EMPLOYMENT TRIBUNALS

Claimant: **Miss J Gauntlett**

Respondent: **One Housing Group Limited**

Heard at: **East London Hearing Centre**

On: **25, 26 and 27 February 2020**

Before: **Employment Judge Russell**

Representation
Claimant: **In person**
Respondent: **Mr E Wojciechowski (Solicitor)**

JUDGMENT having been sent to the parties on 7/03/2020 and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013.

REASONS

1. By a claim form presented to the Employment Tribunal on 23 January 2019, the Claimant brought complaints of constructive unfair dismissal and disability discrimination. The Respondent resisted all complaints.

2. A Preliminary Hearing took place before Employment Judge Tobin on 2 May 2019 at which he identified the issues in the case as:

2.1 The non-payment or shortfall in wages and inaccuracies on payslips;

2.2 Pressure and lack of support in dealing with residents in the supported living accommodation where she worked; and

2.3 An injury at work specifically to the Claimant's wrist and a bed bug infestation causing further injury. The Claimant says that she was particularly aggrieved at the Respondent's failure to make reasonable adjustment in respect of the Claimant's wrist injury and failure to remedy the bedbug infestation.

3. At paragraph 6, Judge Tobin refers to the Claimant's complaints as set out in a grievance which was finally determined on appeal on 14 November 2018 recording that she was worried about the payment of her bills and had warned her employer of the

consequences in respect of not properly sorting out her pay. When there was a further failure to pay her correctly on 27 November, the Claimant resigned. She said that all of the three issues represented fundamental breaches of contract, individually and commutatively, and that the pay slip and pay issues were the trigger and the last straw for her resignation.

4. Although not included in the list of issues determined by Judge Tobin, the Claimant's claim form included a complaint that in summer 2018 she was sent a contract which purported to change her job title and her employment status. The complaint was dealt with in evidence and relevant documents were already in the bundle. In the circumstances, I decided that this was a further issue for the Tribunal to determine in the case and that the Claimant could rely upon it as part of her constructive dismissal claim.

5. I heard evidence from the Claimant on her own behalf. For the Respondent, I heard from Mr Joe Thomas (former Head of Housing), Ms Natalia Castaneda (former HR Assistant) and Ms Kathleen Hopgood (Head of Support Services). I was provided with an agreed bundle of documents and read those pages to which I was taken in evidence.

Findings of Fact

6. The Respondent is a registered social landlord, managing approximately 16,000 homes across London and the surrounding counties. One such property is John Sinclair Court which comprises 31 flats and common areas, including a lounge and an office for use by employees of the Respondent.

7. The Claimant commenced work for the Respondent at John Sinclair Court in April 2016 as an agency worker. From September 2016, she was directly employed by the Respondent, initially on a fixed term contract, and as a permanent employee from 1 April 2017. To confirm the change to permanent status, Ms Anderson (Head of Senior Living) completed a payroll change form which included no change to salary or job title. The Respondent issued the Claimant with a new contract which stated the Claimant's job title as Support Officer and annual salary as £21,000 (in fact this is an error and it common ground that the Claimant's salary had already been increased to £23,000 per annum). It records that her permanent employment commenced on 1 April 2017, but that her continuous service dated back to 1 September 2016. Clause 4.1 of the contract provided that salary would be paid "**on or about the twenty seventh day of each month**". Ms Castaneda confirmed the Claimant's evidence that whilst payment days did vary to take into account weekends, it would always be earlier and never later than the 27th day of the month. Pursuant to the contract, the Claimant was entitled to one month's full pay and one month's half pay if absent due to sickness.

8. The Claimant was the only employee of the Respondent based full time at John Sinclair Court. She was supported by visits and telephone or email contact with her managers. The Claimant enjoyed a good working relationship with her previous managers, Ms Anderson, Ms Bloomfold and Ms Ali.

9. In September 2016, there was a problem with bedbugs in the flats at John Sinclair Court. The Claimant called pest control, her then manager attended the site

and spoke to the residents and the Claimant was happy on that occasion with the response provided.

