



**EMPLOYMENT TRIBUNALS**

***Claimant***

***Respondent***

**Ms M Joseph**

**AND**

**London Borough of Ealing**

**HELD AT: London Central**

**ON: 30 September and  
1 and 2 October 2019**

**BEFORE: Employment Judge Nicolle (Sitting alone)**

***Representation:***

**For Claimant:** Ms H Platt, of Counsel

**For Respondent:** Ms K Loraine, of Counsel

**RESERVED JUDGMENT**

1. The claim for unfair dismissal fails and is dismissed.
2. The claim for wrongful dismissal (and notice pay) fails and is dismissed.
3. The claim for age discrimination was withdrawn on 16 September 2019 and is dismissed. The arguable belatedness of the Claimant's withdrawal of this claim was the subject of an application for costs by the Respondent and is dealt with in a separate Judgment

**REASONS**

**Claims and Issues**

1. Was the Claimant dismissed?
2. Was there a fundamental breach of the contract of employment in that the Respondent breached the so-called "trust and confidence term", i.e. did it, without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between it and the Claimant? The Claimant relied on multiple alleged breaches (a-m below) as individually or cumulatively breaching the implied term of trust and confidence. In her closing submissions Ms Platt

acknowledged that allegations (a) and (b) were background matters only. She further indicated that allegations (c)-(f) were part of conduct which it is contended constituted a cumulative breach but were not sufficient in their own terms. However, she contended that matters (g)-(l) would in their own terms be sufficient to breach the implied term of trust and confidence.

3. If so, did the Claimant affirm the contract of employment before resigning?

4. If not, did the Claimant resign in response to the Respondent's conduct, to put it another way, was it a reason for the Claimant's resignation – it need not be the reason for the resignation?

5. If the Claimant was dismissed, she will necessarily have been wrongfully dismissed because she resigned without notice.

### The Hearing

6. The Claimant gave evidence in support of her own claim. She called no further witnesses. Evidence was given on behalf of the Respondent by Alison Reynolds, Director of Customer Services at the material time (Ms Reynolds), Sandra Bailey, Housing and Benefits Officer (Ms Bailey), Leena Solanki, Team Manager in the Housing and Benefits Department (Ms Solanki) and Kulbinder Thakur, Benefits Processing Operations and Manager (Ms Thakur). There was an agreed bundle comprising 575 pages.

### Background

7. The Claimant was employed by the Respondent; latterly as a Housing and Benefits Officer from 15 January 1990 until her resignation with immediate effect on 31 October 2018. By a claim form presented on 10 January 2019, the Claimant brought complaints of constructive unfair dismissal, direct age discrimination and wrongful dismissal (breach of contract).

### The basis of the Claimant's claim for constructive dismissal

8. In summary the Claimant gave evidence that treatment that she was subject to from approximately April 2012 until her resignation dated 31 October 2018 constituted a course of conduct which breached the implied term of trust and confidence and as such represented a repudiatory breach of her contract of employment by the Respondent. Whilst the Claimant gave evidence of matters prior to the incident which took place on 30 March 2018 the primary matters relied on concerned her suspension which took effect on 12 April 2018 and the Respondent's subsequent conduct of the investigation which culminated in her being sent a letter dated 28 September 2018 inviting her to a disciplinary hearing.

The Facts

9. I set out a summary of the Claimant's role and the circumstances giving rise to her letter of resignation dated 31 October 2018.

10. The Respondent is a local authority which employs approximately 3000 individuals (excluding those who work in schools). The Claimant had worked in the Respondent's Housing and Benefits Department since 1990 and in the period from April 2015 as a Home Worker. Housing Benefit Officers are given access to a variety of different online systems to carry out their role. Only authorised users may access the systems, and they may only do so to the extent that it is necessary to perform their duties for the Respondent. The systems contain personal data of applicants for and recipients of housing benefit and council taxpayers. This includes names, addresses, dates of birth, telephone numbers, national insurance numbers, financial information and bank details.

11. The Claimant had access to the Respondent's "Northgate" application. Northgate is the main database used by Housing Benefit Officers to process welfare benefit applications. Northgate contains two separate-systems, one pertaining to Council Tax benefit (known as "Revenue") and the other pertaining to Housing Benefits (known as "Benefits"). Both sub-systems contain welfare benefits applicant's personal data.

12. The Claimant, like all Housing Benefit Officers, was required to sign and date declarations annually. The declarations confirm the signatory had read and understood key data protection principles and that the personal data to which they have access is only to be used for the role for which they are employed. The last such declaration the Claimant signed before her resignation was dated 16 August 2017.

13. The Claimant's attendance at the Respondent's offices at Perceval House was relatively infrequent and typically comprised monthly meetings.

