



THE EMPLOYMENT TRIBUNALS

Claimant: Mrs Joanne Thompson

Respondent: 2020 Homes Limited

Heard at: Teesside Justice Hearing Centre **On:** Wednesday, Thursday, Friday
30th, 31st October 2019 and 1st
November 2019

Before: Employment Judge Johnson

Members: Ms BG Kirby
Mr G Gallagher

Representation:

Claimant: In Person
Respondent: Mr T Muirhead (Consultant)

JUDGMENT

The unanimous judgment of the employment tribunal is as follows:

- (i) the claimant's complaint of unfair constructive dismissal is well-founded and succeeds. The respondent is ordered to pay to the claimant compensation for unfair dismissal in the sum of £987.26;
- (ii) the claimant's complaint of unlawful age discrimination is not well-founded and is dismissed;
- (iii) the claimant's complaint of unlawful disability discrimination is not well-founded and is dismissed.

REASONS

1. The claimant conducted these proceedings herself. She gave evidence herself, but did not call any other witnesses. The respondent was represented by its employment consultant Mr Muirhead, who called to give evidence Mr Faraz Khaliq

(Finance Director), Mr Arif Mushtaq (Managing Director), Mr John Hartnett (Project Director) and Ms Lesley Huitson (Self-Referrals Manager). There was an agreed bundle of documents marked R1, comprising an A4 bundle containing one hundred and nineteen pages of documents.

2. By a claim form presented on 15th December 2018, the claimant brought complaints of unfair constructive dismissal and direct discrimination on the grounds of age and on grounds of disability. The respondent defended the claims.
3. The nature of the claims and the issues which the employment tribunal would be required to decide were set out in a case management summary at a preliminary hearing before Employment Judge Morris, which took place on 27th March 2019. The claimant and Mr Muirhead today confirmed that those remain the issues which the tribunal will be required to decide at this final Hearing. Those issues are:-

(a) Unlawful age discrimination

When she requested a pay rise, was the claimant told by Mr Faraz Khaliq that he did not wish to widen the pay gap between the claimant and her younger colleague, Subrina Hussain? If so, did that amount to direct discrimination on the grounds of age, contrary to section 13 of the Equality Act 2010?

(b) Was the claimant offered the position of Manager of Supported Housing; was that role subsequently offered to Rebecca Vaughan; was the reason why the post was offered to Rebecca Vaughan because she was more physically capable of performing the out of hours duties; if so, did that amount to direct discrimination on the grounds of the claimant's disability, contrary to section 13 of the Equality Act 2010?

(c) Did the claimant terminate her contract of employment in circumstances in which she was entitled to terminate it without notice, by reason of the conduct of the respondent or the claimant's managers, who were employed by the respondent? Did that conduct amount to a breach of the implied term of trust and confidence and did the claimant resign in response to that alleged breach?

4. Having heard the evidence of the claimant and that of the respondent's witnesses, having examined the documents to which it was referred and having carefully considered the closing submissions of the claimant and Mr Muirhead, the tribunal made the following findings of fact on a balance of probability.
5. The respondent is a property-letting agent based in Middlesbrough, which employs approximately forty-five people. Its managing director is Mr Arif Mushtaq and its finance director is his nephew, Mr Faraz Khaliq. The claimant was employed by the respondent as a finance apprentice from 10th October 2016 until her employment came to an end by way of her resignation with effect from 19th October 2018. Under the terms of her contract, the claimant was entitled to half a day each week leave of absence to attend college to undertake her AAT examinations. The claimant completed her Level 3 AAT examinations in June

2018, having passed every examination at her first attempt. The claimant's salary is stated in her contract to be £7,280 per annum, which is equivalent to the national minimum wage, bearing in mind the claimant's age, which was then thirty-six years. The respondent employed another finance apprentice named Subrina Hussain, who was eighteen years of age. Ms Hussain was paid the appropriate national minimum wage for an employee of that age, and thus was paid less than the claimant, even though she was doing the same work and working the same number of hours.

