# EMPLOYMENT TRIBUNALS

**Claimant:** **Miss N B Green**

**Respondent:** **Department for Work and Pensions**

**Heard at:** **Nottingham**

**On:** **2nd and 3rd October 2019**

**Before:** **Employment Judge Jeram**

**Representation**

**Claimant:** **Miss Alfred (Counsel)**
**Respondent:** **Mr N Roberts (Counsel)**

# JUDGMENT

1. The claim for constructive unfair dismissal is not well founded and is dismissed.

# REASONS

## Background and Issues

1. By a claim presented on 21 August 2018, the Claimant made a claim for unfair constructive dismissal. The Claimant was employed by the Respondent from 23 January 1984 until termination on 19 April 2018. No response to her claim was received and so judgment was entered in her favour on 29 November 2018, with a remedies judgment entered subsequently on 22 February 2019. An application to reconsider those two judgments was received on 27 February 2019. That application was successful and so the judgments were set aside on 29 May 2019 and the matter case managed to a final hearing.

2. The issues broadly framed are:

a. Was there a dismissal? The Respondent contends that the contract was terminated by mutual agreement.

b. If there was a dismissal:

   i. did the Respondent act in a way that fundamentally breached the implied term of trust and confidence?
   ii. If so, did the Claimant resign in response to that breach?
   iii. Did the Claimant delay or affirm the breach?

c. If there was a dismissal, does the Respondent show a potentially fair reason for it?

**The Relevant Law**

3. The burden rests upon an employee to show, on the balance of probabilities, that there was a dismissal, rather than a termination, for example, by resignation or by mutual agreement between the employer and employee.

4. If there is a dismissal, then that amounts to a constructive dismissal if, pursuant to section 95(1(c) ERA 1996:

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

5. An employee is entitled to terminate the contract only if the employer has committed a repudiatory breach of contract i.e. 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: Western Excavating (ECC) Ltd v Sharp 1978 ICR 221, CA.

6. A breach of the implied term of trust and confidence occurs when the employer conducts itself, without reasonable and proper cause, in a manner which is likely to destroy or seriously damage the relationship of trust and confidence between the employer and employee: Malik v BCCI SA [1997] ICR 606 HL.

7. The relationship between employer and employee is regarded as one based on mutual trust and confidence between the parties, so that where the employer breaches the implied term, the breach is inevitably fundamental: Morrow v Safeway Stores plc [2002] IRLR 9, EAT.

8. There will be no breach simply because an employee subjectively feels that such a breach has occurred, no matter how genuinely that view is held: if, on an objective approach, there has been no breach, then the employee's claim will fail: Omilaju v Waltham Forest London Borough Council [2005] ICR 481, CA.

9. A course of conduct can cumulatively amount to a fundamental breach of contract entitling employee to resign and claim constructive dismissal following a last straw incident. That last straw does not have the of the same character as the earlier, nor must it constitute unreasonable or blameworthy under, it must however contribute, however slightly, the breach of the implied term of trust and confidence. An entirely innocuous act on the part of the employer cannot be a final straw: Omilaju, as affirmed by the Court of Appeal in Kaur v Leeds Teaching Hospitals NHS Trust [2018] EWCA Civ 978.

10. The breach need not be the sole cause of the resignation, so long as it is an effective cause. Conversely, if the repudiatory breach although present had played no part in the resignation, then a claim for constructive unfair dismissal must fail: Wright v North Ayrshire Council 2014 ICR 77, EAT and Abbycars (West Horndon) Ltd v Ford EAT 0472/07.

11. I was referred by Ms Alfred to TSB Bank plc v Harris UKEAT/1145/97 and by Mr Roberts to L Lipton Ltd v Marlborough [1979] IRLR 179.

**Findings of Fact**

12. I heard from the Claimant; for the Respondent I heard from Bob Gallacher (National Serious and Organised Crime Leader) and Joanne Espinoza (District Operations Leader). I was referred to various documents in an agreed bundle comprising of 386 pages.

13. The Claimant was employed by the Respondent since 1984, but latterly as a higher executive officer in the Serious and Organised Crime Department. Her career with the Respondent was free of any disciplinary action and she planned to retire on 31 May 2018.

14. On 18 January 2018 the Claimant sent attachments from her work email address to a personal address, without permission to do so. The attachments contained significant amounts of personal data belonging to others. It was, on any objective view, a serious breach of confidentiality.

15. On 24 January 2018, Andy McDonald (Regional Serious Organised Crime Leader for the Midlands region), notified the Claimant of the Respondent's intention to investigate an allegation that "*you allegedly by the sent three emails, containing sensitive information and personal details, to an email address that is outside the 'gsi' network"* (**'the first allegation'**). The letter informed the Claimant that the fact of the investigation was confidential and should not be discussed with anyone not directly involved either during or after the completion of the disciplinary process unless it was necessary to do in connection with the disciplinary process.

16. The Claimant was subsequently invited to an investigation meeting. No further details of the allegation were given. The letter confirmed that a breach of her duty to keep the investigation and disciplinary process confidential would, of itself, be viewed as an act of serious misconduct.