14. The Respondent's position is that all Housing and Benefit Officers are expected to undertake their work (regardless of whether they were working from home or at Perceval House) between 7:30am and 6pm on normal working days. There was a dispute between the parties as to the extent to which this represented actual practice and as to whether adequate communication had been given by the Respondent as to the importance of complying with this time threshold. I find that the Respondent had not fully and regularly communicated this requirement to all employees as there was no documentary evidence of this. I find that the general working hours were a matter commonly known to and followed by most Housing Benefit Officers as there was no evidence given of employees other than the Claimant regularly working outside the stipulated hours of work.

15. There is an annual shut down of the IT systems over the Easter Bank holiday weekend and no employee should access the systems during this shut down. In any event the Respondent's policy is that there should be no

access outside core working hours i.e. from 6pm on Thursday 28 March 2018 until 7:30am on Tuesday 4 April 2018.

16. On 31 March 2018 it came to the attention of Nicola Newman (ICT Systems Expert), (Ms Newman) that the Claimant had accessed Northgate on 30 March 2018 (i.e. on Good Friday) at approximately 11pm. Ms Newman emailed Ms Thakur to express her concern regarding this.

17. In an email of 4 April 2018 to Marla Dodhia, Team Manger Housing Benefits, the Claimant admitted that she had accessed the Northgate Revenue system at approximately 11pm on 30 March 2018 and that such access was not as result of her duties as a Housing Benefits Officer. The Claimant's explanation was that she was seeking the address of a member of her church following the untimely and tragic death of their son. The Claimant's position was that whilst she had attempted to access data in relation to this individual, she had aborted the search realising accessing data in these circumstances would be contrary to her obligations to the Respondent.

18. The Tribunal heard a relatively significant amount of evidence regarding the circumstances of the Claimant's request for home working in the period from May 2012 until it was granted with effect from 15 April 2015. There is no record of the Claimant raising a grievance or complaint during the period prior to her being accepted for home working. The Claimant acknowledges that she did not raise a complaint at the time.

19. The Claimant gave evidence that she perceived that Ms Thakur failed to greet her, or more generally interact with her, on those occasions that she attended Perceval House subsequent to being accepted for home working. Ms Thakur's evidence was that whilst she may not necessarily leave her place of work to greet the Claimant on her arrival in the building this was consistent her approach to all employees, reflective of her physical position within the work space and also as a result of her extremely busy working schedule.

20. Ms Solanki telephoned the Claimant on the afternoon of 12 April 2018 to ask her to attend a meeting at Perceval House at 11am the following day. There was a dispute as to what Ms Solanki said regarding the Claimant undertaking care responsibilities for her mother during her working hours. The Claimant was upset by her perception that Ms Solanki had stated that she should not be looking after her mother during working hours. Exactly what was said to be material to my decision. The Claimant did not state that she was unable to attend the meeting the following day and the Respondent's position was that if she had put forward reasons why she could not attend the meeting would have been rescheduled. I accept the Respondent's position in this respect given that on other occasions meetings had been rescheduled.

21. At the meeting on 13 April 2018 the Claimant was advised by Helen Shacklock, Assistant Director of Customer Services (Ms Shacklock) that as a result the 30 March 2018 incident that she was being suspended. Ms Thakur was appointed by Ms Reynolds to undertake an investigation.

22. The fact of the Claimant's suspension was confirmed in a letter from a Ms Shacklock dated 13 April 2018. This set out potential breaches of various elements of the Council's Code of Conduct and Data Protection Policy. It also referred to an initial period of suspension of twenty working days. The letter advised the Claimant that these constituted "serious allegations".

23. The Claimant was signed off work on account of ill health in the period between 4 May 2018 and 5 July 2018 and then again from 3 October 2018.

24. On 16 May 2018 the Claimant was sent a letter by Ms Shacklock updating her under the disciplinary procedure and expressly referencing the requirement to update her every twenty working days. This was the only such letter sent during the investigation.

25. In relation to the letter to the Claimant letter dated 16 May 2018 Ms Thakur gave evidence that given that it was towards the end of the working day and the Respondent's post may already been sent she used a first-class stamp from her own purse to put on the envelope and post it in the public mailbox. Unfortunately, given that the envelope contained not just the letter dated 16 May 2018 convening the first investigation meeting but also a copy of the relatively bulky disciplinary procedure and code of conduct the letter was not delivered as a result of the postage being insufficient.

26. Given the delay in the Claimant's receipt of this letter she was unable to attend the investigation meeting proposed for 24 May 2018. It was not until an email on 4 June 2018 that the Claimant confirmed receipt of Ms Thakur's letter of 16 May 2018.

27. The Claimant contends that subsequent communications regarding the rescheduling of the aborted investigation meeting proposed for 24 May 2018 were of a pejorative nature as to her culpability for its postponement. For example, the Claimant makes reference to Ms Thakur's letter dated 24 May 2018 in which at paragraph two she states that the Claimant did not contact her and chose not to attend the meeting proposed for 24 May and did not advise as to the reason for her none attendance. However, given that Ms Thakur would not have been aware that the Claimant had not received the 16 May letter the language she used was in itself surprising.

28. Various communications regarding the ongoing investigation were sent to the Claimant during the period between 4 May and 5 July 2018 during which she was certified as off work on account of ill health.

