



EMPLOYMENT TRIBUNALS

Claimant: Mrs A Chadwick

Respondent: Alternative Futures Group Limited

Heard at: Manchester

On: 7-10 July 2020
4 August 2020
(in Chambers)

Before: Employment Judge Ainscough
(sitting alone)

REPRESENTATION:

Claimant: In person

Respondent: Miss R Eeley, Counsel

JUDGMENT

The judgment of the Tribunal is that:

The claimant's claim of constructive unfair dismissal fails and is dismissed.

REASONS

1. The claim was brought by way of a claim form dated 7 May 2019 in which the claimant claimed she had been subject to a detriment in the workplace as a result of trade union activities. The claimant worked as a support worker for the respondent, a company responsible for providing support to vulnerable adults.
2. The response form dated 11 June 2019 defended the proceedings. The respondent contended that there was no such claim for detrimental treatment as a result of taking part in industrial action and sought to strike out the claim.
3. On 8 August 2019 at a preliminary hearing, the claimant's claim for detriment suffered in the workplace as a result of trade union activities was struck out but the claimant was allowed to amend her claim to one of constructive unfair dismissal.

The claimant subsequently provided particulars of claim alleging constructive unfair dismissal, which was denied in amended grounds of resistance by the respondent on 3 October 2019.

Issues

4. Following a case management preliminary hearing on 30 October 2019 the following issues were agreed between the parties:

Breach of Contract

- (1) Did the respondent fundamentally breach the claimant's contract of employment entitling her to resign?

The claimant alleges the following breaches:

- (a) Her team leader, Margaret Morgan, shouted at her and her colleague in an unprovoked rage on 4 April 2019 (paragraph 5 of the claimant's further particulars of claim);
- (b) Adele Hollywood arranged to speak with the claimant informally on 15 April 2019 to discuss concerns the claimant had raised with Kirsty Muldoon, but the call did not take place (paragraph 6 of the further particulars of claim);
- (c) The claimant received a WhatsApp group message from her team leader relating to a message left on the table at Norma Road whilst on the way to a funeral of a friend's son (paragraph 7 of the further particulars of claim), which the claimant says were false allegations against her;
- (d) The claimant did not receive any contact from her team leader to apologise or mediate following the WhatsApp group message (paragraph 8 of the further particulars of claim);
- (e) On 25 April 2019 the claimant was informed by two team leaders visiting Norma Road that an allegation had been made against her and that she was being transferred from Norma Road to Silvester Street on a permanent basis, and was told to take her possessions with her. The claimant was advised days later that the allegation was unacceptable behaviour and conduct (paragraph 8 of the further particulars of claim);
- (f) The claimant was given an oppressive rota for Silvester Street (paragraph 9 of the further particulars of claim);
- (g) Following the conclusion of the respondent's investigation the claimant was advised she would return to Norma Road. During the investigation meeting, the claimant was shown copies of WhatsApp group messages that she had sent after she was removed from post. There was no other social media evidence to support the allegations. She was not exonerated and was advised to undertake social media training. No mediation was offered

- between the claimant and her team leader, and the claimant was to return to work with her team leader and the staff member who had conspired against her (paragraph 10 of the further particulars of claim);
- (h) The respondent failed to adequately investigate the allegations made by the claimant in her grievance (paragraph 11 of the further particulars of claim);
 - (i) No witness statements were produced to the claimant as part of the grievance process and the witnesses were not given the opportunity to review and sign the statements they made (paragraph 12 of the further particulars of claim).
- (2) Did the claimant resign in response to that breach? The claimant alleges she resigned from her role due to the respondent's spurious allegations and reckless actions taken against her, which led to an irreparable breakdown of trust and confidence in the respondent (paragraph 4 of the further particulars of claim).
- (3) Did the claimant resign without delay so as not to constitute affirmation or acceptance of the breach of contract? The claimant alleges she lost trust in the respondent following a period of work related stress, for which she was on sick leave at the time of her resignation, to honour the terms of her contract. The claimant resigned on 23 May 2019.
- (4) If the claimant was constructively dismissed, was that dismissal unfair?

