent was supporting the Claimant whilst she was off sick.

29. The Claimant complains that she was only paid statutory sick pay whilst off sick. The Claimant's contract of employment [p36] provided that she was only entitled to Statutory sick pay.

30. On 11 March 2019 the Claimant resigned by text, in which she thanked Ms T Morley her for all the opportunities she had been given. She said in a text message to Mrs Kirk that she did not feel she could discuss her concerns with Tracey Morley as there were issues with both her and Chloe Morley. In evidence the Claimant said that she had every intention to go back to work and that she wanted to, but that she was too ill.

31. Mrs Kirk arranged a meeting with the Claimant on 13 March 2019 [p65-68] at which the Claimant raised several issues that had occurred during her employment., including that she believed she was being forced out, but made no mention of not being permitted a lunch break. The Respondent emailed the Claimant on 15 March 2019 [p70] and treated the matters raised as formal grievance and investigated the following allegations that: the Claimant felt forced to resign by the way she had been treated, she was forced to change roles against her will and she felt unsupported by her line manager on 2 occasions. The other office staff members were spoken to as part of the investigation [p72-106].

32. The grievance was not upheld and on 24 March 2019 Mr Kirk provided his conclusions to the Claimant [p107-109]. It was specifically found that the Claimant was only entitled to Statutory Sick Pay, that she had not been coerced into changing her role and that she had been supported.

33. The Claimant said in evidence that there was a general culture of bullying, this was disputed by the Respondent's witnesses. On considering the statements taken as part of the grievance process, the Work Buzz survey [p151 to 169] and the evidence as a whole, on the balance of probability, there was not a bullying culture within the Respondent's workplace.

34. The Claimant's case was that she never took a lunch break. She gave evidence that on her first day of work, she asked Kelly Tyler when they had lunch and was told that they do not really take breaks and that they sat at their desks. She added that this was not every day. The Claimant said that there was an expectation that the telephone would be answered within 2 rings and that there was a pecking order, in that the administrators would answer the phone first. The Claimant accepted that in September 2018, when her role changed, she could take breaks when she chose, but that she was prevented from taking a break every time she was in the office. Mr Kirk gave evidence that he observed people taking lunch breaks and that people left the office and the team would often participate in a group lunch when visitors were present. Mr Kirk accepted that on occasions team members would have to interrupt their lunch to take a telephone call. Ms T Morley accepted that lunch breaks were never discussed in the office, but that they were referred to in contracts of employment. Further, as part of the induction process staff were told that they were entitled to a half hour unpaid lunch break, but that there was no a rota as to when it had to be taken. She denied that people were told not to take a lunch break and said it was expected that they would take a break. In answer to a question as part of the grievance process Ms T Morley said that "teams don't take a lunch break, but have breaks throughout the day". Ms Morley said in cross-examination that she had seen the Claimant go to McDonald's and the Co-op and that she had seen her eat food at the middle table. Ms C Morley said that they were encouraged to take lunch breaks and that Mr and Mrs Kirk and Ms T Morley were good about taking breaks. The questions asked in the grievance interviews tend to suggest that breaks were taken during the day for smoking/fresh air and that this was done 2 at a time. On the balance of probability, the Claimant was told on induction that she was entitled to a lunch break and there was a degree of encouragement for staff to take a break. The office was busy and there were occasions when staff members' lunch break was interrupted by having to answer the telephone. On the balance of probability, staff members, including the Claimant, had the opportunity to take a 30 minute lunch break each day and that most of them including the Claimant chose to take it at their desks. It is more likely than not that the Claimant's lunch break was interrupted on occasions by having to answer the telephone, although this was less likely once she ceased to be an administrator. When the Claimant became the Business Development Lead the potential for her lunch break to be interrupted was very much reduced and actual instances of interruption were a rare occurrence. It was not disputed that the last full day the Claimant worked in the office was on 4 February 2019 and she did not give evidence that her lunch break was interrupted on that day. It is more likely than not that the Claimant was aware that she was entitled to a lunch break, however it was sometimes interrupted by needing to answer the telephone, as required by the Respondent.

The law

Constructive Unfair Dismissal

35. Under section 95(1)(c) of the Employment Rights Act 1996 ("the Act"), an employee is dismissed if he 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.

36. 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".

37. 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.*"

38. In Tullett Prebon PLC and Ors v BGC Brokers LP and Ors [2011] EWCA Civ 131, 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.*"

39. In Courtaulds Northern Spinning Ltd v Sibson [1987] ICR 329, 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 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, 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. In need not be the predominant, principal, major or main cause for the resignation.

40. 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".

41. 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."

42. 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).

43. 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.

44. In addition, it is clear from Leeds Dental Team v Rose [2014] IRLR 8 EAT, 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 [2001] IRLR 727 EAT that even where there is conduct which objectively could be said to be calculated or likely to destroy 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.