6. Having completed her Level 3 AAT examinations in June 2018, the claimant expected to have a meeting with her manager Mr Faraz Khaliq to discuss her progress within the company. The claimant spoke to Ms Hussain to consider what steps they should take by way of approach to either Mr Khaliq or Mr Mushtaq about their progress within the company. The claimant wished to speak to her immediate manager Mr Khaliq, whereas Ms Hussain decided that she would go to see Mr Mushtaq. Ms Hussain approached Mr Mushtaq and was given a new role within a different department. Ms Hussain however remained on the same wage, again based on the national minimum wage.
7. The claimant approached Mr Khaliq to enquire as to her future within the company and in particular about the possibility of a pay rise. The claimant wanted to know whether the respondent would continue to pay the course fees for her Level 4 AAT examination. Mr Khaliq indicated to the claimant that the company would no longer be willing to pay course fees. The claimant suggested that she may fund the course herself, as the college would charge less to a self-funding employee than it would to an employing organisation. The claimant enquired as to whether the respondent would increase her salary by the equivalent of the sum she would have to pay to the college for the course fees. The claimant's evidence to the tribunal about these discussions was that, "Faraz agreed that there would be no reason that the cost they would have paid for me to study AAT Level 4 could not be put towards my wages." Mr Khaliq's version was that there was no such agreement, merely a discussion about the alternative methods by which the remaining course fees could be funded. The tribunal found that by this stage, there was no binding agreement between the claimant and the respondent under which the respondent was obliged to pay any further course fees. By this time, there was no obligation on the respondent to provide the claimant with an increase in her salary.
8. The claimant took a week's holiday in early August 2018 and upon her return was asked by Mr Arif Mushtaq (the managing director) whether she might be interested in a different role within the company, that of "Manager of Supported Housing". The claimant's evidence to the tribunal was that she was made a formal offer by Mr Mushtaq, whereas Mr Mushtaq's evidence was that his was simply an enquiry of the claimant as to whether she may be interested in that position. Ms Huitson's evidence to the tribunal was that a similar enquiry was made at around the same time of another employee, Ms Rebecca Vaughan. The tribunal found it more likely that the claimant had simply been asked whether or not she would be interested in that position. The claimant certainly did not indicate at the time she was spoken to by Mr Mushtaq, that she would either accept the position or was interested in it. She asked to discuss the matter with her husband before responding. The

claimant's evidence to the tribunal was that she was prepared to accept that new role, provided that she did not have to undertake any night-time call-outs. Her explanation for being unable to undertake night-time call-outs was that, due to her disability, she took medication which would adversely affect her ability to undertake duties during the night. Furthermore, her disability was such that the risk of being "bumped or jostled" by un-cooperative tenants, would make it impossible for her to undertake night-time call-outs.

9. The evidence of the respondent's witnesses was that the claimant, having considered the matter with her husband, stated that she did not consider the new role to be suitable for her. It was unsuitable because her husband did not want her to undertake night-time call-outs, because she had young children at home and because her back condition was such that the role was unsuitable.
10. The tribunal found that the respondent's version of these discussions was more likely to be correct. The tribunal found that Mr Mushtaq's discussion with the claimant did not constitute a formal offer of the new role. It was merely an enquiry as to whether or not the claimant may be interested in that position. A similar enquiry had been made of Ms Vaughan. The tribunal found that it was reasonable for the respondent to conclude that the claimant was not interested in the position and that this lack of interest was not wholly due to the claimant's back condition. The claimant's lack of interest was due to a number of factors, of which her back condition was only one. The claimant's evidence to the tribunal was that she would have been willing to accept the role, provided that the requirement to undertake night-time call-outs was removed. The tribunal did not accept the claimant's evidence that she had made this clear to the respondent. The tribunal found that it was reasonable for the respondent to conclude that the claimant was simply not interested in the position.
11. As a result of the claimant's lack of interest in the position, the role was offered to Ms Vaughan, who was prepared to accept it without condition. The claimant's case before the tribunal was that giving the role to Ms Vaughan was an act of direct disability discrimination on the basis that the reason why the position was offered to Ms Vaughan instead of to the claimant was because of the claimant's disability. The tribunal found that the reason why the position was not offered to the claimant was not because of her disability, but because when invited, the claimant had stated that she did not consider the role to be suitable for her and that she was not interested in it. The role was then offered to Ms Vaughan.
12. The claimant pressed the respondent on the question of a pay rise, on the basis that she had successfully completed her Level 3 AAT and was to progress to undertake Level 4. The claimant's evidence to the tribunal was that she met with Mr Faraz Khaliq on 16th August, 22nd August and again on 23rd August 2018. On 22nd August, Mr Khaliq is alleged to have informed the claimant that he was not prepared to award the claimant a pay rise because "the company did not want to widen the pay gap between the claimant and Ms Hussain". The claimant's evidence was that she immediately told Mr Khaliq that he was unhappy with that explanation as "it is not my fault that the other person was younger and therefore they were choosing to pay her the national minimum wage for her age". The claimant considered this to be an unfair reason for not providing her with a pay