Remedy (Unfair Dismissal)

- (5) If the claimant was unfairly dismissed, should compensation be awarded to the claimant?
- (6) If so, what level of compensation should be awarded to the claimant?
- (7) In particular:
- (a) Did the claimant's conduct cause or substantially contribute to her dismissal? If so, by what proportion would it be just and equitable to reduce the compensatory award?
 - (b) If the respondent failed to follow a fair procedure, can the respondent show that following a fair procedure would have made no difference to the decision to dismiss? If so, by how much would it be just and equitable to reduce the compensatory award?
 - (c) If the respondent failed to comply with the ACAS Code of Practice on Disciplinary and Grievance Procedures (the ACAS Code), was its failure reasonable? If the respondent's failure to comply with the ACAS Code was unreasonable, is it just and equitable to increase any award made to the claimant? If so, by how much should the award be increased?

- (d) Has the claimant complied with the ACAS Code? If not, should any compensatory award made to the claimant be reduced to take into account the claimant's unreasonable failure to comply with the ACAS Code? If so, by how much should the compensatory award be reduced?
- (e) To what extent, if any, has the claimant mitigated her losses?

5. At the outset of the hearing, the respondent's representative indicated that the respondent was not intending to dismiss the claimant and therefore the issues in regard to the claimant's contributory fault or the fairness of the any procedures followed were not being pursued and evidence would not be presented about those issues.

6. In addition, it was agreed that the evidence given at this hearing would relate only to liability. If the claimant proves her case, it was agreed that the issue of remedy would be dealt with at a later hearing.

Evidence

7. The parties agreed a joint bundle running to 294 pages inclusive of witness statements.

8. In addition, during the hearing, following submissions from the parties, I agreed to admit the supplemental statement prepared by the claimant following the late disclosure of the Unison WhatsApp messages. In addition, I also allowed the admission of the WhatsApp messages between Joan Shannon and Felicity Pilson as they were relevant to the issues in the case. The claimant's application to include a witness statement from a Fiona Whelan was denied as I did not consider her evidence to be relevant to the issues before the Tribunal. A screenshot of the absence history of Joan Shannon was also admitted during the course of evidence as a result of questions raised during cross examination of the respondent's witnesses.

9. The claimant gave evidence and called Felicity Pilson, a colleague who was present at a meeting on 4 April 2019, to give evidence. The respondent called five witnesses:

- (1) Margaret Morgan, a team leader and the claimant's line manager;
- (2) Adele Hollywood, the Area Manager and Margaret Morgan's direct line manager;
- (3) Michelle McCusker, the investigating officer;
- (4) Elaine Denby, the grievance handler; and
- (5) Andrea Roach, the grievance appeal handler.

Relevant Legal Principles

10. The unfair dismissal claim was brought under Part X of the Employment Rights Act 1996. An unfair dismissal claim can be pursued only if the employee has

been dismissed, and the circumstances in which an employee is dismissed are defined by Section 95. The relevant part of Section 95 was Section 95(1)(c) which provides that an employee is dismissed by his employer if:

“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.”

11. The principles behind such a “constructive dismissal” were set out by the Court of Appeal in **Western Excavating (ECC) Limited v Sharp [1978] IRLR 27**. It was held that unreasonable conduct is not enough, there must be a breach of contract which led to the constructive dismissal. The statutory language incorporates the law of contract, which means that the employee is entitled to treat himself as constructively dismissed only if the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract.

12. The term of the contract upon which the claimant relied in this case was the implied term of trust and confidence. In **Malik and Mahmud v Bank of Credit and Commerce International SA [1997] ICR 606** the House of Lords considered the scope of that implied term and the Court approved a formulation which imposed an obligation that the employer shall not:

“...without reasonable and proper cause, conduct itself in a manner calculated [or] likely to destroy or seriously damage the relationship of confidence and trust between employer and employee.”

13. It is also apparent from the decision of the House of Lords that the test is an objective one in which the subjective perception of the employee can be relevant but is not determinative. Lord Nicholls put the matter this way at page 611A:

“The conduct must, of course, impinge on the relationship in the sense that, looked at objectively, it is likely to destroy or seriously damage the degree of trust and confidence the employee is reasonably entitled to have in his employer. That requires one to look at all the circumstances.”