29. The Claimant was sent a letter dated 11 July 2018 by Ms Thakur inviting her to the disciplinary investigation meeting at 2:30pm on 17 July 2018.

30. The Claimant was sent a letter dated 16 August 2018 inviting her to attend the second disciplinary investigation on 20 August 2018.

31. There were delays in the investigation undertaken by Ms Thakur. The Claimant attended investigation meetings on 17 July 2018 and 20 August

2018. Ms Thakur's findings are in an investigation report dated 17 September 2018. This was sent to the Claimant under cover of a letter from Ms Reynolds dated 28 September 2018 inviting the Claimant to attend a disciplinary hearing on 5 October 2018. This hearing was postponed as result of the Claimant being signed off sick from 3 October 2018 and ultimately did not take place given the Claimant's resignation with immediate effect from 31 October 2018.

32. The Claimant gave evidence that at both investigation meetings on 17 July and 20 August 2018 that she was left waiting for a period of up to 45 minutes as result of Ms Thakur's delay. Ms Thakur disputed that there was any significant delay in the commencement of the meetings.

33. I accept from the Claimant's evidence, that she was upset by what she construed as a discourtesy towards her in the meetings being delayed. I find that it was likely that there was some delay but it is apparent from Ms Thakur's very candid evidence that she was under significant pressure of work and I do not consider that any delay in the commencement of the meetings was a deliberate discourtesy towards the Claimant.

34. The Claimant complains that the notes which were provided to her at the investigation meetings were incomplete and/or inaccurate. She further complains that there was significant delay in providing her with the notes of the meetings and that she had to persistently chase Ms Thakur before such notes were provided.

35. Ms Thakur took handwritten notes at the meetings and then typed these up. Whilst a representative from HR attended the 17 July meeting, they were not there in an official note taking capacity. Whilst they took a handwritten note, they did not then turn this into a typed note but rather provided Ms Thakur with their handwritten note which Ms Thakur then combined into the typed transcript of the meeting which was subsequently sent to the Claimant.

36. The Claimant then had the opportunity to make handwritten annotations to the transcript. Having reviewed such handwritten transcripts I find that there were no deliberate or material oversights in the transcript provided. Ms Thakur's evidence was that it was intended to be a summary of key issues rather than a verbatim account. The Claimant was quite properly given the opportunity to add comments and these were included in the documentary record which formed part of the investigation process.

37. The Respondent's disciplinary procedure was negotiated with the recognised trade union. It does not have contractual status. The Claimant referred to various elements of both the disciplinary policy most recently revised in October 2015 (the Disciplinary Policy) and the Respondent's guide for investigating officers conducting disciplinary investigations dated May 2012 (the Disciplinary Investigation Guide) and then highlighted deficiencies in the Respondent's compliance with such obligations.

38. In summary the Disciplinary Policy includes (quoting the relevant section numbers):

### **Disciplinary Policy**

**3.1** in the event of the inability to comply with timescales employees must be informed in writing and given the reasons for the extension, together with details of any steps to be taken to resolve the disciplinary case within this period.

**9.15** suspensions should be confirmed in writing within two working days of the alleged incident being reported with the reasons for the suspension.

**9.19** all suspensions must be reviewed and authorised by the director of human resources or their nominated representative after twenty working days. Thereafter, a suspension must be reviewed every twenty working days and a written explanation provided.

**12.1** it is important that investigations are undertaken promptly.

**12.7** the investigating officer conducting the investigation should be as objective as possible and not prejudge the issues of the case.

**12.10** the investigation should be completed as soon as possible and except in exceptional circumstances, it should normally be completed within twenty working days, following appointment of the investigating officer.

**12.11** the investigating officer will draw up a result of the investigation for the head of service having taking advise from human resources. This should normally be completed within ten working days.

39. It is acknowledged by the Respondent that the timescales referred to above were not complied with. Indeed, the evidence from both Ms Reynolds and Ms Thakur was very candid to the effect that a failure to comply with timescales represents the Respondent's norm rather than the exception. As such the Claimant's case was by no means unusual. It was apparent from Ms Thakur's evidence, which I accept, that she was under significant pressure at work. Indeed, she had made it clear to her line manager that she really did not have the capacity to undertake the investigation but was nevertheless advised that it represented her responsibility. This was undoubtedly a significant contributory factor to the delays which took place at various stages of the process. For example, it was acknowledged by Ms Thakur that after her investigation meetings with various witness in early May 2018, that it was not until early August 2018, that she sent them notes of the meetings for their review. As such this was a delay which was entirely unconnected to the Claimant's absence on account of poor health.

40. The Claimant was suspended on 12 April 2018 and it was not until 28 September 2018 that a letter was sent convening a disciplinary hearing. The Claimant was fit to return to work on 5 July 2018. The Claimant attended investigation meetings on 17 July and 20 August 2018. There were some ongoing investigations undertaken by the Respondent as a result of the additional matters raised following a search of the Respondent's revenue system and which came to Ms Thakur's attention in early August 2018.