rise. The claimant had become upset at this meeting and asked for it to be postponed to the following day so that she could be accompanied by a work colleague. Mr Khaliq agreed and the meeting resumed on 23rd August, when the claimant was accompanied by Ms Lesley Huitson. During this meeting, the claimant alleged that Mr Khaliq told her that one of the reasons why she would not be getting a pay rise, was because of concerns about her performance. Mr Khaliq referred to a number of mistakes which the claimant had made and which, in his opinion, meant that it was inappropriate to provide her with a pay rise at that stage. The claimant accepted that she and colleagues had from time to time had minor errors drawn to their attention, that she had never been told that there were any genuine concerns about her performance or that it was of such a standard as to be of any particular concern. The claimant referred to her college appraisal forms, which indicated that the respondent considered that she had been progressing well. There had certainly never been any formal complaint made to the claimant or any formal performance procedure invoked. The claimant informed Mr Khaliq that she did not accept that her performance was such that it would not justify a pay rise. The claimant informed Mr Khaliq that she did not consider it fair that her salary and any increase in it, should be influenced by what was being paid to a younger employee.

13. It was at this stage that the claimant alleged that Mr Khaliq had told her that, not only was that she was not worth a pay rise, but she was “not worth the hourly rate I was currently being paid, never mind getting a pay rise”. Mr Khaliq in his evidence to the tribunal denied making that comment. Ms Huitson’s evidence to the tribunal was that “Faraz did not state that Joanne was not worth the hourly rate she was being paid, he actually stated that he had little confidence in her work”. The tribunal found that the claimant’s version of this discussion was more likely to be correct. Whatever the precise words which were used, they were to the effect that Mr Khaliq did not consider the claimant to be worth what she was then being paid, let alone any increase in salary.
14. The tribunal accepted the claimant’s evidence that she had been genuinely upset and distressed at the outcome of this meeting. The claimant was somewhat bewildered by the fact that she had recently been offered a more senior management role, which would have involved an increase in salary, but was then being told that Mr Khaliq did not consider her to be worth the national minimum wage which she was then being paid for her current role. The tribunal found that Mr Khaliq’s words and actions in the next meeting, which took place on 30th August, supported that finding.
15. The claimant was called into a further meeting with Mr Khaliq on 30th August 2018. Mr John Hartnett was present. Mr Khaliq informed the claimant that “he did not think things were working anymore” and that it was time for the claimant and the respondent to “part ways”. Mr Khaliq is alleged to have told the claimant that the respondent wanted to employ more experienced staff and that although she was only entitled to one week’s notice, they would pay her notice until the end of September, but may not require her to work until the end of September. The claimant was again completely taken aback by this decision. She could not understand why the respondent had just recently been prepared to offer her a more senior position, but was now saying that her services were no longer

required. The claimant expressed those views to Mr Hartnett, who assured the claimant that he would speak to the managing director Mr Mushtaq, on her behalf.

16. Mr Khaliq's evidence to the tribunal about this conversation was that he had been thinking matters over and considered whether he should terminate the claimant's employment. He was concerned about her performance and her lack of experience in the role that she occupied. Mr Khaliq expressed concern about tasks which she was reluctant to give to the claimant. His version of the discussion was that, "I informed Mrs Thompson that I intended to give her notice. I did not go as far as saying that her employment was terminated. I just advised her that that was my intention." The tribunal did not accept Mr Khaliq's evidence in this regard. The respondent's pleaded case at paragraph 9 of its response is as follows:-

"It is accepted that the respondent notified the claimant that it intended to terminate her employment. She was informed that she would receive confirmation of same in writing."

The tribunal found that Mr Khaliq, in clear and unequivocal terms, informed the claimant that her employment was to be terminated and that this was to be confirmed in writing when she would be notified of her period of notice.