17. At the investigation meeting, which took place on 12 February 2018, the Claimant, who was accompanied by her trade union representative, admitted to sending the three emails and their attachments to her personal address.

18. By the date of this meeting, the Claimant's retirement date had already been confirmed as 31 May 2018.

19. On 15 February 2018, the Respondent wrote to the Claimant to invite to disciplinary meeting on the 27 February 2018 to discuss the first allegation; she was told that the allegation, if found, would amount to serious misconduct which, the letter explained, might result in a written warning or a final written warning.

20. In fact, other concerns relating to the Claimant's conduct arose before that disciplinary hearing could take place.

21. On 16 February 2018, Simon Ripley raised concerns about an exchange that he had had with the Claimant to his own line manager, Tina Doyle (Covert Operations Manager, Midlands) as well as with Ruth Brown (Higher Investigations Leader). Ruth Brown was the Claimant's previous line manager. There had been difficulties in their relationship.

22. Both Ms Doyle and Ms Brown emailed their respective line managers with the information that Simon Ripley had passed on to them verbally. The

Claimant's evidence was that Ms Brown was at one stage her manager and that the two of them did not get on.

23. Preliminary enquiries were made, for example, of Chris Hare (then National Leader of the Serious and Organised Crime Department, though since retired); according to Simon Ripley, the Claimant had alleged that Chris Hare had given her permission for her alleged actions. HR advice was also taken.

24. Bob Gallacher was appointed as investigator. On 21 February 2018 at 07.56, he emailed the Claimant. The attached letter informed the Claimant that Mr Gallacher was appointed "*to investigate an allegation that you have removed covert surveillance equipment from the office. It is alleged that you have done so for demonstration purposes as part of presentations that you have been delivering to outside bodies. It is further alleged that, as part of your presentations, you have also spoken about live operations. The severity of these allegations may constitute gross misconduct*" (**'the second allegation'**). Mr Gallacher stated that he would shortly be in touch to arrange a date for the investigation meeting. For a third time, the Claimant was warned to keep the fact of the investigation confidential, save for where it was necessary to do so in connection with the disciplinary procedure.

25. Bob Gallacher knew of the investigation into the first allegation by Andy McDonald; he did not know its details.

26. On the same day, at 08:36, the Claimant was sent an email from Andy McDonald, who informed the Claimant that his HR advice had been not to proceed with his process until the new investigation was resolved and so that a decision maker could take into account both processes. The Claimant did not complain about this proposed course of action, whether directly or via her trade union representative, or her later appointed lawyer.

27. Also, on the same day, Bob Gallacher emailed Simon Ripley to invite him to an investigation meeting. The attached letter informed him that any information that he gave in the investigation would form the part of his investigation report and would be made available to the Claimant. Simon Ripley was also notified of his duty to keep the investigation confidential.

28. Bob Gallacher met with Simon Ripley on 26 February 2018. Simon Ripley provided information not only about the second allegation, which was the purpose of his interview, but also raised two further matters which I shall return to in due course. A notetaker was present at the meeting.

29. Simon Ripley said it the exchange between himself and the Claimant had taken place in the afternoon of Thursday 15 February 2018. He then described the exchange, which he said was around 10 minutes long, in detail that was reproduced over 3 pages of notes. It is unnecessary to reproduce the full details of the interview save to note that it was said that:

    a. The Claimant told him that she needed him to dig out some defunct surveillance equipment for her;
    b. When he asked for what purpose she needed the equipment, the Claimant began talking about her retirement plans;
    c. The Claimant mentioned that she had another business, a health spa, but that she was now preparing to give talks to outside organisations using the equipment as 'props';
    d. The Claimant had said that in relation to giving talks at the Women's Institute, she *"had already got some practice in and they had gone down a storm";*
    e. The talks were promoted as *"basically a day in the life of a fraud investigator";*
    f. The Claimant had described other areas being covered including criminal investigations and house searches and that she confirmed that she had explained the use and monitoring of open source internet research;
    g. The Claimant was being paid for these talks;
    h. She had already given a presentation to *"the forensics people*" and that the content of her presentations had been vetted and agreed by Sherri Bexon (Higher Investigation Leader);
    i. The Claimant had claimed that Chris Hare had no issue with her talks as *"it was all already out there in the public domain on TV programmes such as 'Benefits Cheats' and 'Saints & Sinners'";*
    j. She had already used the Respondent's equipment in these talks, and when asked, confirmed the items she had used;
    k. The Claimant expected to keep the props to use in future presentations and that Chris Hare had told her that she could have any *"old, unused, defunct kit";*
    l. In response to Simon Ripley stating his serious concerns, the Claimant retorted *"that the Official Secrets Act gets ripped up on 31.5.18 when I retire"* and *"what do I care, it's not my problem when I leave, and what can they do to me when I'm gone";*
    m. The Claimant's final comment to him was *"I knew I should never have come to you about this".*

30. Simon Ripley then described that whilst in the equipment room, he noticed that older surveillance equipment was not where it should have been i.e. in their own individual protective cases, but instead all stashed together inside a bag; he took photographs of the items on his mobile phone and shared them with Bob Gallacher.