10. In early 2018, there was a significant change in the management structure. The Claimant became part of Mr Thomas's teams from around about April 2018 with Mr Mario Evans as her line manager. The Claimant became increasingly concerned about a lack of management support from Mr Evans, with whom she had no formal one to one meetings. The Claimant's evidence was that he rarely, if ever, visited John Sinclair Court. There is no evidence in the bundle to show visits by Mr Evans, far less their frequency. On balance, I accept the Claimant's evidence as reliable and find that although she had telephone and email contact with Mr Evans, he rarely if ever visited her at the site.

11. On 8 May 2018, the Claimant commenced a period of sickness absence. By email sent that day, she informed Mr Evans that she had been bitten all around her ankles by bedbugs in the building and that she had arranged for Tower Hamlets pest control, the external provider used by the Respondent, to visit on 17 May 2018 between 9am and 1pm. In a longer email of the same date, the Claimant set out her concerns with regard to her working conditions at John Sinclair Court, including complaints about bedbugs and a lack of support, and requested a reply by 30 May 2018. There is no evidence of any reply, although I appreciate the Claimant was on sickness absence. In her emails, the Claimant refers to stress and backache as the cause of her absence although her statement for fitness for work give right elbow pain and right-hand pain as the reason for absence.

12. The Claimant's evidence is that the pest control treatment scheduled for 17 May 2018 did not take place because nobody was present at the property to allow entrance. The Respondent relies on a report produced by Tower Hamlets pest control as evidence that on 17 May 2018 there was a visit to the warder's office at John Sinclair Court and that the activity status is marked as "done", as evidence that the treatment did take place. On balance, and considering a similar report for a subsequent visit in September 2018 also marked as "done" when it was common ground that treatment could not in fact be carried out, I find that the report shows no more than the fact of attendance by pest control on the scheduled date and does not record whether treatment in fact had taken place. In resolving the dispute of evidence, I took into account Mr Thomas' evidence at the grievance appeal hearing six months' later where he accepted that the treatment on 17 May 2018 had been missed because Mr Evans was not at the property. This is a more contemporaneous recollection than the evidence given by Mr Thomas in these proceedings some years later. On balance, I find that the treatment did not take place on 17 May 2018.

13. Whilst off sick, the Claimant was entitled to one month's full pay and one month's half pay, before then reverting to statutory sick pay. The Respondent uses an external payroll provider, NGA Human Resources. The Claimant was not aware that an external provider was used and I accept that nothing in the correspondence provided to her would reasonably have led her to believe that the Respondent was not directly responsible for payroll. Starting from June 2018, the Claimant encountered repeated problems with her pay and pay slips. The Claimant was concerned that she had received less money than she believed she was entitled to and asked for a copy of her contract and her pay slip. After some confusion, Ms Castaneda confirmed that the

Claimant's pay was £23,000 per annum.

14. The Claimant's sickness absence continued and her July 2018 pay was incorrectly calculated. On 3 August 2018, the Claimant returned to work for one day before going on sickness absence again. She provided a sick certificate by the cut-off date for payroll but Mr Evans was late in submitting it and, as a result, the Claimant was paid her full wages for that month rather than her sick pay entitlement. This was an overpayment.

15. On her one day back at work in August 2018, the Claimant was concerned that there were still bedbugs at John Sinclair Court and arranged for Tower Hamlets pest control to attend on 17 September 2018. On 7 August 2018, the Claimant informed her managers about the ongoing problem with bedbugs and orally notified Mr Evans of the date of the pest control visit.

16. On 20 August 2018, the Claimant was sent a copy of what was said to be her contract of employment and asked to return a signed copy. It was not the correct contract: it purported to be for a fixed-term, dated her service only to 1 April 2017 and incorrectly gave her job title as Sheltered Housing Lead. The Claimant was concerned that she was being asked to sign a contract which was materially inaccurate and which would affect the security of her employment status. Ms Castaneda accepted in evidence that had she signed the contract, the Claimant's terms and conditions would have been varied. On 29 August 2018, HR confirmed that the contract had been sent in error based upon a form submitted by an unknown manager but offered no apology. In her oral evidence, Ms Castaneda maintained that the error was caused by the change of status document on the file. I did not find her evidence credible or reliable given that the change of status document makes no reference to job title. I find it more likely that, as Ms Castaneda went on to explain, the Claimant's increased salary was higher than the usual bracket for a Support Officer and that this led her to believe that the job title must also have changed. As can be seen from the contemporaneous email exchanges, this issue caused great concern into the Claimant.