41. The Respondent failed to comply with the timelines (to include the obligation to update the subject of a disciplinary investigation) as set out in the Disciplinary Policy. The Claimant made various requests for updates as to the progress of the investigation and the production of notes from the investigation meetings. For example, the Claimant sent an email to Ms Thakur on 2 August seeking an update following the meeting she had attended on 17 July 2018. Whilst it is apparent that there was an ongoing delay it is noted that Ms Thakur responded the following day to this request to advise that no decision had yet been made. The Claimant sent further emails requesting updates and/or the production of notes from the investigatory meetings on 15 August (responded to by Ms Thakur later that day) and to were both Ms Thakur and Ms Reynolds on 11 and 13 August respectively to which there is no evidence of a reply in the bundle of documents.

42. Ms Thakur's notes of the 17 July 2018 meeting were sent by her to the Claimant on 15 August 2018. The Claimant sent an email requesting the notes of the second investigatory meeting dated 20 August 2018 on 11 September 2018. She was not provided with these notes until they were sent to her as appendix 25 to the investigation report which was appended to Ms Reynolds' letter dated 28 September 2018.

43. The Claimant complains that matters investigated during the course of her suspension morphed from the triggering incident on 30 March 2018 to a more general consideration of "performance" and "timekeeping" issues and that this was symptomatic of a general desire by Ms Thakur and the Respondent more generally to find evidence to justify her dismissal. Further, the Claimant contends that in adopting such an approach the disciplinary investigation departed from the requirements under the disciplinary investigation guide for investigations to remain "impartial and objective".

44. It is apparent that issues relating to timekeeping and to a lesser extent performance arose during Ms Thakur's investigation. I will deal first with timekeeping. As previously stated, the Respondent's position is that housing benefit staff are required to undertake their duties between 7:30am and 6pm on normal working days. Evidence was given on behalf of the Respondent that access to the Respondent's online systems outside these hours could risk compromising payment processes albeit there was no evidence given that any breach of such a requirement by employees had given rise to such problems.

45. The Claimant's evidence was that she habitually worked outside the stipulated hours. This became apparent when data was produced by the Respondent's IT department showing samples of the times upon which she



accessed the Northgate system in the days preceding the 30 March incident. This data evidenced that the Claimant was accessing Northgate in the evenings and it was acknowledged by the Respondent that this was primarily to undertake housing benefit cases. Notwithstanding evidence that the Claimant was accessing Northgate for significant periods beyond 6pm it was apparent from her outlook calendar entries and timesheets for the equivalent days that she was only recording hours worked up to 6pm.

46. The Respondent's witnesses indicated that this represented a concern. The disciplinary hearing invitation letter dated 28 September 2018 was confined to issues relating to inappropriate access to individual records on Northgate rather than the time at which work (or indeed unauthorised activity) was undertaken.

47. The Claimant contends that there was an unreasonable and unfair expansion of the ambit of the disciplinary investigation and ultimately the disciplinary charges set out in the letter dated 28 September 2018. In summary this concerns the addition of s.2 in the letter dated 28 September 2018 which comprised the following:

“accessed and viewed the Northgate Revenues IWorld application database for a further six people where there was no housing benefit claim held”.

48. This concern only became apparent to Ms Thakur following an email to her from Ms Newman on 1 August 2018 containing a list of ten names. Following investigation by Peter Harris, in the Respondent's IT team it transpired that six of the ten names (the last ten accessed by the Claimant on the Respondent's Revenue system) were not housing benefit claims. Further, it became apparent that one of the ten was a current employee of the Council and two were former employees. The Respondent's concern was that there was no legitimate basis for the Claimant's access to these names.

49. Ms Thakur's concern regarding the Claimant having access to these names was raised with her during the investigation meeting on 20 August 2018. The letter from Ms Thakur dated 16 August 2018 inviting the Claimant to that disciplinary investigation meeting did not refer to the additional concern and confined itself to the original incident of 30 March 2018.

50. It would, therefore, have come as a surprise to the Claimant to be asked for comment on these names during the 20 August meeting. Her recorded response to the individual names was “no comment”.

51. The Claimant's position is that it was not her who accessed these records and that such access must have been as a result of her experiencing a password issue and being provided with a temporary password. Her position is that such access must have been by someone masquerading as her. The Respondent's position is that having considered the matter it was satisfied that on the balance of probabilities its log in system was sufficiently robust with multiple checks required and it would therefore have been highly

improbable that such access would have occurred as inferred by the Claimant. Further, it was apparent on investigation that at least some of the work that had been undertaken in respect of these names was genuine housing benefit work and therefore if there had been unauthorised access or “hacking” it would have been highly improbable that the hacker would have proceeded with routine housing benefit work.