31. In addition to the facts surrounding the second allegation, Simon Ripley also stated that it had become common knowledge amongst the Ilkeston team that

the Claimant had recently been through a disciplinary investigation, and that he, personally, had overheard her discussing it, twice, with others. He described her to be happy and laughing, having just ended a phone call to *"Andy Mac*" to learn that she was likely to receive a written warning for misconduct stating *"I've just dodged a bullet on that one".*

32. He stated that whilst working at his desk on 26 February 2018, he learned from what appeared to be common knowledge around the office that the Claimant was now also subject to a second internal disciplinary investigation, that she had telephoned into the office claiming to be unwell when in fact she was going to see a solicitor to take legal advice about the latest matter.

33. Thus, it appeared, the Claimant may have been in breach of her duty to keep the investigations confidential (**'the third allegation'**).

34. The final topic that Simon Ripley raised was a complaint in relation to the Claimant's use of derogatory language (**'the fourth allegation'**). He stated that racial slurs were regularly and openly used by her over a period of years. He described a situation where staff had resigned themselves to having to tolerate her behaviour and that even when he had complained, after what little effort managers had made to challenge her, her conduct had worsened. He gave recent examples of the language he accused the Claimant of using on a regular basis. They included: referring to Asian people as *"Paki*" or *"fucking Paki";* referring to Muslims as *"Muzzas*" and *"you can't trust any of them*" and using the phrase *"typical thieving East Europeans*". He distinguished those phrases from what he said were more historic examples. They included referring to Chinese people as "*Chinkies*" and using nicknames for an Asian police officer such as *"PC Poppadom"* and *"DC Chapatti*". He complained that she laughed about a black barrister who expressed an interest in using her health spa, and that she said *"there's no way I'm having a 6 feet 2 Darkie in my swimming pool, you're having a fucking laugh"* and, referring to her partner, *"if our Neil saw a 6 feet 2 Darkie walking down our drive he would go and get his shotgun".*

35. Further evidence was gathered about the second allegation from the three people named in the narrative provided by Simon Ripley. Sherri Bexon gave information about allegation two; Simon Franks gave information about allegations two, three and four. Chris Hare provided the context in which a discussion had taken place between himself and the Claimant about her giving talks after her retirement i.e. allegation two.

36. On 5 March 2018, the Claimant submitted a grievance to the Respondent against Simon Ripley, who she suspected of having provided information to the Respondent. She stated that Simon Ripley had *"fabricated stories*" about

her that had formed the basis of the investigation and that this was not the first time that he *"made up stories that were not true*"; she referred to an earlier incident in which an informal investigation had been carried out with her, with the outcome that there was 'no case to answer'. The outcome the Claimant sought in her grievance, was for Simon Ripley to be *"dealt with at the same level of severity i.e. Gross Misconduct*".

37. The Claimant had at this stage seen only the letter of 21 February 2018, notifying her of the fact and substance of an investigation into the second allegation. She would not, by this stage, have been aware of the additional information provided by Sherri Bexon, Simon Franks and Chris Hare.

38. The Claimant, in this email and grievance, made reference to her solicitor and attributed words to him or her. I therefore find that she had received legal advice before submitting her grievance on 5 March 2018.

39. Bob Gallacher responded to the Claimant the following day i.e. 7 March, notifying her that he had appointed Tina Doyle to investigate her grievance. At 12.17 on 6 March, the Claimant replied to him stating that, having taken advice, she *"had concerns*" about the nomination of Tina Doyle as the investigator. Bob Gallacher responded to her at 15:50 the same day, nominating David McKay instead.

40. On 6 March 2018, Bob Gallacher emailed to the Claimant a letter advising her that he was:

*"Investigating the alleged breach of the Respondent's Standards of Behaviour. It has been alleged that you have:*

a. *Removed covert surveillance equipment from the office without authorisation and that you have used that equipment as part of talks that you are alleged to have delivered to outside groups;*
b. *You have delivered presentations to outside groups about the work of SOC, again without firstly obtaining line manager approval or agreement;*
c. *Despite being reminded of the need to respect confidentiality in these matters under investigation, it is alleged that you have spoken openly about these matters within your team; and*
d. *It is alleged that you quite openly use derogatory terms when referring to ethnic groups causing offence amongst colleagues."*

41. The Claimant was reminded that the issues could amount to gross misconduct.

42. On 12 March, David McKay emailed the Claimant to inform her that, for reasons I was not taken to, he could not proceed to investigate her grievance until the investigation into her conduct had been concluded. The Claimant did not comment at all on this course of action at the time, either directly or via her trade union or legal representative.