17. On her one day back at work on 3 August 2018, the Claimant asked for a work station assessment because of the pain she was experiencing in her wrist and hands. She was given a work station assessment form which she completed and returned on 28 August 2018. The Respondent appears to have believed that the Claimant had to return to work in order for the assessment to take place. This was correct for a proposed DSE assessment but the work station assessment was properly completed and simply required a manager's approval for purchase of a different chair and/or desk and mouse. Regrettably, that was not done.

18. The Claimant returned to work on 20 August 2018. She remained concerned about bedbugs at John Sinclair Court as Mr Evans had not intervened to obtain an earlier treatment appointment and unhappy that nobody had contacted her to discuss the contract issue. The Claimant submitted a formal grievance on 3 September 2018 in which she set out her concerns about lack of management support, no risk assessment for lone working, being sent the wrong contract and the bedbugs which were still present as not action had been taken in May 2018. The grievance also raises other concerns which are not relied upon as part of the claim and upon which I make no findings, such as the location of a phased return to work.

19. The Tower Hamlets pest control team were not able to carry out the bedbug treatment of the office scheduled for 17 September 2018 as access was not made available to the communal areas (although it appears that some of the flats were treated). A further pest control visit was scheduled for 3 October 2018 and treatment was carried out on this date.

20. Mr Thomas was appointed to hear the grievance and a hearing took place on 24 September 2018. The handling and outcome of the grievance are not relied upon as part of the reasons for the Claimant's subsequent decision to resign. Although the Claimant expanded upon her concern about lack of management support, I find that the notes of the hearing make clear that the Claimant's principal concern was about her pay: her wages did not seem to make sense, she was not sure what she was being paid or on what date. The pay slips, which are in the bundle, show significant pay variations for each month with some deductions for which no explanation has been provided. Even Miss Castaneda struggled in evidence to understand what some of the figures represented, candidly accepting that they were "**all over the place**" and that it would have been better to meet with the Claimant and have the payroll provider on the telephone at the meeting to provide an explanation.

21. In his decision letter dated 15 October 2018, which is not particularly clearly expressed, Mr Thomas accepted that there had been deficiencies in communication and that an incorrect contract had been issued in error but did not uphold her grievance about the bedbugs and work station assessment. Attached to the letter was a spreadsheet said to provide a breakdown of the overpayment caused by the Claimant's sickness absence. The spreadsheet is not clear but does confirm that there were inaccuracies in the Claimant's pay for each of June, July and August 2018.

22. The Claimant's appeal against the grievance decision was heard by Ms Hopgood. In her decision letter sent on 14 November 2018, Ms Hopgood largely upheld the Claimant's concerns about communication, identifying a number of errors, but denied that there had been any breach of the duty of care or that there was any significant problem with bedbugs. Ms Hopgood acknowledged that there had been some delays in getting an assessment, that the Claimant's concerns about lone working could have been responded to more quickly and that it would be reasonable to expect there to be some formal one to one meetings since Mr Evans took over her management in April 2018.

23. Ms Hopgood explained that pay problems were due to issues with the external payroll provider which HR would look into and respond appropriately. I accept Ms Castaneda's evidence, which is consistent with contemporaneous emails, that she was in regular contact with the external payroll provider in an attempt to ensure that the Claimant was properly paid. Ms Castaneda was successful to the extent that underpayments in September and November 2018 were remedied within a couple of days of the pay date by way of supplementary payment. Regrettably, no clear explanation was provided to the Claimant at the time as to the cause of the repeated incorrect payments (namely, an inadequate external payroll provider) or the steps taken to remedy the same. As a result, the Claimant was left in the position where she could not be confident that her full salary would be paid or whether she would have an underpayment which she needed to chase and receive by way of "top up". It was not until Ms Hopgood's appeal decision that the Claimant was aware that the problem was

an external payroll provider.