52. Whilst I find that the Respondent was deficient in the time taken for additional background IT checks to be undertaken (outcome early August when these checks and analysis could have been undertaken from early April onwards) I consider it understandable that these were matters of concern to the Respondent. First, a situation where a random check of ten names indicated that six were not for legitimate work purposes would be a potentially serious issue. Secondly, there is an obvious similarity between the concerns which came to the Respondent’s attention in early August 2018 with the original triggering incident of 30 March 2018.

53. It was by random chance that the incident of 30 March 2018 came to the Respondent’s attention. This was as a result of Ms Newman becoming aware of access during the annual shut down of the Respondent’s IT systems for maintenance and upgrading. Whilst it is true that the Claimant conceded that the access had been inappropriate this was only in response to her being asked for an explanation. When it belatedly came to the Respondent’s attention that from a check of the last ten revenue search accesses made by the Claimant that six had not been for illegitimate purposes, I find it to be understandable that the Respondent perceived a concerning pattern.

## Law

54. The claimant contends she was constructively dismissed under s95(1)(c) of the Employment Rights Act 1996. Under s95(1)(c) an employee is dismissed where she terminates the contract under which she is employed (with or without notice) in circumstances in which she is entitled to terminate it without notice by reason of the employer’s conduct.

55. An employee will be entitled to terminate her contract without notice to her employer only if the employer is in repudiatory breach of contract: see Western Excavating (ECC) v Sharp [1978] ICR 221. The claimant contends that her employer was in breach of the implied term of trust and confidence. Breach of the implied term of trust and confidence will mean inevitably that there has been a fundamental or repudiatory breach going necessarily to the root of the contract (Morrow v Safeway Stores Ltd [2002] IRLR 9, EAT).

56. In Mahmud v Bank of Credit and Commerce International SA [1997] ICR 606, [1997] IRLR 462, the House of Lords held the implied term of trust and confidence to be as follows:

57. 'The employer shall not without reasonable and proper cause conduct itself in a manner calculated *and* likely to destroy or

seriously damage the relationship of confidence and trust between employer and employee.'

58. The italicised word 'and' is thought to be a transcription error and should read 'or'. (Baldwin v Brighton & Hove City Council [2007] IRLR 232).

59. In employment relationships both employer and employee may from time to time behave unreasonably without being in breach of the implied term. It is not the law that an employee can resign without notice merely because an employer has behaved unreasonably in some respect. The bar is set much higher. The fundamental question is whether the employer's conduct, even if unreasonable, is calculated or likely to destroy or seriously damage the relationship of trust and confidence between employer and employee.

60. There is no breach of trust and confidence simply because the employee subjectively feels that such a breach has occurred no matter how genuinely this view is held. If, on an objective approach, there has been no breach then the employee's claim will fail (see Omilaju v Waltham Forest London Borough Council [2005] EWCA Civ 1493, [2005] ICR 481, CA). The legal test entails looking at the circumstances objectively, i.e. from the perspective of a reasonable person in the claimant's position. (Tullett Prebon PLC v BGC Brokers LP [2011] IRLR 420, CA.)

61. The repudiatory breach or breaches need not be the sole cause of the claimant's resignation. The question is whether the claimant resigned, at least in part, in response to that breach. (Nottinghamshire County Council v Meikle [2004] IRLR 703, CA; Wright v North Ayrshire Council UKEATS/0017/13.)

62. The duty not to undermine trust and confidence is capable of applying to a series of actions by the employer which individually can be justified as being within the four corners of the contract. (United Bank Ltd v Akhtar [1989] IRLR 507, EAT).

63. A claimant may resign because of a 'final straw'. The final straw, viewed alone, need not be unreasonable or blameworthy conduct on the part of the employer. It need not itself amount to a breach of contract. However, it will be an unusual case where the 'final straw' consists of conduct which viewed objectively as reasonable and justifiable satisfies the final straw test. An entirely innocuous act on the part of the employer cannot be a final straw, even if the employee genuinely (and subjectively) but mistakenly interprets the employer's act as destructive of the necessary trust and confidence."

64. Langstaff J in Lochuak v L B Sutton UKEAT/0197/14 said this about the 'last straw' doctrine:

*'I do not think it necessary to resolve a case of constructive dismissal by analysing what is meant by "last straw". The issue which needs to be addressed is whether there has been a repudiatory breach. That may be obvious even if only one incident has occurred. It may only be clear when a number of incidents are taken together, where it is the effect of*

*those incidents taken together that amounts to a breach. If some of the alleged incidents are found not to have occurred, a Tribunal must have regard to those which it has found did occur and ask objectively whether, in the particular context of the case, they amounted to a breach of contract and whether, in the particular context of the case, that breach was so serious as to be repudiatory. It may be that an employee puts up with a breach of contract which is, properly analysed, repudiatory because he would prefer to retain his employment rather than be cast adrift on the labour market. In such a case he might very well spend a period of time without taking any action, or actually take positive steps which would indicate that he wished the contract to continue notwithstanding the breaches which had occurred. But they would remain breaches. A failure to elect to treat a contract as repudiated does not waive such breaches. It merely declines to make the choice. If a later incident then occurs which adds something to the totality of what has gone before, and in effect resuscitates the past, then the Tribunal may assess, having regard to all that has happened in the meantime - both favourable to the employer and unfavourable to him - whether there is or has been a repudiatory breach which the employee is now entitled to accept. If so, and if the employee resigns at least partly for that reason, it will find in that case that there has been a constructive dismissal.'*