17. Mr Mushtaq's evidence to the tribunal was that he was informed of Mr Khaliq's decision and informed Mr Khaliq that he should retract it. Mr Khaliq's evidence to the tribunal in his witness statement does not mention that he had been told by Mr Mushtaq to retract the claimant's dismissal. Mr Khaliq says that he met with the claimant again on 6th September and "informed her that I no longer intended to give her notice of termination of her employment and instead I would look to see if there was another role that we could provide for her." The tribunal found that Mr Khaliq was being less than candid with the tribunal in this regard. It was clear to the tribunal that Mr Khaliq had decided that he was to dispense with the claimant's services and had made that clear to her at their previous meeting. It was only when Mr Mushtaq intervened that Mr Khaliq was forced to retract the dismissal of the claimant. Mr Khaliq says in paragraph 9 of his statement that he was concerned about the claimant's lack of experience, yet says in paragraph 10 that the new role suited her experience. Mr Mushtaq's evidence was the respondent valued the claimant's experience.
18. Having been informed by Mr Khaliq on 30th August that her employment was to be terminated, the claimant immediately set about looking for alternative employment. The claimant was the principal bread-winner for her family and having been notified that her employment was to be terminated, the tribunal found that it was entirely reasonable for her to seek alternative work. The claimant secured an offer of alternative employment, to start on 22nd October 2018. The claimant accepted that offer.
19. The claimant handed in the four weeks' notice which is required by her contract, on Monday 24th September. The claimant attended for work throughout that period and her employment came to an end on 19th October 2018. The claimant's evidence to the tribunal was that throughout her notice period she was given

mundane tasks to perform and that Mr Khaliq had been constantly and unnecessarily “checking-up” on her. Whether or not that was the case, the tribunal found that it was of no significance to the claims as it could not have impacted upon the claimant’s decision to resign. That decision was made before she handed in her notice and the conduct about which she now complains, took place after the notice was handed in.

20. The claimant’s evidence to the tribunal was that the respondent’s conduct through its finance director Mr Khaliq amounted to a breach of the implied term of trust and confidence which must exist between employer and employee. The claimant’s case was that Mr Khaliq’s behaviour towards her and treatment of her was such that no employee would reasonably be expected to put up with it. The matters upon which the claimant relied included the following:-
- Refusing to give her a pay rise following the completion of her Level 3 AAT examinations, because the respondent did not wish to widen the pay gap between the claimant and Ms Hussain.
 - Offering her a more senior position, but then giving the role to another employee because the claimant was unable to perform certain parts of the role due to her disability.
 - Informing the claimant of the reasons why she would not be given a pay rise was because of her poor performance, when in fact there was no such poor performance.
 - Informing the claimant that her performance was such that she was not worth the national minimum wage which she was then being paid.
 - Dismissing the claimant.
 - Subsequently reinstating her which the claimant considered to be no more than her manager trying to cover up what had previously occurred.
21. The claimant’s letter of resignation appears at page 69 of the bundle and states as follows:-

“Dear Faraz

Please accept this letter as formal notice of my resignation from the position of finance apprentice with the 2020 group. As per the terms of my employment contract I’m giving 4 weeks’ notice, with my last day of employment being Friday the 19th of October 2018.

It was put to the claimant by Mr Muirhead that this letter contains no reason for her resignation and if the real reason had been because of the matters set out in the above paragraph, then she would have set them out in the letter. It was put to the claimant that the reason why she resigned was simply because she had received a more suitable role elsewhere. In their evidence to the tribunal, Mr Hartnett and Ms Huitson both stated that the claimant had told them that she had decided to leave

because had received a more suitable role elsewhere. The tribunal found that, whilst the claimant may well have explained her decision to leave in those terms, that did not in itself mean that the factors set out above were not those which effectively led to her resignation.

22. The law

The relevant statutory provisions engaged by the claims brought by the claimant are contained in the Employment Rights Act 1996 (unfair constructive dismissal) and the Equality Act 2010 (age discrimination and disability discrimination). The relevant statutory provisions are as follows:-

Equality Act 2010

Section 4 The protected characteristics

The following characteristics are protected characteristics –

Age;
Disability;
Gender reassignment;
Marriage and civil partnership;
Pregnancy and maternity;
Race;
Religion or belief;
Sex;
Sexual orientation.