43. On 20 March 2018, the Claimant attended an investigation meeting with Bob Gallacher. She was accompanied by her trade union representative. It was recorded, and a transcript of the meeting was subsequently produced. At the outset of the hearing, the Claimant asserted that the advice from her trade union was that, by reference to her invitation letter, she should only be questioned that day about the 'original' allegations i.e. (a) and (b) abpve; that she was not prepared to discuss allegations (c) and (d). She said that the other two allegations would "*need to be investigated independently"* and her trade union representative confirmed that she was content to return to be re-interviewed. On that basis, Bob Gallacher agreed to restrict his questioning.

44. In that interview, the Claimant:

    a. Confirmed that she did talks at the Women's Institute, although she said it was about her previous career as a landlady;
    b. Said that she had considered doing talks about a day in the life of an investigator;
    c. Said that she made reference to Simon Ripley about being offered money to do public speaking;
    d. Told Bob Gallacher that she had emailed Chris Hare recently to ask if he would be a witness for her, in relation to an exchange that she had with him about her giving talks;
    e. Said that when Simon Ripley asked whether she had permission to give talks, she did tell him that she had spoken to Chris Hare, albeit briefly;
    f. When pressed by Bob Gallacher, did not claim that she had secured the approval of Chris Hare to do those talks, only that she had emailed him;
    g. When pressed said that she could not explain why Simon Ripley would contradict her;
    h. When pressed said that both Simon Ripley and Simon Franks must have misinterpreted what they had heard;
    i. That she had not taken the items that she was alleged to have asked Simon Ripley about.

45. At the end of the investigation, the Claimant enquired whether the allegations just discussed would amount to gross misconduct if found; Bob Gallacher replied in the affirmative. When she queried the remaining two allegations, Bob Gallacher ventured that they too would likely amount to allegations of gross misconduct before confirming that another person would act as decision maker.

46. Nothing was said by the Claimant or her trade union representative at the time, or indeed at any time until after the termination of her contract of employment, about the categorisation of any of these allegations as potentially acts of gross misconduct, that the process was unnecessarily formal; likewise, nothing was said about the manner in which Bob Gallacher had conducted the interview.

47. On 21 March 2018, Bob Gallacher emailed the Claimant to invite her to a follow up interview on 11 April 2018 to discuss the two remaining allegations.

48. At 13:05 on 22 March 2018, the Claimant emailed her line manager, GW in the following terms:

> *"Hi*
>
> *As discussed, due to both my struggling health, and stress along with the fact my father has been diagnosed with blood cancer I would like to bring my retirement forward to the 22/4/2018.*
>
> *Thank you for your help in these matters,*
>
> *Kind regards,*
>
> *Bridget"*

49. The Claimant's retirement was processed and, internally, the reason for leaving was recorded as '*Retirement (including ill health grounds*)'. Her last day of service was 19 April 2018. When asked in cross-examination about the circumstances in which the retirement date changed from 22 April (as indicated in her email to GW), to 19 April, the Claimant explained that she was informed by the Respondent that her last day had to be a working day, so 19 April was settled upon.

50. The Claimant produced her GP notes to the Tribunal. It is clear that there are two older entries relating to stress; one in October 2017 when she was complaining about being bullied by her then line manager, Ruth Brown. The entry states that she was *"refusing to go back to work so asking for a sick note as "so stressed"".* The next entry I was taken to was on 3 February 2018, which also made reference to '*significant stress at work'*. The last entry I was taken to was 28 March 2019, when the notes states *"has two (she says unfounded) complaints against her that are being investigated. due to retire in 3 weeks has a lot of work to finish and would like investigations postponed till after that time. Has coping strategies. Wants note supporting her request to postpone these investigations seems an odd use of GP authority but letter written".*

*51.* Consistent with that last GP entry, on 28 March, the Claimant's GP wrote a letter 'to whom it may concern'. It stated that the Claimant was *"suffering from stress symptoms associated with an unfounded allegation. She is due to retire on 19.4.18 and requests that any investigation or enquiries be postponed til after this time so that she can complete her obligations at work. I feel that this is a reasonable request."* The GP does not state that the Claimant was unfit to attend an investigation meeting; the Claimant did not suggest in her evidence that she was not fit to attend. The letter was emailed by the Claimant to Bob Gallacher on 29 March 2018.

52. I accept the Claimant's contention that the investigations caused her significant stress. The Claimant did not suggest that her decision to continue working was made against GP advice. I find, therefore for the avoidance of doubt, that she was fit to work and fit to attend the investigation conducted by Bob Gallacher, until the end of her employment.

53. On receipt of the letter from the Claimant's GP, Mr Gallacher agreed to defer further investigation into the Claimant's actions.

54. Other investigations, however, continued. Three more witnesses gave evidence at interview about allegations two to four. Most of the information was prejudicial to the Claimant; none of it was exculpatory.

55. On 18 April 2018 David MacKay, who was nominated to deal with the Claimant's grievance, emailed her to tell her that, on HR advice, the grievance would not be progressed until such time as the investigation into her conduct had been completed. In her response, the Claimant again referred to her legal advice but did not object to David MacKay's proposal.