14. The EAT in *Leeds Dental Team Ltd v Rose* [\[2014\] IRLR 8](#), EAT said:

“The test does not require a Tribunal to make a factual finding as to what the actual intention of the employer was; the employer’s subjective intention is irrelevant. If the employer acts in such a way, considered objectively, that his conduct is likely to destroy or seriously damage the relationship of trust and confidence, then he is taken to have the objective intention spoken of...”

14. The objective test also means that the intention or motive of the employer is not determinative. An employer with good intentions can still commit a repudiatory breach of contract.

15. In **Bournemouth University Higher Education Corporation v Buckland [2010] ICR 908** the Court of Appeal confirmed that the test of the “band of reasonable responses” is not the appropriate test in deciding whether there has been a repudiatory breach of contract of the kind envisaged in **Malik**.

16. Not every action by an employer which can properly give rise to complaint by an employee amounts to a breach of trust and confidence. The formulation approved in **Malik** recognises that the conduct must be likely to destroy or seriously damage the relationship of confidence and trust. In **Frenkel Topping Limited v King UKEAT/0106/15/LA 21 July 2015** the EAT chaired by Langstaff P put the matter this way (in paragraphs 12-15):

“12. We would emphasise that this is a demanding test. It has been held (see, for instance, the case of **BG plc v O’Brien [2001] IRLR 496** at paragraph 27) that simply acting in an unreasonable manner is not sufficient. The word qualifying “damage” is “seriously”. This is a word of significant emphasis. The purpose of such a term was identified by Lord Steyn in **Malik v BCCI [1997] UKHL 23** as being:

“... apt to cover the great diversity of situations in which a balance has to be struck between an employer’s interest in managing his business as he sees fit and the employee’s interest in not being unfairly and improperly exploited.”

13. Those last four words are again strong words. Too often we see in this Tribunal a failure to recognise the stringency of the test. The finding of such a breach is inevitably a finding of a breach which is repudiatory: see the analysis of the Appeal Tribunal, presided over by Cox J in **Morrow v Safeway Stores [2002] IRLR 9**.

14. The test of what is repudiatory in contract has been expressed in different words at different times. They are, however, to the same effect. In **Woods v W M Car Services (Peterborough) Ltd [1981] IRLR 347** it was “conduct with which an employee could not be expected to put up”. In the more modern formulation, adopted in **Tullett Prebon plc v BGC Brokers LP & Ors [2011] IRLR 420**, is that the employer (in that case, but the same applies to an employee) must demonstrate objectively by its behaviour that it is abandoning and altogether refusing to perform the contract. These again are words which indicate the strength of the term.

15. Despite the stringency of the test, it is nonetheless well accepted that certain behaviours on the part of employers will amount to such a breach. Thus in **Bournemouth University Higher Education Corporation v Buckland [2010] ICR 908 CA Sedley LJ** observed that a failure to pay the agreed amount of wage on time would almost always be a repudiatory breach. So too will a reduction in status without reasonable or proper cause (see **Hilton v Shiner Builders Merchants [2001] IRLR 727**). Similarly the humiliation of an employee by or on behalf of the employer, if that is what is factually identified, is not only usually but perhaps almost always a repudiatory breach.”

17. In some cases the breach of trust and confidence may be established by a succession of events culminating in the “last straw” which triggers the resignation. In such cases the decision of the Court of Appeal in **London Borough of Waltham Forest v Omilaju [2005] IRLR 35** demonstrates that the last straw itself need not be a repudiatory breach as long as it adds something to what has gone before, so that when viewed cumulatively a repudiatory breach of contract is established. However, the last straw cannot be an entirely innocuous act or be something which is utterly trivial. The Court of Appeal recently reaffirmed these principles in **Kaur v Leeds Teaching Hospitals NHS Trust [2018] EWCA Civ 978**.

18. There is also an implied term that an employer will reasonably and promptly give employees an opportunity to seek redress for any grievance: **Goold WA (Pearmak) Ltd v McConnell [1995] IRLR 516**. Alternatively failure to handle a grievance properly might amount to breach of the implied term as to trust and confidence if serious enough to be repudiatory.