45. A claimant cannot rely upon a breach of contract which he/she has been taken to have affirmed. Affirmation can, of course, have been express, but it can also be implied by inaction and delay, although simple delay is rarely enough. In Chindove-v-Morrisons UKEAT/0201/13/BA, Langstaff J said this (paragraph 26);

> "*He [the claimant] may affirm a continuation of the contract in other ways: by what he says, by what he does, by communications which show that he intends the contract to continue. But the issue is essentially one of conduct and not of time….. It all depends upon the context and not upon any strict time test."*

Working Time Regulations 1998 claim

46. Reg. 12(1) provides that a where a worker's daily working time is more than 6 hours, he is entitled to a rest break. Under Reg. 12(3), subject to the provisions of any applicable collective agreement or workforce agreement, the rest break provided for in paragraph (1) is an uninterrupted period of not less than 20 minutes, and the worker is entitled to spend it away from his workstation if he has one.

47. Reg. 30 provides:

(1) A worker may present a complaint to an employment tribunal that his employer—
(a) has refused to permit him to exercise any right he has under—
[(i) regulation 10(1) or (2), 11(1), (2) or (3), 12(1) or (4), 13 or 13A;]
…
*(2) [Subject to [*regulations 30A and *[regulation] 30B], an employment tribunal] shall not consider a complaint under this regulation unless it is presented—*
(a) before the end of the period of three months (or, in a case to which regulation 38(2) applies, six months) beginning with the date on which it is alleged that the exercise of the right should have been permitted (or in the case of a rest period or leave extending over more than one day, the date on which it should have been permitted to begin) or, as the case may be, the payment should have been made;
(b) within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be

presented before the end of that period of three or, as the case may be, six months.

…

(3) Where an employment tribunal finds a complaint under paragraph (1)(a) well-founded, the tribunal—

(a) shall make a declaration to that effect, and

(b) may make an award of compensation to be paid by the employer to the worker.

(4) The amount of the compensation shall be such as the tribunal considers just and equitable in all the circumstances having regard to—

(a) the employer's default in refusing to permit the worker to exercise his right, and

(b) any loss sustained by the worker which is attributable to the matters complained of.

48. In Gallagher v Alpha Catering Services Ltd [2005] ICR 673 CA Peter Gibson LJ said at paragraph 50

"Whilst I accept on the authority of Simap [2001] ICR 1116 (see para 50 of the judgment of the European Court of Justice) that a period in which the worker is on call is not in itself sufficient to make that period working time, it seems plain to me that down time in the present case, the incidents of which are stated by the employment tribunal in para 6(5), cannot be a rest break, and a fortiori a period of down time cannot retrospectively become a rest break only because it can be seen after it is over that it was an uninterrupted period of at least 20 minutes. The worker is entitled under regulation 12(1) to a rest break if his working time exceeds six hours, and he must know at the start of a rest break that it is such. To my mind a rest break is an uninterrupted period of at least 20 minutes which is neither a rest period nor working time and which the worker can use as he pleases."

49. The EAT in MacCartney v Oversley House Management [2006] ICR 510 held at paragraph 33

"On any basis, the claimant had daily working time of more than six hours. She was therefore entitled, if regulation 12 applied, to a rest break. It was not sufficient to leave her to take such rest as she could during her working time. She was entitled to an uninterrupted period of at least 20 minutes, and she was entitled to know at the start of the rest break that it would be such."

50. In Grange v Abellio London Ltd [2017] ICR 287 the EAT considered competing interpretations by the EAT in Miles v Linkage community Trust Ltd [2008] IRLR 602 and Scottish Ambulance Service v Truslove UKEATS/0028/11, in relation to what refusal in Reg. 30(1) meant. HHJ Eady QC considered the Advocate General's opinion in *Commission of the European Communities v United Kingdom of Great Britain and Northern Ireland (Case C-484/04) [2007] ICR 592* at paragraphs 68 and 69, with which the Court agreed:

"68. *However, an employer may on no account withdraw into a purely passive role and grant rest periods only to those workers who expressly request them and if necessary enforce them at law. Not only the risk of losing a case, but also the risk of becoming unpopular within the business merely for claiming rest*

periods, could distinctly hamper effective exercise of those rights to ensure protection of the health and safety of workers.

"69. Instead, it is for the employer actively to see to it that an atmosphere is created in the firm in which the minimum rest periods prescribed by Community law are also effectively observed. There is no doubt that this first presupposes that within the organisation of the firm appropriate work and rest periods are actually scheduled."