65. The claimant must not 'affirm' the breach. A claimant may affirm a continuation of the contract in various ways. She may demonstrate by what she says or does an intention that the contract continue. Delay in resigning is not in itself affirmation, but it may be evidence of affirmation. Mere delay, unaccompanied by any other action affirming the contract, cannot amount to affirmation. However, prolonged delay may indicate implied affirmation. This must be seen in context. For some employees, giving up a job has more serious immediate financial or other consequences than others. That might affect how long it takes the employee to decide to resign. (Chindove v William Morrisons Supermarket PLC UKEAT/0043/14.)

66. The parties' representatives are largely in concurrence as to the applicable case law and test to be applied.

67. I consider it appropriate to comment briefly on some of the case law referred to by Ms Platt on behalf of the Claimant in support of her contention that the Claimant was constructively dismissed.

68. She cited to the case of Gogay v Hertfordshire County Council [2000] IRLR 703 which referred to an employer's "knee jerk" reaction in suspending an employee. Given that one of the criticisms of the Respondent is that it delayed in suspending the Claimant I do not consider this case to be apposite. Further, I do not consider that it could be said that the Respondent's reaction was "knee jerk" particularly in circumstances where the Claimant concedes that the fact of a suspension was appropriate in the context of the admitted 30 March 2018 incident.

69. Further, other cases referred to by Ms Platt regarded suspension without pay. Whilst I acknowledged that the implied term could potentially still apply where an employer is in receipt of pay, I consider this to be a significant distinguishing factor from cases such as Warburton v Taff Vale Railway Co 1902 18 TLR 420.

### **Conclusions**

70. I now apply the law to the facts to determine the issues. If I do not repeat every single fact, it is in the interests of keeping these reasons to a manageable length.

#### The Reason for the Claimant's Resignation

71. The first question is why the claimant resigned. I find that the reason the claimant resigned at the particular point in time by tendering her immediate resignation in her letter dated 31 October 2018 was the content of the letter dated 28 September 2018 inviting her to the disciplinary hearing and a realisation that the likely outcome was to be her dismissal for gross misconduct.

72. In this letter to Ms Reynolds the Claimant listed a series of matters which she contended separately and cumulatively amounted to a fundamental breach of the implied term of trust and confidence. This in effect formed the basis of all those matters relied on as (a) to (m) in the Employment Tribunal hearing. The majority of these matters had been known to the Claimant for many months and I consider it more reasonable to conclude that the primary motivation for the Claimant's resignation

73. It would have been open to the Claimant to attend the disciplinary hearing and put forward explanatory and/or mitigating evidence. She chose not to do so. I therefore conclude that the Claimant's resignation was not as a result of the matters as set out in (a) to (m) above.

#### Fundamental breach of implied term of trust and confidence

74. I need to consider whether the conduct by the Respondent amounted to a fundamental breach of the implied term of trust and confidence. I remind myself that this is an objective test. It is not sufficient that the Claimant subjectively feels such a breach has occurred. Further, it is not enough that the respondents acted unreasonably in some respects. The bar is set much higher.

#### Matters relied on by the Claimant as conduct breaching the implied term of trust and confidence

- (a) Failure to determine application for home working promptly between May 2012 and 15 April 2015.*

75. I do not consider it necessary for the purposes of my decision to address this matter in any detail. First, and principally, given that as at the date of her suspension the Claimant had been working as a home worker for three years, I consider that there would be no realistic basis for including any purported delay in the Respondent's dealing with the Claimant's request to be accepted for home working as part of a course of conduct culminating in the Claimant's resignation.

76. Whilst there was a dispute on the evidence between the parties as to the timing of when the Claimant first requested home working, I do not consider that this represents a material issue for the reasons as set out above.

77. To a significant extent the inclusion of the home working issue as part of the claim would appear to be a legacy of the withdrawn claim for age discrimination pursuant to which the Claimant had named ten comparators (all of whom were significantly younger than her) whom she contends were granted home working much quicker than her. Given that this claim was no longer being pursued I do not consider it necessary to address the position in this respect, albeit evidence was given as to Adam Smith, in respect of whom the Respondent acknowledged his application was dealt with much quicker than that of the Claimant.

78. In part the Claimant sought to rely on what she perceived to represent the obstructiveness of Ms Thakur to her home working application as evidence of Ms Thakur's pre-existing antipathy towards her which she considers was subsequently exhibited in Ms Thakur's conduct of the 2018 investigation. Ms Thakur's evidence was that whilst she was responsible for managing the home working project, she had no say as to the suitability of the individual applicants for home working and that this was the decision of the applicant's individual and line manager. I do not find that there is any basis for the Claimant's perception that Ms Thakur had a pre-existing antipathy towards her emanating from the home working application. In this context it is also relevant to refer to an email sent by the Claimant to Ms Thakur dated 4 September 2017 in which she thanked Ms Thakur for all her help and support regarding the resolution of an IT issue. I conclude that matter (a) does not amount to a breach of the implied term of trust and confidence and in event Ms Platt had indicated that this was not a matter relied on.