56. The Claimant's contract of employment ended on 19 April 2018.

57. On 30 May 2018, the Claimant submitted a grievance against Bob Gallacher. The complaints include a failure to consider *"other options before going down the investigative route*", a failure to provide particulars of the topics that fell to be discussed at the investigation meeting and behaving aggressively during the investigation meeting. The Claimant concluded thus *"this has had a devastating effect on my health both physically and mentally which resulted in me seeking medical help, and bringing my retirement date forward from 31/5 to 19/4 to prevent me from having a breakdown at work".*

58. She continued *"My lawyer's advice is to give the DWP a final opportunity to put things right and to deal with me fairly. I am prepared to continue to vindicate myself from all the false allegations made against me and hope that the DWP can conduct itself in a more professional manner, following procedures, and choose impartial people to deal with it."*

59. As a result of the grievance, Mr Gallacher's role as investigating officer was transferred to Jo Espinoza. She continued the investigation into allegations two to four with additional witnesses, and recalled the Claimant to another investigation meeting.

60. I was taken by Claimant's Counsel to an interview of Steve Allsop which took place on 17 October 2018; he admitted to using decommissioned equipment for demonstration purposes internally and also storing equipment in a holdall in a similar fashion to that that Simon Ripley had observed.

61. Jo Espinoza interviewed the Claimant on 22 August 2018. The Claimant attended that meeting unaccompanied and with no more details than those provided to her during the investigation with Bob Gallacher.

62. The Claimant denied giving talks or taking equipment to use at talks about her work with the Respondent; she did not recall the conversations put to her in which she had apparently breached her duty to keep investigations into her conduct confidential; she admitted to using some of the names that the Respondent had described as 'derogatory and offensive' by the Respondent, but she denied that they were, as she described them, racist.

63. Ms Espinosa, having decided that there was insufficient evidence to prove 'beyond doubt' that the Claimant had conducted herself in the manner being investigated, decided that the Claimant had 'no case to answer' and discontinued the investigation. In evidence, she told me that she had taken that view in light of the Claimant having already retired from service. She had not considered, at the time, whether a conclusion of 'no further action' might have been more appropriate in the circumstances. She had not considered making recommendations to enquire further into why, as the evidence seemed to suggest, the Respondent's employees were left to tolerate such a dysfunctional state of affairs in the office i.e. the events giving rise to the fourth allegation.

64. On an unspecified date, the Claimant contacted the Human Resources Department about how she should deal with the investigation; the Claimant alleged that an officer by the name of Ajay Patel told her that he could only give advice to managers.

## CONCLUSIONS

### Termination by Mutual Consent

65. I find that the contract of employment terminated by agreement between the Claimant and the Respondent i.e. there was no dismissal within the meaning of s.95 ERA 1996.

66. I do so for the following reasons. The Claimant's retirement date had already been settled upon as being 31 May 2018 before the investigation meeting with Bob Gallacher. Two days after that investigation meeting, the Claimant initiated a discussion to alter that date. She did so by using the words *"As discussed. . .I would like to bring my retirement date forward to the 22/4/18*". The words, on their face, are inconsistent with being compelled to leave employment. It is surprising that there was no involvement of the Claimant's union in this dialogue given that it accompanied her to the investigation meeting only 2 days earlier, which was said to be a significant factor in her decision to resign. The Claimant's stated reason for leaving was her own health as well as that of her father. There is no suggestion that the person with whom she spoke about bringing her retirement forward was even aware of the investigation into her conduct, much less that it, or the other factors the Claimant now relies upon had caused her health problems, as she now alleges. Put another way, if the Claimant was intending to resign, certainly her communication did not suggest that. She provided no explanation why she did not say that she was resigning or state in explicit terms the reason why she was resigning. Finally, the Claimant's own evidence was that the settled date for her retirement was arrived at after discussion in that the Respondent required her retirement date had to coincide with a working day, and "*so it was 19 April 2018".* All those matters lead me to find, on balance, that there was a consensual termination in circumstances where the terms settled upon were acceptable to the Claimant, rather than because the employment was terminated by the Respondent.

### Repudiatory Breach

67. Even if I am wrong about my conclusion above, and there was a termination of the contract of employment by the Claimant, I find that there was so in the absence of a repudiatory breach.

68. Counsel for the Claimant helpfully identified at the outset the acts that the Claimant relied upon as individually or cumulatively amounting to a repudiatory breach of the implied term of trust and confidence. I address them each below.

**(a) The Allegations were 'Entirely Fabricated'**

69. The Claimant did not allege that the Respondent fabricated the first allegation i.e. the sending of sensitive and personal information to her private email address (which she in any event admitted to). It is against that context that the Claimant was required to satisfy the Tribunal that, notwithstanding that the first allegation was not only genuine, but well founded, the Respondent had nevertheless 'entirely fabricated' allegations two, three and four.

70. Simon Ripley's evidence related to allegations two, three and four. Whilst at the investigation stage only, I find that Simon Ripley's evidence was, on the face of it, compelling. It was reported by others to Bob Gallacher the day after it was said to have occurred and his interview took place some 10 days later. It is detailed, measured, and attributes numerous quotes to the Claimant. His evidence is supported in very significant respects by evidence gathered from three other witnesses; Chris Hare, Sherri Bexon and Simon Franks.