HHJ Eady QC noted that the EAT in Miles had not been referred to the Advocate General's opinion. HHJ Eady QC refused to follow the decision in Miles and preferred the approach in Truslove and considered at paragraph 43:

"*I turn to the language and purpose of the Working Time Directive . Doing so, I note the guidance provided in Commission of the European Communities v United Kingdom of Great Britain and Northern Ireland [2007] ICR 592 and the Court of Justice's condemnation of the earlier DTI guidance stating that employers were under no obligation to ensure that workers were actually able to exercise such a right. I further observe that, in terms of the nature of the right, the court saw no distinction between a worker's entitlement to rest and an employer's obligation to ensure maximum hours of working time. Given that guidance, I consider it clear the Directive entitlement to a rest break is intended to be actively respected by employers. It is required not merely that employers permit the taking of rest breaks (in accordance with Directive provision) but—allowing that workers cannot be forced to take rest breaks—that they proactively ensure working arrangements allow for workers to take those breaks: see paras 68–69 of the Advocate General's opinion."*

It was held at paragraph 47

"Adopting an approach that both allows for a common sense construction of regulation 30(1) , read together with regulation 12(1) , and still meets the purpose of the Directive, I consider the answer is thus to be found in the appeal tribunal's judgment in Truslove : the employer has an obligation ("duty") to afford the worker the entitlement to take a rest break (para 32, Truslove). That entitlement will be "refused" by the employer if it puts into place working arrangements that fail to allow the taking of 20-minute rest breaks (MacCartney v Oversley House Management). If, however, the employer has taken active steps to ensure working arrangements that enable the worker to take the requisite rest break, it will have met the obligation upon it: workers cannot be forced to take the rest breaks but they are to be positively enabled to do so."

I adopt the reasoning as set out by HHJ Eady QC and follow the approach as set out in Grange.

51. The EAT in Scottish Ambulance Service v Truslove UKEATS/0028/11, held that time started running on each occasion that the Claimant did not receive the daily rest to which he or she was entitled.

52. In relation to remedy, guidance was given in Miles v Linkage community Trust Ltd [2008] IRLR 602 as to the factors to take into account in determining what is just

and equitable in terms of an award the Tribunal should consider: (1) the period of time during which there was a default, (2) the degree of default, i.e. how outrageous or offensive its behaviour was, and (3) the amount of the default in terms of the number of hours the employee was required to work and the number of hours he or she was to be given as rest periods.

Conclusions

Was the Respondent in fundamental breach of contract:

By changing the Claimant's job role?

53. The Respondent asked the Claimant whether she wanted to change her job role because the needs of the business had changed, and she was considered a suitable candidate. Ms T Morley consulted with her about the proposal and considered that she was the best person for the job. The Claimant did not object to the change and agreed to undertake it before the Respondent approached Ms Taylor about moving to the Claimant's old role. The Claimant says that Ms Taylor signed her contract before she did. I was provided with Ms Taylor's contract and it had the same date as the Claimant. The Claimant freely signed the contract and did not suggest to the Respondent that she was unhappy in so doing. The Claimant failed to demonstrate that she as forced to sign the new contract and did not establish that the Respondent was in breach of contract. The Respondent demonstrated that it had reasonable and proper cause when it asked the Claimant if she wanted to change roles.

By asking her to move desks/moving the telephone?

54. The Claimant accepted that the first desk move was reasonable. In the light of my findings that there was a business need for an office-based colleague to have the telephone, the Respondent had reasonable and proper cause for removing the telephone from the Claimant's desk. There were a limited number of telephones and the Claimant did not require to use it to the same extent as other colleagues.

By reason of the discussion with Ms T Morley on 30 January 2019?

55. The Respondent had received a complaint about a potential breach of confidentiality and the Claimant accepted that it was appropriate to investigate. The Claimant suggested that it was a 'trumped up' charge. I reject that submission on the basis that the Claimant was immediately questioned by Ms T Morley and the decision not to pursue a disciplinary process was communicated to the Claimant the same day. If the allegation had been 'trumped up', it is more likely than not that disciplinary proceedings would have followed. Ms T Morley acted with reasonable and proper cause in investigating the matter and dealing with it within a day. In the light of my findings of fact the Claimant has failed to prove that this was a breach of contract.

By not supporting the Claimant prior to the radio Interview?

56. On the basis of my findings of fact the Claimant was supported when she gave the radio interview. The Claimant did not tell Ms T Morley that she was ready to make a presentation and therefore Ms Morley would have been unaware of that. Accordingly, the Claimant has failed to prove that the Respondent was in breach of contract.

By only paying the Claimant Statutory Sick Pay, whilst off sick?

57. The Claimant's contract of employment only provided for Statutory Sick Pay; accordingly, the Claimant has not established that the Respondent was in breach of contract.