Section 13 Direct discrimination

- (1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.
- (2) If the protected characteristic is age, A does not discriminate against B if A can show A's treatment of B to be a proportionate means of achieving a legitimate aim.
- (3) If the protected characteristic is disability, and B is not a disabled person, A does not discriminate against B only because A treats or would treat disabled persons more favourably than A treats B.
- (4) If the protected characteristic is marriage and civil partnership, this section applies to a contravention of Part 5 (work) only if the treatment is because it is B who is married or a civil partner.
- (5) If the protected characteristic is race, less favourable treatment includes segregating B from others.
- (6) If the protected characteristic is sex--
 - (a) less favourable treatment of a woman includes less favourable treatment of her because she is breast-feeding;

- (b) in a case where B is a man, no account is to be taken of special treatment afforded to a woman in connection with pregnancy or childbirth.
- (7) Subsection (6)(a) does not apply for the purposes of Part 5 (work).
- (8) This section is subject to sections 17(6) and 18(7).

Section 39 Employees and applicants

- (1) An employer (A) must not discriminate against a person (B)--
 - (a) in the arrangements A makes for deciding to whom to offer employment;
 - (b) as to the terms on which A offers B employment;
 - (c) by not offering B employment.
- (2) An employer (A) must not discriminate against an employee of A's (B)--
 - (a) as to B's terms of employment;
 - (b) in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for receiving any other benefit, facility or service;
 - (c) by dismissing B;
 - (d) by subjecting B to any other detriment.
- (3) An employer (A) must not victimise a person (B)--
 - (a) in the arrangements A makes for deciding to whom to offer employment;
 - (b) as to the terms on which A offers B employment;
 - (c) by not offering B employment.
- (4) An employer (A) must not victimise an employee of A's (B)--
 - (a) as to B's terms of employment;
 - (b) in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for any other benefit, facility or service;
 - (c) by dismissing B;

(d) by subjecting B to any other detriment.

(5) A duty to make reasonable adjustments applies to an employer.

Section 136 Burden of proof

- (1) This section applies to any proceedings relating to a contravention of this Act.
- (2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

Equality Act 2010 Section 13 – Direct discrimination

23 Section 13 prohibits less favourable treatment “because of a protected characteristic”. It is not sufficient for the tribunal to be satisfied that the employee has been treated less favourably than their chosen actual or hypothetical comparator. The tribunal must consider why the claimant was treated differently. It is only if the protected characteristic is a substantive or operational reason for the less favourable treatment, that liability will be established.

24 The House of Lords in **Chief Constable of West Yorkshire Police v Khan [2001 UKHL48]** said that the real question is “what, consciously or unconsciously, was the alleged discriminator’s reason for the treatment?” That is a subjective test. Discrimination will therefore be treated as being because of the protected characteristic if the substantial or effective, although not necessarily the sole or intended, reason for the discriminatory treatment was the protected characteristic. In **Igen v Wong [2005 ICR931]** it was held that the protected characteristic should not be “any part of the reasons for the treatment in question”.

25 For the purposes of the Equality Act 2010, the protected characteristic of “age” is a reference to a person of a particular age group, which is defined as a “group of persons defined by reference to age, whether by reference to a particular age or range of ages”. (Equality Act 2010 Section 5).

26 The claimant’s main complaint of unlawful age discrimination contrary to section 13 above is that she was told by Mr Khaliq that the reason why she was not to be given a pay rise was because the respondent did not wish to widen the pay gap between herself and a younger employee, Ms Hussain. The claimant’s case is that this refusal was therefore because of “age”. The tribunal found this approach to be misconceived. The claimant’s comparator, Ms Hussain, was in fact being paid less than the claimant. Both were being paid the statutory sum fixed by the National Minimum Wage Regulations, according to their age. The claimant was not being treated less favourably than Ms Hussain. Neither had been provided with a pay rise. The claimant may well have believed that she was being treated unreasonably or unfairly, but that did not mean that she was being treated less favourably because of her age. The complaint of unlawful age discrimination is therefore dismissed.