*(b) Failure by Ms Thakur to communicate generally with the Claimant between 15 April 2015 and 13 April 2018.*

79. I refer to the Claimant's email to Ms Thakur of 4 September 2017 and referred to in more detail in (a) above. I do not find that there is any evidence that Ms Thakur deliberately and inconsistently with her approach to other employees failed to communicate with the Claimant. I conclude that matter (b) does not amount to a breach of the implied term of trust and confidence and in event Ms Platt had indicated that this was not a matter relied on.

*(c) Convening a suspension meeting at short notice without due consideration for the Claimant's care commitments.*

80. Given that 13 April 2018 constituted a normal working day and in the context of what the Respondent considered the urgency of the matter given its concerns regarding the Claimant's conduct, I do not consider that requiring the Claimant to attend a meeting at Perceval House the following day was unreasonable.

81. The nature of the meeting was such that there was no preparatory work which the Claimant could undertake. It was therefore solely a case of her availability to attend during her contractual working hours. I conclude that matter (c) does not form part of a course of conduct amounting to a breach of the implied term of trust and confidence.

*(d) Failure to ensure sufficient postage on the letter dated 16 May 2018 convening the first investigation meeting*

82. Ultimately, I do not consider that issues relating to this matter are of any real materiality to the overall complaints put forward by the Claimant. At the material time the Claimant was not in a position to attend any meeting as result of her ill health and it was not until 5 July 2018 that the Claimant was declared fit for work. I conclude that matter (d) does not form part of a course of conduct amounting to a breach of the implied term of trust and confidence.

*(e) Scheduling the investigation and meetings whilst the Claimant was certified sick*

83. It does not necessarily follow that in all circumstances where an employee is signed off work on account of ill health that they are prohibited from performing any element of their duties albeit given that the Claimant's ill health had commenced when she was already suspended, this would be a situation whereby implication that would almost certainly have been the case. Given that the Claimant was not required to attend a meeting nor treated adversely as result of failing to do so until she was certified as fit for work, she suffered no prejudice as a result of such communications. Whilst I consider that this is indicative of a lack of joined up process by the Respondent, I conclude that matter (e) does not form part of a course of conduct amounting to a breach of the implied term of trust and confidence.

*(f) Ms Thakur's delay in commencing the investigation meetings (namely 45 minutes for the first meeting, and 30 minutes for the second meeting) without explanation.*

84. Notwithstanding a delay of up to 45 minutes the meetings went ahead and there is no suggestion that the Claimant's ability to properly provide explanations as to the matters put to her was in any way curtailed as result of any lateness in the commencement of the meetings. The Claimant remained on full pay and the meetings were scheduled during the course of her normal working day. I conclude that matter (f) does not form part of a course of conduct amounting to a breach of the implied term of trust and confidence.

*(g) Failure to record accurately the content of the investigation meetings*

85. Having reviewed the transcripts and the Claimant's handwritten notes on them I find that there were no deliberate or material oversights. It was intended to be a summary of key issues rather than a verbatim account. The Claimant was quite properly given the opportunity to add comments and these were included in the documentary record which formed part of the investigation process. I conclude that matter (g) does not individually, or as part of a course of conduct, amount to a breach of the implied term of trust and confidence.

*(h) Undue delay in the investigation process between suspension and the letter convening the disciplinary hearing in breach of the disciplinary procedure*

86. I do not consider that any significant criticism can be made of the delay in the period between the suspension on 12 April and the Claimant's ill health with effect from 5 May 2018.

87. As such the material period to consider the extent of the delay is from when the Claimant was fit to return to work on 5 July 2018 and 28 September 2018. There were clearly delays, and whilst it is apparent that the Claimant was becoming (understandably) increasingly frustrated and concerned by such delays. Clearly it would have been preferable if the Respondent's appointed investigating officer, Ms Thakur, had the resources to conduct the investigation with greater expedition. I do not consider that the fact and extent of the delays was sufficient for matter (h) to individually, or as part of a course of conduct, amount to a breach of the implied term of trust and confidence.

*(i) Failure to keep the Claimant informed of progress and/or updated during the investigation in breach of the disciplinary procedure*

88. The Respondent failed to comply with the timelines in its own disciplinary procedure and ideally would have updated the Claimant at regular intervals as to the progress (or in some respects lack of progress) of the investigation. The general position appears to be that when the Claimant requested an update that she received a timely response. The Respondent's failures should be seen in the context of the employees involved in the investigation being overburdened with work and not directly as result of an attitude pursuant to which the Claimant's position was disregarded. It is nevertheless understandable that the Claimant perceived that she was "of no importance" and the Respondent's approach, to include the apparent lack of direct HR involvement in the conduct of the investigation (to include providing appropriate administrative support) is open to criticism. However, the deficiencies were not sufficient for matter (i) to individually, or as part of a course of conduct, to amount to a breach of the implied term of trust and confidence.