By other conduct

58. In the light of my findings the Claimant has not proved that poor conduct was directed towards her. In relation to the cooling off of the relationship with her colleagues, after removing them from social media, this was understandable in the circumstances and lasted about a week. The Claimant failed to prove that the Respondent acted without reasonable and proper cause or that it was calculated or likely to destroy her trust and confidence in the Respondent. Additionally, the Claimant failed to prove that all the conduct taken together was sufficient to amount to a breach of the implied term of trust and confidence.

Did the Respondent have reasonable and proper cause for the way it acted?

59. In the light of my findings of fact the Respondent had reasonable and proper cause in the way it conducted itself towards the Claimant.

Was the last of the alleged breaches sufficient to constitute a final straw?

60. In the light of my findings that the Respondent acted with reasonable and proper cause in relation to the 30 January 2019 and the radio interview, neither amounted to a final straw within the meaning of the law.

Was such conduct calculated or likely to destroy or seriously damage the trust and confidence the Claimant had in the Respondent?

61. The conduct of the Respondent was not calculated or likely to destroy or seriously damage the trust and confidence the Claimant held in the Respondent.

Did the Claimant resign in response to a fundamental breach?

62. In any event, the Claimant's evidence was that she wanted to return to work, but her ill health prevented her from so doing. Accordingly, the conduct she alleged was not an effective cause of her resignation.

Did the Claimant wait too long to resign?

63. In the light of my earlier findings it is unnecessary to consider this issue.

Did the Respondent refuse the Claimant the right to take rest breaks as entitled under Reg. 12 WTR?

64. The Respondent was required to allow the Claimant to take an uninterrupted rest period. The Claimant was permitted to take breaks and did so, however when she took her lunch break at her desk there was the possibility that it would be interrupted by having to take a telephone call, by reason of the policy to answer the telephone within 2 rings. Although the Respondent allowed breaks the Claimant did not know at the start of her lunch break whether or not it would be interrupted. Knowing that a rest period will be uninterrupted is a key part of reg. 12 as set out in MacCartney v Oversley House Management. Accordingly, to that extent, the Respondent was in breach of the Working Time Regulations. The effect on the Claimant was limited and her lunch break was interrupted very occasionally, however when she started her break, she did not know it would be uninterrupted. That was also the situation on the Claimant's final day in the office, although she did not give evidence that her break was interrupted. The 4 February 2019 was less than 3 months before the Claimant presented her Claim to the Tribunal and accordingly the claim was presented within the time limits.

Remedy for the claim under the Working Time Regulations 1998

65. The Claimant did not seek an award in relation to her health, but claimed an amount on the basis of what she would have been paid for her lunch breaks of 30 minutes over her the whole of her employment and she calculated that to be £3,500. The Respondent submitted that remedy should be considered through two lenses, firstly in relation to the conduct of the Respondent and secondly by reference to the losses of the Claimant. The Respondent said that that the Claimant had said the sum should be £3,500 on the basis of 4 years employment, however the exposure to the breach was less after she became Business Development. It was submitted that there was no evidence of bad faith by the Respondent and its witnesses had been honest in their evidence. The Respondent put the level of breach at a low order and referred to the Respondent having a small office with a small number of staff. The Respondent submitted that the Claimant's net pay would have been £4.49 per hour and that the award was to compensatory and not punitive.

66. Taking into account the matters in Miles v Linkage community Trust Ltd I had to consider what was just and equitable and this involved an exercise of discretion. The Claimant's contract of employment required her to work 40 hours per week and she was allowed a 30 minute unpaid lunch break each day. The period during which there was default started on 23 November 2015 and continued until 4 February 2019. The effect on the Claimant was limited in that her breaks were interrupted occasionally. The Respondent allowed employees other breaks for the purposes of fresh air or smoking and encouraged that, however there was always a risk that the designated rest break would be interrupted. The level of default of the Respondent was of a low order in that breaks were provided but they could be occasionally interrupted. In the context of the case as a whole the Respondent's behaviour was not particularly offensive or outrageous. The Claimant's contractual entitlement exceeded the amount prescribed by the Regulations.

67. Taking all matters into account I rejected Mr Jones' submission that no award should be made. The purpose of the Working Time Regulations is to protect health and safety and the Claimant did not know whether her breaks would be uninterrupted and it was therefore appropriate to make a financial award in addition to a declaration. The Claimant's calculation was not reflective of her financial loss, because under her contract the lunch break was unpaid. In the circumstances of this case the just and equitable award was £1,000.

68. The Employment Protection (Recoupment of Jobseeker's Allowance and Income Support) Regulations 1996 ("the Recoupment Regulations") do not apply in relation to the Working Time Regulations claim.

Employment Judge Bax

Dated: 15 October 2019

Judgment sent to Parties: 23 October 2019

FOR THE TRIBUNAL OFFICE