24. Ms Hopgood made a series of recommendations, some of which could be implemented swiftly, some of which would require longer. One recommendation was that HR would review the pay slips and, if there had been an overpayment of sick pay, there would be a discussion about how it should be managed. Whilst the Respondent was contractually entitled to recover the overpayment from August 2018, the cause was the error by Mr Evans and the amount of the overpayment was complicated by the repeated underpayments in other months. It was agreed, therefore, that the Claimant would be allowed to put forward a plan for instalment repayments. Regrettably, and for reasons which are not clear to me, the payroll provider deducted the full amount of the overpayment in the November 2018 pay run.

25. The error by the external payroll provider was particularly significant as the Claimant had contacted her manager and made the Respondent aware that she expected to be paid in full on the correct date. I accepted the Claimant's evidence that she checked her pay on 26th and saw that she had received only £491.70, which was £662.10 less than should have been paid. She then spoke with Ms Castaneda and explained the consequences of late payment upon her ability to honour her direct debits. Ms Castaneda said that she would correct the error that day and, although she did contact the external payroll provider the same day, the balancing payment was not made to the Claimant until 28 November 2018. I accept that this was the final straw and the Claimant decided that she had no option but to resign. In a letter dated 28 November 2018, she said:

> **"In addition to all what I am going through with my injuries and issues at home caused by the workplace, I also have no money to attend work as a particular staff in HR is constantly deliberately holding my wages or making some form of errors on my pay slip knowing already the problems which have occurred due to the nonsupport that was previously at my place of work.**
>
> **Adjustment in my office still has not been carried out from July 2018 in which my GP requested. This is now making my injuries worse.**
>
> **This is seriously affecting my physical and mental health and for that reason I am left with no other choice but to resign."**

26. By letter dated 7 December 2018, the Respondent offered the Claimant the opportunity to reconsider her resignation. The Claimant did not change her mind and her employment terminated with effect from 28 November 2018.

Law

27. Section 95(1)(c) ERA provides that a dismissal occurs if the employee terminates the contract under which they are employed (with or without notice) in circumstances in which they are entitled to do so by reason of the employer's conduct. Whether the employee was entitled to resign by reason of the employer's conduct must be determined in accordance with the law of contract. In essence, whether the conduct of the employer amounts to a fundamental breach going to the root of the contract or which shows that the employer no longer intended to be bound by one or more of the essential terms of the contract, **Western Excavating Ltd v Sharp** [1978] IRLR 27 CA.

28. The term of the contract which is breached may be an express term or it may be an implied one. In this case, the Claimant relies upon breach of the implied term of trust and confidence. This requires that the employer shall not without reasonable and proper cause conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between employer and employee. The employee bears the burden of identifying the term and satisfying the tribunal that it has been breached to the extent identified above. The employee may rely upon a single sufficiently serious breach or upon a series of actions which, even if not fundamental in their own right, when taken cumulatively evidence an intention not to be bound by the relevant term and therefore the contract. This is sometimes referred to as the "last straw" situation. This last straw need not itself be repudiatory, or even a breach of contract at all, but it must add something to the overall conduct, **Waltham Forest London Borough Council –v- Omilaju** [2005] IRLR 35.

29. The question of fundamental breach is not to be judged by reference to a range of reasonable responses, **Buckland v Bournemouth University Higher Education Corp** [2010] IRLR 445, CA. The tribunal must consider both the conduct of the employer and its effect upon the contract, rather than what the employer intended. In so doing, we must look at the circumstances objectively, that is from the perspective of a reasonable person in the claimant's position. The question of fundamental breach is not to be judged by a range of reasonable responses test.

30. In **Tullett Prebon Plc v BGC Brokers LLP** [2010] EWHC 484 QB, Jack J stated at paragraph 81 that the conduct must be so damaging that the employee should not be expected to continue to work for the employer and that:

> "**Conduct, which is mildly or moderately objectionable, will not do. The conduct must go to the heart of the relationship. To show some damage to the relationship is not enough**."