27 The claimant's complaint of unlawful disability discrimination also involves an alleged breach of section 13, direct disability discrimination. The claimant must therefore show that the reason why she was treated less favourably than her comparator (in this case Ms Vaughan) is because she is disabled. The respondent has conceded that the claimant's back condition amounts to a disability as defined in the Equality Act 2010. The respondent maintains that it did not know and could not reasonably have been expected to know that the claimant's back condition did amount to a disability. That aside, the tribunal was not satisfied that the claimant had been treated less favourably because of her disability. To be treated less favourably than Ms Hussain because of her disability, the claimant would have had to have been refused the position of supported housing because of her disability. The claimant's case was that she would have been prepared to accept the position provided that she did not have to undertake any night-time duties and the reason why she could not undertake night-time duties was because of her disability. The respondent's position was that the claimant had not been refused the position because of her disability, but because she had made it clear to them that the position was not suitable for her. The reasons why the claimant had said the position was not suitable for her related to her husband's reluctance to allow her to undertake night-time duties, the fact that she had children at home and the fact that her night-time medication would adversely affect her performance during the night and finally because she did not wish to be exposed to the risk of being bumped or jostled by un-cooperative tenants. The tribunal found that the claimant had not been "offered" the position in terms whereby she could have accepted the offer. The claimant had been asked whether she was interested in the position and had made it clear to the respondent that she was not interested. The role was then offered to and accepted by Ms Vaughan. The tribunal found that there had been no less favourable treatment of the claimant in comparison to Ms Vaughan. The tribunal found that the claimant's disability did not play any part of the reasons for the respondent's treatment of the claimant. The complaint of unlawful disability discrimination is therefore dismissed.

28 Unfair constructive dismissal

The relevant statutory provisions are set out in sections 94, 95 and 98 of the Employment Rights Act 1996.

Section 94 The right

- (1) An employee has the right not to be unfairly dismissed by his employer.
- (2) Subsection (1) has effect subject to the following provisions of this Part (in particular sections 108 to 110) and to the provisions of the Trade Union and Labour Relations (Consolidation) Act 1992 (in particular sections 237 to 239).

Section 95 Circumstances in which an employee is dismissed

- (1) For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2) ..., only if)--
 - (a) the contract under which he is employed is terminated by the employer (whether with or without notice),

- (b) he is employed under a limited-term contract and that contract terminates by virtue of the limiting event without being renewed under the same contract, or
 - (c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct.
- (2) An employee shall be taken to be dismissed by his employer for the purposes of this Part if--
- (a) the employer gives notice to the employee to terminate his contract of employment, and
 - (b) at a time within the period of that notice the employee gives notice to the employer to terminate the contract of employment on a date earlier than the date on which the employer's notice is due to expire;

and the reason for the dismissal is to be taken to be the reason for which the employer's notice is given.

Section 98 General

- (1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show--
- (a) the reason (or, if more than one, the principal reason) for the dismissal, and
 - (b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.
- (2) A reason falls within this subsection if it--
- (a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,
 - (b) relates to the conduct of the employee,
 - (c) is that the employee was redundant, or
 - (d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.
- (3) In subsection (2)(a)--
- (a) "capability", in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality, and

- (b) "qualifications", in relation to an employee, means any degree, diploma or other academic, technical or professional qualification relevant to the position which he held.
- (4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)--
- (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
- (b) shall be determined in accordance with equity and the substantial merits of the case.

29 The employee should be entitled to terminate the contract without notice, due to the employer. Dismissal occurs on the date when the notice expires. Lord Denning explained the principal of constructive unfair dismissal in **Western Excavating (ECC) Limited v Sharp [1978 ICR221]** in the following terms:-

"If the employer is guilty of conduct which is a significant breach going to root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer's conduct. He is constructively dismissed."

29 The essential elements of a claim for unfair constructive dismissal are therefore:-

- Repudiatory breach by the employer
- The employee must elect to accept the breach and treat the contract as at an end. The employee must resign in response to the breach.
- The employee must not delay too long and thereby accept the breach.

30 Recent guidance was given by the Court of Appeal in **Kaur v Leeds Teaching Hospitals NHS Trust [2018 EWCA-CIV-978]**.

- What was the most recent act or omission on the part of the employer which the employee says caused or triggered his or her resignation?
- Has he or she waived the breach, or affirmed the contract, since that act?
- If not, was that act or omission by itself a repudiatory breach of contract?
- If not, was it nevertheless a part of a course of conduct comprising several acts or omissions which, viewed cumulatively, amounted to a repudiatory breach of the implied term of trust and confidence?

- Did the employee resign in response (or partly in response) to that breach?