19. In the case of **Assamoi v Spirit Pub Company (Services) Limited (formerly known as Punch Pub Co Limited) UKEAT/0050/11/LA** the Employment Appeal Tribunal confirmed that (paragraph 36):

“There is a fundamental distinction which, it is perhaps more easy to recognise than to define, between there being a fundamental breach of contract that an apology by an employer cannot cure and there being action by an employer that can prevent a breach of contract taking place.”

20. In the case of **Blackburn v Aldi Stores Limited [2013] IRLR 846** the Employment Appeal Tribunal determined that a failure to adhere to a grievance procedure was capable of amounting to or contributing to a fundamental breach. However, not every failure to adhere to such procedure will constitute a fundamental breach. The Employment Appeal Tribunal was clear that this is a question for the Tribunal to assess in each individual case.

Relevant Findings of Fact

21. The claimant was a support worker for the respondent who provided living support services for vulnerable adults. The claimant's role was to work at a property providing daily support to vulnerable adults.

22. The claimant's base was Norma Road in Waterloo, Liverpool. The claimant had performed this role since 16 November 2009, having previously TUPE transferred from First Initiatives Limited, and at the time of her resignation was employed by the respondent.

23. The claimant and her colleagues worked alone at Norma Road on each shift and were line managed by team leader Margaret Morgan. Margaret Morgan was responsible for line managing teams at three sites. Adele Hollywood, an Area Manager, was Margaret Morgan's line manager.

24. The respondent operated various policies which supplemented the contract of employment including a disciplinary and grievance procedure and a staff transfer policy.

Transfer of staff

25. On 4 April 2019, Margaret Morgan visited Norma Road. She was in accompaniment with a new starter, Lee Scott, and spoke to the claimant and her colleagues, Felicity Pilson and Sarah McDonald.

26. Margaret Morgan told the group that due to ongoing strike situations, it had been decided that a striking member of staff would be swapped with a non striking member of staff from another property. The claimant immediately informed Margaret Morgan that she would not be prepared to work from the Silvester Street site and that she would leave first. Felicity Pilson asked Margaret Morgan if it was punishment for staff taking strike action. Margaret Morgan informed her that that was not the case.

27. During the subsequent discussion, Margaret Morgan asked the staff if they were listening to her. Felicity Pilson insisted that they were listening to Margaret

Morgan and repeated what had been discussed. Margaret Morgan felt that she was not being listened to, and left the room with Lee Scott.

28. On 5 April 2019 the claimant emailed Kirsty Muldoon, the Director of People and Organisational Development. The claimant complained that she had been told in an inappropriate manner that strikers were to be moved to other houses and would be replaced by non strikers. The claimant sought confirmation as to the criteria that would be used in selection. On 9 April 2019 the claimant chased a response.

29. On the same day, Kirsty Muldoon responded and confirmed she was supportive of the move where the actions of staff put the continuity of quality of service at risk, which included taking part in strike action. It was explained to the claimant that the transfer was to protect her right to take lawful strike action and minimise the disruption to the service user. The claimant was referred to the staff transfer policy for information about the criteria.

30. In light of the claimant's concern, Adele Hollywood arranged to speak with the claimant to discuss the matter. This discussion was due to take place on 15 April 2019, but Adele Hollywood was ill and unable to talk to the claimant.

31. On 16 April 2019, because the claimant had been unable to discuss the matter with Adele Hollywood, she submitted a grievance to Andrea Woodward of the HR Department. The claimant complained that there had been unfair selection of staff in other houses and she was awaiting unfair selection at Norma Road. It was the claimant's view that the respondent had resorted to bullying tactics to break the strike.

Graffiti on Garden Table

32. On 17 April 2019 the claimant had worked at Norma Road overnight. On the morning of 18 April 2019, she handed over the shift to her colleague, Joan Shannon. The claimant left the property to attend a funeral in Yorkshire. Joan Shannon was late for the start of the shift because she had been working at another property and had had to wait for Margaret Morgan to attend to take over from her.

33. At 10.18am Joan Shannon sent a WhatsApp message to Felicity Pilson asking if she knew anything about the words "AFG scum" being written on the garden table. At 12.36pm Joan Shannon messaged Felicity Pilson stating that she could not ring Angela because she was at a funeral, she "knew it wasn't Felicity" and that Joan Shannon was not putting up with it off "her".