71. The Claimant did not contend that any of the witnesses had not provided the evidence as documented, nor did she suggest any basis upon which it could be said that the witnesses had colluded, or that the Respondent, when receiving that false information, knew or ought to have known that it was 'entirely fabricated'.

72. The reality is that the process was in the early investigation stage only; further witnesses were yet to be interviewed. The Respondent had not yet, at the Claimant's own request, completed interviewing her, let alone reached the stage of deciding whether there was a case to even answer.

73. Furthermore, when Bob Gallacher asked the Claimant during her investigation meeting why Simon Ripley would provide the evidence he had (whilst discussing allegation two), her response was not that he had lied. It was: *"I've got a bit of history with Simon . . I would say we probably don't really get on that well but erm try to be professional about it. You know the chalk and cheese as people. I've no idea why erm people would be, go down these lines no"*. The ambivalence of that response is all the more surprising given that the Claimant had already submitted her grievance, couched in the most strident terms, about Simon Ripley and his integrity.

74. In respect of allegation four, Claimant's Counsel indicated at the outset of the hearing that, save for the use of the phrase "*a chink in the curtain"* when addressing a friend of Chinese origin, the Claimant maintained that all the other phrases attributed to her were also entirely fabricated. I found that to be a surprising position to adopt given that the transcript of her interview with Jo Espinoza discloses that when the language was put to her, she laughed and responded "*none of those are words I use. I'm not telling you the one's I do but they're, they're not, I'm not a racist*". The exchange then goes on to record that, when speaking about a black person – either a colleague's boyfriend or a member of a band that she and her colleagues went to see – she appears to accept that she addressed him as '*one of those'* or, possibly, '*chocolate drop'.* The Claimant did not disavow the accuracy of the transcript. In evidence the Claimant said she had used the phrase 'chocolate drop' *"but that was 3 years before and it was dealt with"* whilst later stating that she "*can't recall"* using that phrase and then *"I don't use it, it's not something I would say"*. Yet further, in evidence, she admitted that she also did use the phrase '*JF'* as initials for *'Johnny Foreigner*' and she did use the names '*PC Poppadom'* and '*DC Chapatti'* when speaking about an Asian police officer. I found the Claimant to be inconsistent in her evidence about this subject matter and her discomfort when being questioned was evident. I find that the Claimant did use derogatory language, and that notwithstanding her suggestion – made in evidence at Tribunal but not during her meeting with Jo Espinoza – that others in the office were also involved, she knew that it was unacceptable and furthermore she knew that the Respondent did not 'entirely fabricate' allegation four.

75. I therefore reject the contention that allegations two, three and four were 'entirely fabricated' by the Respondent.

**(b) Significant Delay**

(i) <u>The outcome of the investigation by Andy McDonald</u>

76. The Claimant invites me to find that there was a significant delay in being notified of the outcome of the investigation by Andy McDonald into allegation one. I reject that contention. The Claimant was in fact informed on 15 February 2018 that the allegation would be considered at a disciplinary hearing to take place on 22 February 2018; that itself amounted to notification of the outcome of the investigation by Andy McDonald. Insofar as the Claimant (implicitly) alleges that there was a delay in the notification of the outcome of the disciplinary proceedings generally, I also reject that contention. The Respondent notified the Claimant on 21 February 2018 of its decision to postpone the sanction in relation to allegation one until the conclusion of the investigation into allegations two, three and four. That was, in my view, not only a perfectly reasonable course of action, but a sensible one also; the other allegations were potentially more serious than allegation

one and could have attracted a graver sanction. The Claimant accepted in evidence that at no stage did she complain about this course of action.

(ii) The decision to put the Claimant's grievance against Simon Ripley 'on hold'

77. The Claimant also complains that her grievance against Simon Ripley was put 'on hold'. Her grievance was submitted on 5 March 2018, after she had been notified of the investigation into allegations two, three and four and after, as she confirmed in evidence, she spoke to others and formed a suspicion that Simon Ripley was the source of the allegations. The grievance was a simple one; that Simon Ripley *'made false allegations'*. The Claimant was told on 12 March 2018 that the grievance would not be investigated until after the investigation conducted by Bob Gallacher had concluded and the Claimant did not disagree with this course of action whether directly of via her trade union or lawyer. Indeed, when asked during her investigation meeting with Bob Gallacher why Simon Ripley would provide information that was not true, the Claimant was unable to say. I accept, therefore, Mr Roberts' submission that, when looking at the substance of what happened, rather than its form, the Respondent was in fact doing what the Claimant had asked of it, namely, investigating the Claimant's word against largely, but not exclusively, Simon Ripley's word. I do not find that to amount to an act that was likely to destroy the trust and confidence between the parties. If I am wrong about that, then the Respondent had reasonable and proper cause to do so since it was already investigating the basis of the complaint in the grievance, it was reasonable and proper cause to suspend the grievance formally.