31. In **Kaur v Leeds Teaching Hospital NHS Trust**, the Court of Appeal revisited the question of cumulative effect and last straw as set out by Underhill LJ from paragraph 41. At paragraph 55, Lord Justice Underhill posed five questions that the Tribunal must answer in a case of constructive dismissal:

(1) 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?

(2) Has he or she affirmed the contract since that act?

(3) If not, was the act (or omission) by itself a repudiatory breach of contract?

(4) If not, was it nevertheless a part (applying the approach explained in **Omilaju**) of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a (repudiatory) breach of the **Malik** term?

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

Conclusions

32. The most recent act or omission causing the Claimant to resign was the failure to pay her in full on 27 November 2018. Affirmation and causation, **Kaur** (2) and (5) are not in issue in this case. The issue between the parties is whether there was a repudiatory breach by reason either of a single act or omission or the cumulative effect of a course of conduct.

33. There are two terms of the contract which have been addressed in this hearing: the express term as to pay; and the implied term of trust and confidence. The express term provided for payment "**on or about the twenty seventh day of each month**". The Claimant's pay was paid on 26 and 28 November 2018. Whilst in practice, payment was always made on 27th or before, the contract entitled the Respondent to make the payment on 28th and I conclude that there was no breach of the express term.

34. Turning next to the implied term of trust and confidence, was the failure to pay in full on 26th, by itself, a repudiatory breach of the implied term? I consider that it was not. It was a significant failure from the Claimant's point of view but it was swiftly remedied by the intervention of Ms Castaneda. If the claim had been founded upon the problems with payment in November 2018 alone, the Claimant's case would have failed.

35. The Claimant also relies upon the cumulative effect of a course of conduct, culminating in the last straw of the mistake in November 2018. The conduct can be broadly summarized as: pay (underpayments, pay slip inaccuracies and incorrect contract); lack of support; and workplace (wrist injury adjustments and bedbugs).

36. Dealing with the pay category, I have found that from May 2018 until termination of employment on 28 November 2018 there were significant and repeated problems in the correct payment of the Claimant. In six of the seven final months of her employment, she was not paid properly and all were underpayments save for the overpayment caused by Mr Evans' failure to process the fitness to work certificate within the required time frame. This led to a further problem when rather than allow the Claimant to put forward a plan for instalment repayments, the Respondent deducted it in one lump sum.

37. Mr Wojciechowski submitted that the November 2018 pay error was an innocuous act and not the fault of the Respondent, such that it could not be considered part of a course of conduct or a last straw within **Omilaju.** I disagree. The Respondent is responsible to its employees for the discharge of its obligation to pay them properly and in a timely manner. This requires the amount paid to be accurate and provision of a pay slip describing what has been paid and what has been deducted. It is implicit in this obligation that the content of the pay slip must be readily understandable and the payment reliable. The Respondent chose to discharge this obligation by engaging the services of an external provider, regrettably one which proved less than competent and I accept that the problems were caused by that provider. This was not a "one off" problem which could not be anticipated. If it had been, there would be some force to Mr Wojciechowski's submission. Instead, this was the sixth error in seven months in respect of the same employee.

38. A final straw need not be unreasonable or blameworthy, it need only contribute (however slightly) to the breach of the implied term. The Respondent knew that there was a history of problems with payment, knew that the Claimant expected that she be paid properly in November 2018 and had agreed to allow her to put forward a plan for instalment payments. There is no evidence that it communicated this agreement to the payroll provider nor that it took steps *in advance* of the pay date to ensure that the Claimant would, on this occasion, be paid correctly. Ms Castaneda did act to rectify earlier problems and ensure that the Claimant was paid with only a short delay, however, historically it had not resolved the problem caused by what appears to be the not unusual incidence of sickness absence. The Claimant was not kept informed and the unpredictability of what pay she could expect to receive on her normal pay date was a specific concern raised to the Respondent. The payslips were not clear, to quote Ms Castaneda the figures were all over the place. The Claimant had lost confidence in the Respondent's ability to pay her in full and on time. The last straw contributed to this course of conduct and it is a matter for which the Respondent was responsible.