34. At 12.14pm Margaret Morgan sent a message with a picture of the writing to the group WhatsApp of which the claimant, Felicity Pilson and Joan Shannon were all members, asking if somebody could shed some light on the comment left on the table in the garden. The claimant responded at 1.06pm asking Margaret Morgan to check with a tenant. The claimant also asked who had found the message. Joan Shannon responded saying she had found it when she went for a cigarette and that she had already spoken to the tenants. The claimant responded saying, "so the allegation is that it is staff", and denied that it was her. Joan Shannon responded to the claimant saying that Margaret Morgan had gone out there and that she "could not

give a fuck”, to which the claimant responded saying that she “could not give a fuck” either. Joan Shannon then left the conversation.

35. Two minutes later Joan Shannon sent a private WhatsApp message to the claimant asking if the claimant had a problem. The claimant responded saying that she was annoyed that Joan Shannon had pointed the writing out to Margaret Morgan and that she was getting such texts whilst she was at a funeral. Joan Shannon responded saying that she had not texted and that she had not run to Margaret and that she could hold her own and called the claimant a “cheeky bitch”. The claimant then told Joan Shannon to “fuck off”. The claimant then sent a longer message accusing Joan Shannon of setting her up with Margaret.

36. On 20 April 2019, Joan Shannon went off sick. The claimant returned to work for her next shift on 24 April 2019 and completed a sleepover. The claimant was due to end her day shift at 3.00pm on 25 April 2019. Prior to her return to work, the claimant had sent text messages to Margaret Morgan asking about the message on the table, asking if it was an allegation against her (the claimant) and said that Margaret Morgan was messing with her mental health.

Removal from Norma Road

37. At 2.45pm, the claimant was told by team leaders Danny McGovern and Danielle Buckley that an allegation had been made against her and she was being moved to Silvester Street. The claimant was given the opportunity to collect her personal items and remove her name from a tenant’s bank card. At 4.46pm on the same day, the claimant emailed Helen Mullarkey in HR to complain about her move to Silvester Street. The claimant alleged that the move was a breach of the implied term of trust and confidence and was as a result of the issues she had with Margaret Morgan from 4 April 2019. The claimant included a copy of the Whatsapp conversations from 18 April 2019.

38. On 26 April 2019, the claimant received a letter from Michelle McCusker saying that she had been subject to allegations of “unacceptable behaviour and conduct”. In that letter it was confirmed that the claimant would move from Norma Road to Silvester Street.

39. On 26 April 2019 the claimant was signed off sick with stress and anxiety. Later that day the claimant sent another email to Helen Mullarkey expressing concern that she had not responded to her request for details of the allegations against her. The claimant alleged that she had been subject to appalling treatment and had been bullied. At 3.03pm, Helen Mullarkey responded stating that the notification letter was all the information that was available at that time, and that the investigation officer, Michelle McCusker, would arrange a meeting. It was also confirmed that Elaine Denby would deal with the grievance. The claimant responded saying that it would assist her recovery if the allegation against her could be revealed sooner rather than later.

40. On 28 April 2019 the claimant emailed Helen Mullarkey and said that she had sought advice and that it was a breach of her human rights to withhold details of the allegation.

41. On 29 April 2019 the claimant sent another email expressing upset that she had not received details of the allegation and that she was going to talk to ACAS and move forward to an Employment Tribunal. The claimant complained that her new rota was oppressive. The claimant sent details of the new rota which showed her working three weekends out of four. The claimant's complaint was that her husband worked Monday to Friday and this was an unfair and bullying rota. Later that day Helen Mullarkey responded saying that the claimant had been given all the necessary detail about the allegation and the rest would be discussed with her at the investigation meeting. It was intimated that the investigation meeting would be held later that week. The claimant stated that she would attend a meeting and asked if she could be interviewed at home.

42. On 30 April 2019 the claimant emailed Helen Mullarkey to say she had no confidence in the internal process, it was a futile step and she would not achieve justice. The claimant believed she was being mistreated as a trade union member and asserted that she was being subject to constructive dismissal. Helen Mullarkey responded stating she had spoken to her new line manager in order to sort out the shifts, and he would call to advise if it was possible to amend the rota. The claimant responded saying she was not prepared to work at Silvester Street. Later that day the claimant sent an email saying that she had lost all trust in the organisation.