31 In **Woods v WM Car Services (Peterborough) Limited [1982 ICR 693]** the implied term of mutual trust and confidence was first identified. The implied term is that the employer will not, without reasonable and proper cause, conduct itself in a manner which is calculated or likely to undermine the relationship of trust and confidence which ought to exist between the employer and the employee. The test of whether the employee's trust and confidence has been undermined is objective. It is not necessary that that employer intended any particular breach. The tribunal must examine the employer's conduct as a whole and considering all the circumstances of the case whether it amounted to a breach of the implied term of trust and confidence.

32 Where the employer relies on a series of events or a course of conduct over a period of time, in such circumstances the tribunal must ask whether the "final straw", namely the last in a series of acts or incidents contributed something to the breach. The court of appeal set out guidance in **Waltham Forest v Omilagu [2004 EWCA-CIV-1493]** as follows:-

- The last act must not be utterly trivial.
- The last act does not have to be of the same character as earlier acts.
- It is not necessary to characterise a final straw as unreasonable or blameworthy conduct in isolation.
- Entirely innocuous acts cannot be a final straw, even if the employee genuinely but mistakenly interprets the act as hurtful and destructive of their confidence in the employer.

33 The claimant relies upon those matters set out in paragraph (X) above. Those matters occurred within a relatively short space of time and cumulated with the retraction of the claimant's dismissal after she had begun searching for alternative employment. Looking at each of those matters objectively, both individually and collectively, the tribunal found that it amounted to a breach of the implied term of trust and confidence. Most certainly, telling an employee she is not worth the national minimum wage which she is being paid, amounts to conduct likely to destroy the relationship of trust and confidence. Informing an employee that she was being dismissed with notice because she was no longer needed, was also likely to destroy the relationship of trust and confidence. Being subsequently reinstated by a manager with whom the employee would subsequently still have to work and whose decision to reinstate was due to a specific instruction from the managing director, would also amount to conduct which the employee could not reasonably be expected to put up with.

34 The tribunal found that the respondent's treatment of the claimant amounted to a breach of the implied term of trust and confidence which amounted to a fundamental breach of the claimant's contract of employment.

35 The tribunal was satisfied that the claimant resigned in response to that fundamental breach of contract. The tribunal did not accept the respondent's arguments that the real

reason why the claimant had resigned, was because she had obtained employment elsewhere which was more suitable for her. The tribunal accepted the claimant's evidence that the only reason why she applied for alternative employment was because she had been told by the respondent that she was being dismissed. The fact that the claimant gave and chose to work her notice, did not in these circumstances mean that she had accepted the breach and waived her right to resign and claim that she had been constructively unfairly dismissed. The Court of Appeal said in **Wethersfield v Sargent [1999 IRLR94]** that there is no requirement for the employee to state their reason for leaving at the time. The fact that the claimant gave lawful notice (and no more) does not mean that she has affirmed the contract. (**Brown and Another v Neon Management Services Limited**). The question for the tribunal in cases where delay is alleged to mean that the claimant has accepted the breach and affirmed the contract, is "what is the reason behind the delay?" It was said in **Waltons and Morse v Dorrington [1997 IRLR488]** that delay of a few weeks before the employee resigned (in order to look for other work) did not amount to affirmation. In the present case, the claimant did no more than undertake those tasks which she was allocated to do during her lawful notice. The tribunal found that those activities did not amount to acceptance of the breach and affirmation of the contract.

36 For those reasons, the claimant's complaint of unfair constructive dismissal is well-founded and succeeds.

37 The claimant is entitled to a basic award based upon her age and length of service equivalent to two weeks' pay in the sum of £587.26. As a result of her unfair dismissal, the claimant has lost the right not to be unfairly dismissed as it would take two years for her to acquire that right. The claimant awards compensation for the loss of those statutory rights in the sum of £400.00. The claimant makes no claim for loss of earnings and therefore there is no other compensatory award. Mr Muirhead recommends that the tribunal should make a reduction in any compensation awarded to the claimant because of her failure to properly go through the grievance procedure. The tribunal found that there was no formal grievance procedure available to the claimant and in any event in all the circumstances of this case it would not be just and equitable to make any deduction. The total sum ordered to be paid by the respondent to the claimant is £987.26.

EMPLOYMENT JUDGE JOHNSON

**JUDGMENT SIGNED BY EMPLOYMENT
JUDGE ON 13 December 2019**

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