*(j) Failure to provide promptly notes of both investigation and meeting*



89. Given that the 28 September letter required the Claimant to attend a disciplinary hearing on 5 October 2018 it was clearly deficient that the notes of the second interview meeting were only being provided at that stage. Nevertheless, in considering the effect of this deficiency I am assessing not whether the Respondent fully complied with the terms of its own disciplinary procedure or alternatively whether it could have conducted things more efficiently (quite clearly it could have done and this much I think was largely accepted by the Respondent's witnesses) but rather whether the effect of such a deficiency was sufficiently serious to breach whether individually, or as part of a course of conduct, the implied term of trust and confidence. In my opinion it was not.

*(k) Investigating performance and time keeping issues unrelated to the disciplinary case against the Claimant*

90. I do not consider it inappropriate or unexpected that given the nature and timing of the initial incident that the Respondent would consider the Claimant's working times.

91. I do, however, consider that the more limited references to the Claimant's "performance" were inappropriate in the context of a disciplinary rather than a capability performance process. For example, in the interview with Marla Dodhi, the Claimant's team manager (interview on 11 May 2018) there was discussion regarding the Claimant's performance which Ms Dodhi considered to be "low performance".

92. Nevertheless, in the summary to Ms Thakur's investigation report there was no reference to performance. I therefore consider that performance represented a peripheral matter raised during the investigation rather than a matter substantive to it. As such I do not consider that the arguable blurring of the lines between the disciplinary investigation and considerations of her performance breached individually, or as part of a course of conduct, the implied term of trust and confidence.

*(l) Ms Thakur formulating a second disciplinary allegation which was unsustainable on the available evidence*

93. Given that Ms Thakur and the Respondent more generally were self-evidently aware of the additional concern it would have been appropriate for this to have been included with appropriate details provided in the invitation letter.

94. I therefore considerate it was appropriate that these matters were investigated. It was reasonable for the Respondent to have concern that notwithstanding the Claimant's denial that such access had taken place at her instigation and for therefore understandable for this additional allegation to be added to the letter dated 28 September 2018.

95. As such I do not consider that the inclusion of this additional issue as part of the investigation and disciplinary charges breached whether

individually, or as part of a course of conduct, the implied term of trust and confidence.

*(m)By Ms Thakur stating in the investigation report, “there was no guarantee that either this has not happened before or could not happen in the future” implying that the Claimant could not be trusted whether working from home or at the office*

96. Whilst it is understandable that the Claimant took exception to this remark, I do not consider it inappropriate in the context of the investigation. I reach this decision for the following reasons:

97. As such whilst it is acknowledged that the Claimant does not accept responsibility for the additional six access concerns it is entirely reasonable for the Respondent to have a genuine concern warranting a further investigation and potential disciplinary proceedings; and

98. As such I do not consider that the Respondent’s conduct was sufficiently serious whether individually, or as part of a course of conduct, to breach the implied term of trust and confidence.

99. I do not consider that allegations (c)-(f) were part of conduct which constituted a cumulative breach of the implied term of trust and confidence nor that matters (g)-(m) breached the implied term of trust and confidence whether individually or part of a course of conduct.

100. As I find no breach of the implied term of trust and confidence, the claim for unfair constructive dismissal fails.

#### Affirmation

101. Notwithstanding my conclusion above it is appropriate for me to consider whether, in any event, the Claimant by her continuing employment had affirmed any purported breaches of the implied term of trust and confidence. I have already indicated that this would certainly apply to those matters pertaining to the Claimant’s application for home working in the period May 2012 to April 2015. I also consider that it would apply on an individual basis (but not necessarily on a course of conduct basis) to the matters set out above from (b) to (f). I do not, however, consider that affirmation would have applied to those matters listed as (g) to (m).

102. More specifically in relation to delays in the investigation and disciplinary process it is relevant to consider the extent to which the Claimant arguably affirmed the continuation of her contract of employment notwithstanding such delays. Ultimately, her resignation was after receipt of the letter inviting her to a disciplinary hearing and not directly in response to such delays. As such I consider that by her continuing employment during this period the Claimant had affirmed the continuation of her employment notwithstanding any breaches of the implied term of trust and confidence.

Other Matters

103. Given my findings above it is not necessary for me to consider the question as to whether if the Claimant had been dismissed that the Respondent would have potentially fair grounds for doing so either on the basis of conduct or some other substantial reasons. It is also not necessary for me to consider potential reductions in any compensatory award pursuant to “Polkey” or contributory conduct.

Employment Judge Nicolle

**Dated: 1 November 2019**

Judgment and Reasons sent to the parties on:

05/11/2019

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For the Tribunal Office