43. On 1 May 2019 the claimant emailed Michelle McCusker stating that she still had no details of the allegations and felt she was being moved as a striking staff member and subject to an oppressive rota. She again asked for details of the allegation. In response, Michelle McCusker said that the claimant was being investigated for unacceptable behaviour and conduct and that added to that would be verbal and written communications included in WhatsApp messages.

Disciplinary Investigation

44. On or around 25 April 2019, Margaret Morgan approached Adele Hollywood with the group WhatsApp message from 18 April 2019 Unison group WhatsApp messages supplied by a colleague who had complained to Margaret Morgan that the claimant had made derogatory comments about that colleague in the Unison group WhatsApp. Margaret Morgan also informed Adele Hollywood of the content of the meeting on 4 April 2019. It was agreed that the matter would be referred to Andrea Woodward in HR and that an investigation into the claimant's behaviour was warranted.

45. Michelle McCusker was appointed to investigate the claimant's behaviour and originally arranged to meet with the claimant on 8 May 2019 but subsequently changed that date to 15 May 2019. At the outset of the investigation, Michelle McCusker was provided with the group WhatsApp message from 18 April 2019, the WhatsApp messages between Joan Shannon and the claimant of 18 April 2019 and the Unison group WhatsApp messages.

46. On 29 April 2019, Michelle McCusker met with Margaret Morgan.

47. Michelle McCusker also met with Adele Hollywood who explained the rationale for moving a striker and non striker into different houses to cover the shifts affected by the strikes.

48. Michelle McCusker subsequently met with the claimant on 15 May 2019 after the claimant had attended her grievance meeting and outlined the allegations to her. At that meeting, the claimant asked Michelle McCusker to speak to Felicity Pilson and denied raising her voice in the meeting of 4 April. The claimant admitted that swearing in the group WhatsApp was inappropriate but asked that it be seen in context and that she had been sworn at first. There was a discussion about the Unison WhatsApp messages, and when the claimant asked for copies she was told they would not be provided as the matter was not being taken further.

49. Michelle McCusker spoke with Felicity Pilson on 16 May 2019.

50. On 18 May 2019, the claimant sent Michelle McCusker an email setting out what had been discussed at their meeting. The claimant asked to be told as soon as possible if the matter was going to proceed to a disciplinary as a result of her ongoing anxiety. She asked that she be reinstated to Norma Road and that there be disciplinary action against Margaret Morgan and Joan Shannon. She also asked that they both be moved to Silvester Street.

51. On 20 May 2019 Michelle McCusker responded and accepted it as a true record of what they spoke about and advised the claimant that she had finished typing up her report and was sending it to HR and hoped that it would be sent out to the claimant fairly quickly.

52. On 23 May 2019 Michelle McCusker provided an outcome letter stating that there was insufficient evidence of unacceptable behaviour and conduct but that there had been inappropriate and unprofessional communication via social media and a recommendation that the claimant speak with her line manager and go through the social media policy. The claimant was informed that no formal action would be taken and she would return to Norma Road.

Grievance Procedure

53. On 15 May 2019 the claimant met with Elaine Denby to discuss her grievance. This meeting took place before the disciplinary investigation meeting and at this stage the claimant still did not know the details of the allegations against her. At the conclusion of the grievance meeting, the claimant asked that she be returned to work at Norma Road, receive a genuine apology from Margaret Morgan and have any pay rectified.

54. On 16 May 2019, having attended the disciplinary investigation meeting, the claimant sent an email to Elaine Denby updating her as to the content of that meeting.

55. On 20 May 2019, the claimant emailed Andrea Woodward and informed her that she had been signed off sick until 30 May 2019 and would be going on holiday from 1 June 2019 to 16 June 2019. The claimant asked if she could have an outcome of both the grievance and the disciplinary investigation prior to her holiday.

56. On 24 May 2019 Elaine Denby spoke to Margaret Morgan and Sarah McDonald.

57. On 31 May 2019, the claimant emailed HR and asked that the grievance decision be emailed to her as if it did not arrive on that day she would only be able to

access it via her email as she would be on a cruise. The claimant subsequently received a letter dated 30 May 2019 from Elaine Denby in which she was informed that her grievance was unsubstantiated. The claimant was advised that she could appeal the outcome within five days of receipt of the letter.