(iii) The delay in dealing with the grievance against Bob Gallacher

78. Finally, on the question of delay, the Claimant says that there was a delay in processing the grievance she submitted against Bob Gallacher on 30 May 2018. I have, rightly, been taken to very few papers in the hearing bundle that relate to matters after the resignation of the Claimant. I am not satisfied that there was a delay; however, assuming that there was, it cannot logically have contributed to the Claimant's decision to leave employment, this particular grievance having been submitted after she left.

**(c) Inappropriate Involvement**

79. The Claimant contends that there were three people who were inappropriately involved in the investigation into her conduct. I deal with each below.

(i) Bob Gallacher

80. Bob Gallacher was said to have been an inappropriate appointment because, it was said at the outset of the hearing, he was aware of the investigation by

Andy McDonald into the first investigation. I find it entirely reasonable and appropriate for one investigator to be aware of the existence, but not the details, of another investigation. The Claimant was aware, she said, that Bob Gallacher would not be the disciplinary officer, because he told her so.

81. During the hearing, two other criticisms of Bob Gallacher emerged and I deal with them briefly. First, it was said that language he used in emails to colleagues disclosed a bias against the Claimant. I reject that suggestion. The Claimant did not challenge Bob Gallacher's evidence that there was almost no contact between the two of them before the investigation he conducted. Furthermore, even if the wording in his emails did disclose a bias against the Claimant, and I do not find that they did, the Claimant did not learn of that bias – and therefore that knowledge cannot have informed her decision to bring forward her retirement – until after she left employment, when she received documents pursuant to a Subject Access Request.

82. Second, it was put to Bob Gallacher in cross examination that his style of questioning was "*abusive"*. The basis for that assertion appeared to be his repeated questioning in relation to one subject matter i.e. whether or not she had given talks to outside bodies. No criticism was made of his manner, his demeanour or tone. I agree that there appears to be an element of repetition in his questioning from the notes of that meeting. Having heard from Bob Gallacher, I consider it significantly more likely that that was due to an element of inefficiency in his questioning style rather than anything approaching "*abusive"*.

(ii) <u>Tina Doyle</u>

83. Next, Tina Doyle was said to have been an inappropriate nomination for the role of grievance officer in respect of the Claimant's grievance against Simon Ripley. I reject that assertion. When the Claimant submitted her grievance to Bob Gallacher, she copied Tina Doyle into the email. No reason was advanced as to why Bob Gallacher would know that Tina Doyle ought not be appointed. When the Claimant indicated to Bob Gallacher simply that she *"had concerns"* about the nomination of Tina Doyle, he responded within 4 hours with an alternative nomination. Nothing more was said on the matter. It is difficult to understand how it is said that this exchange either itself amounted to a repudiatory act or contributed to such an act.

(iii) <u>Ruth Brown</u>

84. Ruth Brown was, at the outset of the hearing, said to have had an inappropriate involvement in the investigation in circumstances were '*it was not her place to do so*'. It was said that she was discussing the Claimant's case, '*giving names*', '*discussing the case'*, when it was not appropriate to do so. It is clear that, subjectively, the Claimant resented any involvement in this matter by Ruth Brown. However, I was taken to only piece of evidence I was

taken to at the relevant time was Ruth Brown's email on 16 February 2018 to Gareth Wallbank, the Claimant's current line manager, setting out her concerns about the Claimant's conduct, having spoken to Simon Ripley. She echoes Simon Ripley's concerns about the exchange he had had with the Claimant the previous day. Given that there was a concern that the Claimant either had, or intended to, act in a way that may disclose covert surveillance techniques to the general public, I find that the sending of the email to the Claimant's manager to consider what, if any action was to be taken about the information, perfectly reasonable and proper. Furthermore, she is quite likely to have done so in compliance with her own duty to report such matters; an email to similar effect had been sent by Tina Doyle earlier that same day to Bob Gallacher.

**(d) An overly heavy-handed approach**

85. The Claimant says that the allegations were *'elevated to gross misconduct'* and that with reasonable discussion, the issues could have been sorted out without being elevated to that level. This was particularly so, the Claimant said, in the absence of a written complaint.

86. Again, I reject the contentions. First, there were no allegations that had been *'elevated to gross misconduct*'; there had been a partial investigation into a number of allegations which, had they had proceeded to a disciplinary may, if found, amount to gross misconduct. Second, the potential allegations were each sufficiently serious that they objectively they could amount to acts of gross misconduct; the fact that the trade union did not ever complain about the categorisation of the allegations is evidence to support that. Third, the Claimant herself acknowledged the seriousness of the allegations against her when, in her grievance, she suggested that Simon Ripley was "*dealt with at the same level of severity i.e. Gross Misconduct".*

87. In her evidence, however, the Claimant put it slightly differently; she said that in light of her significant length of service, her clean disciplinary record and the fact that she was "*about to retire*", there was no point proceeding with a disciplinary process when any penalty "*would apply after [she] retired, so what's the point*?". It cannot be said that the Respondent acted without reasonable and proper cause to follow its investigation and disciplinary procedures to someone still in employment, albeit one who was soon to leave.