39. The sending of the incorrect contract in August 2018 is another act which, of itself, would not be sufficiently serious to amount to a repudiatory breach of the implied term. However, on the facts as I have found them, it was sent to a Claimant who was concerned that she was not being properly paid, did not know to what pay she was properly entitled and how it was calculated and required her contract to help her understand what she was due. Instead, the Respondent sent her a contract which reduced her employment status to a six-month fixed term and purported to change her length of service and job title. The explanation provided by the HR assistant at the time was scant and there was no apology. The correction letter was only sent in October 2018. The combined effect of these errors, made without reasonable and proper cause, was such that it had the cumulative effect of undermining the Claimant's trust in her employer. Whilst Ms Castaneda made some attempts to correct the repeated errors, the Claimant did not know this due to poor communication by the Respondent and, therefore, it was objectively reasonable for the conduct to have the proscribed effect. Moreover, a breach once committed cannot be remedied and the Respondent's actions were too little, too late.

40. The lack of support and workplace issues overlap to a considerable degree. As accepted by Ms Hopgood, the Claimant had not had a formal 1:1 between April and November 2018 as she should, there had been delay in carrying out the work station assessment and lone worker risk assessment. Ms Hopgood recognized this and made appropriate recommendations in her appeal decision. It is a sad feature of the case that had the pay problem not reoccurred on 27 November 2018, the recommendations of Ms Hopgood may well have reestablished the relationship of trust and confidence and enabled the employment to continue. Given the short period of time between the appeal decision and the Claimant's resignation, there was no undue delay in implementing them during that period. By contrast, I do not consider that there was reasonable and proper cause for the failure of Mr Evans to provide adequate support to the Claimant before that date by regular visits to John Sinclair Court as provided by previous managers and by provision of the equipment agreed in the work station assessment which was awaiting manager's approval.

41. Linked to this is the bedbug concern. Two pest control treatments were

missed because the Respondent did not arrange to have an employee at John Sinclair Court to provide entry to the communal areas when the Claimant absent. There is some evidence to suggest that there was not an "infestation" of bedbugs, a rather emotive term albeit I accept that a bedbug is rarely a solitary creature, but there was evidence that the Claimant was concerned and the presence of even a single bedbug on a cushion in the lounge (as was subsequently found) supports the need to take steps to address the risk. There was no evidence which would have given the Respondent reasonable and proper cause to think of the Claimant as anything other than truthful in her reports of concerns about bedbugs. It was appropriate to ensure that pest control could carry out the treatments which were scheduled by the Claimant (and which the Respondent accepted as reasonably required at the time). There was no good reason for the Respondent to fail to ensure that those treatments could be completed.

42. The Claimant's case is that the cumulative effect of these failures was that she no longer had any trust in the Respondent's handling of paperwork and management of her employment. Pay is a fundamentally important part of the employment relationship. The employee agrees to provide their services in return for pay; the employer agrees to pay the contracted sum in a timely manner for those services. On the facts as I have found them, the Respondent has over a six-month period shown itself incapable of remedying repeated problems with delayed payment, with varying pay figures which cannot be understood from the pay slips, it has asked the Claimant to sign a new contract which reduced her rights (albeit in error), failed to provide the equipment identified in the work station assessment and failed to organize entry for the bedbug treatments which were properly required. This cumulative course of conduct had the effect of destroying or seriously damaging the relationship of trust and confidence and the Claimant was entitled to resign and treat herself as dismissed.

43. During the hearing, the Claimant raised a number of points with regard to tax and information provided for benefits purposes after her employment ended. These are matters not relevant to a constructive dismissal claim and I make no finding on them. Whilst I have addressed the wrist injury insofar as it relates to the equipment required (the work station assessment), it is not necessary me to decide whether the Claimant's wrist injury was in fact caused at work and, if it were, whether the Respondent was legally responsible. I make no finding whatsoever on that contention as it is a matter for a different forum to this.

44. Having given Judgment with oral reasons, remedy was agreed between the parties.

Employment Judge Russell
Date: 21 April 2020