58. At 2.10am on 1 June 2019, the claimant submitted her appeal disputing the outcome of the grievance.

59. On 7 June 2019 a letter was posted to the claimant advising her of an appeal meeting on 18 June 2019. The claimant responded by email on 17 June 2019, having returned from holiday in the early hours, and stated it was too late for her to arrange representation and asked if she could deal with it via written submissions.

60. At 4.16am on 18 June 2019 the claimant emailed written submissions of her appeal. The claimant disputed the finding that the transfer was not punishment for striking as no strike had taken place. The claimant disputed that she had complained about the accusation that she had written graffiti on the garden table. The claimant disputed that nobody could corroborate her allegation that Margaret Morgan had shouted on 4 April 2019. The claimant confirmed that she had not complained about underpayments in her grievance.

Claimant's Resignation

61. At 1.11pm on 23 May 2019, the claimant resigned from her role with immediate effect. The claimant informed the respondent that she needed to do so for the sake of her mental wellbeing, that she had lost trust and confidence in the organisation given the maintenance of her move to Silvester Street and that she needed to draw a line under the matter for the sake of her wellbeing.

62. The outcome of the disciplinary investigation was sent to the claimant after receipt of her resignation.

63. On 24 May 2019 Andrea Woodward asked the claimant to reconsider her resignation as she was a valued member of the respondent's company. She asked the claimant to consider allowing the grievance process to take its course before making her decision.

64. On 28 May 2019 the claimant responded saying that she had considered the position and that it would be unwise for her to return to work with the respondent. The claimant reiterated that she felt that she was in a situation that had been orchestrated against her, that she had been escorted from work as a result of a ridiculous allegation and that bullying and collusion had been allowed to flourish.

65. On 3 June 2019 the claimant was informed that Andrea Roach had been appointed as the grievance appeal handler and Andrea Woodward checked again whether the claimant was reconsidering her resignation.

66. On 8 June 2019 the claimant asked Andrea Woodward to process her resignation.

Grievance Appeal

67. Andrea Roach and her colleague Viv Harflett spoke with Felicity Pilson, Adele Hollywood, Margaret Morgan, Joe McCourt and Sarah McDonald.

68. On 24 July 2019 Andrea Roach wrote to the claimant with the outcome of her appeal. The claimant's appeal was not upheld.

Submissions

Respondent's Submissions

69. The claimant acknowledges that at the time she was moved from Norma Road, Joan Shannon was off sick. However, the claimant gave evidence under cross examination that Joan Shannon's car was seen at Norma Road on 6 and 7 May 2019, although it is the respondent's case that Joan Shannon did not return to work at Norma Road until August 2019. When Margaret Morgan was asked whether Joan Shannon worked on 6 and 7 May she said "yes". Adele Hollywood relied on the official sickness record which suggested that Joan Shannon remained off until August. The Tribunal was reminded of the case of **Bournemouth University**, where the respondent is not able to cure a breach after the event.

70. The Tribunal was taken to page 75 of the bundle which sets out the List of Issues agreed between the parties:

- (a) It was submitted that the claimant was made more of the meeting on 4 April with hindsight and time for reflection. The respondent submits that this was a team leader delivering news with which the claimant did not agree and that the claimant's allegations against her team leader are not corroborated.
- (b) The claimant accepted in evidence that she was not criticising Adele Hollywood for not speaking to her on 15 April when she was ill. It is submitted that it was appropriate that Adele Hollywood did not speak to the claimant after her grievance had been submitted because it was being dealt with by another manager.
- (c) The respondent states that the message sent to the claimant on 18 April was an open question and did not allege that the claimant had produced the graffiti. The respondent submits that although the claimant was at a funeral, Margaret Morgan had to carry on managing the Home. The respondent submits that the reality was that there was a problem between the claimant and Joan Shannon but there is no evidence of a conspiracy or a breach of contract.
- (d) It is submitted it would have been inappropriate for Margaret Morgan to contact the claimant after the instigation of a disciplinary procedure and a grievance procedure.
- (e) The respondent submits that there is no evidence that the claimant was escorted out unceremoniously and in fact was given an opportunity to collect her personal things and remove her name from a tenant's bank card. The respondent submits that the claimant was unable to work at any other site other than Silvester Street and that she was not being treated any differently to Joan Shannon who was also subject to scrutiny.