**(e) Lack of Specificity**

88. The Claimant contended that the allegations were not adequately detailed in the letter from Bob Gallacher inviting her to an investigation meeting. The Claimant maintained that she should have been given dates, times and other particulars of the acts she was alleged to have been guilty of and that this matter was a *"a huge thing"* informing her decision to leave.

89. I reject the claim that the lack of specificity at the investigation stage was a significant factor in the Claimant's decision to retire early. Had it been, she would have made some reference to it before she retired. I note that at the investigation meeting she, accompanied by her trade union, did not request an adjournment of the discussion about allegation two by reason of an inability to deal with the allegation because of the lack of details provided, but did request that discussion of allegations three and four was adjourned because they had not been included in the Respondent's original notification of investigation letter. The Claimant understood allegation two, she denied the allegation and her denial did not rest upon specific dates or other details. Had she in fact asked for further details, which she did not, she would have learned that the Respondent had no such information to give; or at least not at that stage - it had not completed its investigation.

90. I reject Ms Alfred's submission that the Respondent had an obligation under the ACAS Code of Practice for Disciplinary and Grievance Procedures requires an employer to particularise the 'allegations' at the investigation stage. The requirement to provide sufficient information about the alleged misconduct so as to enable an employee to prepare a response is a requirement that applies once an employer has decided that there is a case to answer; that stage had not been reached here.

**(f) Policy / Advice of HR**

91. Finally, the Claimant stated that when she contacted the Human Resources Department about how she should deal with the investigation, Ajay Patel told her that he could only give advice to managers. This allegation was raised for the first time at the outset of the hearing and the Respondent, understandably in the circumstances, was prepared to meet the allegation. I was not told what Ajay Patel's particular role was; I have no basis upon which to determine that even if the comment was made as alleged, it was an inappropriate statement to make. If it was inappropriate, it is surprising that complaint was not raised sooner by either the Claimant or her trade union. In summary, I am not satisfied the exchange took place at all and if it did, that it was an inaccurate or inappropriate statement to have made.

**The Last Straw**

92. I heard no evidence from the Claimant as to what the last straw was, that led her to resign. In submissions, Ms Alfred invited me to infer that the investigation meeting with Bob Gallacher was the last straw. I decline to do so. I remind myself that the last straw must contribute something, however slightly, to the overall breach. The burden is on the Claimant to establish her case and to infer a significant aspect of her case in the absence of any direct evidence would amount to an error of law. In any event, as above, I do not consider that anything that occurred at that investigation meeting contributed to a breach of the implied term of trust and confidence.

**The Effective Cause of the Resignation**

93. I am not satisfied that the conduct of the Respondent, even if repudiatory, was the effective cause of the Claimant's resignation.

94. As set out above, the Claimant brought forward the date of her retirement; she did not resign. I prefer Mr Roberts' submission that the explanation for the Claimant's actions in bringing forward the date of her retirement cause was the Claimant's desire to avoid disciplinary proceedings. I do so for the following reasons. First, the Claimant was already aware that allegation one was, because of her admission to Andy McDonald, likely to lead to a finding of serious misconduct and a sanction short of dismissal. She was aware that there was a significant risk of a further finding of gross misconduct in relation to allegation two – she had never denied that she had had a conversation with Simon Ripley; her case as to what that conversation was about was less clear. She furthermore knew, I find, that there was a significant risk of a further finding of gross misconduct in respect of allegation four. Two of her actions in particular point to an effort to avoid disciplinary proceedings concluding. First her unnecessary request to defer discussion of allegations three and four to a future occasion. The request was for a spurious reason; that the original notification letter did not cite allegations three and four was the sole and simple basis upon which the deferment was sought; it had nothing to do with fairness and I find that it was done in an effort to delay the conclusion of the investigation. Second, the Claimant obtained a letter from her GP not because she was unfit to work and not because she was unfit to attend an investigation meeting, but so as to persuade the Respondent to defer investigation until after her retirement, the ostensible reason being the need to complete a volume of work before her employment ended.

95. I have considered Ms Alfred's submission that the Claimant was not attempting to avoid the disciplinary proceedings, as evidenced by her attendance at the investigation meeting with Jo Espinoza. I find that her

attendance at that meeting after her retirement is as consistent with a desire on the Claimant's part to know the evidence against her in a 'risk free' setting. Her view that she had vindicated herself at that meeting was not entirely unreasonable given Jo Espinoza's finding that there was *'no case to answer'* when, on any objective view, at the time of her decision to abandon the investigation there was significant evidence against the Claimant in relation to all four allegations.

## Conclusion

96. In conclusion, I find that there was no dismissal of the Claimant at all, but a consensual termination of the contract. Even if I am wrong about that, I do not find that there was a repudiatory breach on the part of the Respondent and even if there had been, I do not find that any such breach was the effective cause of the Claimant's departure from employment. Accordingly, the claim fails and is dismissed.

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Employment Judge Jeram

Date: 20 December 2019

REASONS SENT TO THE PARTIES ON

FOR THE TRIBUNAL OFFICE