It is the respondent's case that there is no duty upon an employer to give full details of allegations until an investigation has been completed.

- (f) The respondent disputes the rota was oppressive and that the claimant was slotted into gaps in order to achieve her full-time hours. The claimant does not allege that the manager at Silvester Street was involved in any conspiracy.
- (g) It is submitted that the claimant was investigated because of her behaviour on 4 April and the various WhatsApp messages seen by the respondent. The respondent submits it had a duty to investigate the matter properly and it cannot be held that it was a breach to investigate allegations.
- (h) It is submitted that the grievance did reasonably investigate the claimant's complaints and any gaps were rectified on appeal. It was submitted that the claimant is holding the respondent to too high standard.
- (i) The respondent submits the fact that no statements were produced during the grievance does not make the investigation inadequate. It is the respondent's case that the grievance was dealt with post resignation.

71. The respondent submits that each allegation does not stand up as a breach on their own or together, and the claimant was not entitled to resign.

72. In the alternative, the respondent submits that if the Tribunal finds that they did amount to a breach on their own or together, the claimant waited too long to resign in response to the earlier breaches and then did not wait long enough until she had the outcome of the grievance and the investigation before she resigned. The respondent submits that the claimant admitted in evidence that during the grievance meeting there was still something that could be done to get her back to work. It is the respondent's overall submission that nothing happened to the claimant up to 23 May that would have justified resignation. The respondent submits the claimant tried to run her claim on the basis of her trade union status and when this did not work she has tried to make it fit to constructive unfair dismissal and has failed.

Claimant's Submissions

73. The claimant submits that she resigned before the outcome of the grievance or the disciplinary after four weeks of extreme stress. The claimant believed she had no position but to resign. It is the claimant's view that Joan Shannon was not subject to comparable treatment and had been allowed to return to work at Norma Road. The claimant alleges that she had seen Joan Shannon's car outside Norma Road in May.

74. It is the claimant's submission that Margaret Morgan and Joan Shannon did conspire to make allegations against her, as the WhatsApp messages reveal that they were together when the graffiti was found. The claimant submits that Michelle McCusker would have recommended further investigation against others had she not been leaving the organisation. The claimant also submits that Elaine Denby

attempted to circumvent the grievance procedure by allowing her less time to appeal the grievance outcome.

75. The claimant submits that her instincts on 23 May when she resigned were correct. She submitted that had she been exonerated she would have stayed.

Discussion and Conclusions

76. It is the claimant's claim that there has been a breach of the implied term of trust and confidence.

Was there a fundamental breach of the claimant's contract?

77. The claimant alleges that there were nine breaches:

(a) Her team leader, Margaret Morgan, shouted at her and her colleague in an unprovoked rage on 4 April 2019.

78. Margaret Morgan, the claimant and Felicity Pilson all describe the meeting between them on 4 April 2019 as "tense". It is also agreed between the three that Margaret Morgan accused the claimant and Felicity Pilson of not listening to her. However, the claimant and Felicity Pilson allege that Margaret Morgan shouted at them and the claimant goes on to say that it was an "unprovoked rage".

79. When Margaret Morgan's evidence was tested on this point by the claimant, Margaret Morgan admitted the conversation was "heated" and "emotional". Under cross examination, Felicity Pilson said that Margaret Morgan raised her voice, was aggressive and slammed her laptop down. The claimant maintained that Margaret Morgan shouted but denied that she had called Margaret Morgan a liar and insisted that it was an "unprovoked rage".

80. All witnesses agree that the atmosphere was tense and that there was confrontation between the claimant and Margaret Morgan. It is likely that Margaret Morgan raised her voice in response to a challenge to the claimant over the transfer of staff, which the claimant readily admits she made. The matter was a confrontational situation. However, it is clear that the raising of her voice would not have been unprovoked given the claimant does admit to challenging Margaret Morgan over the move. Felicity Pilson described the previous working relationship between the claimant and Margaret Morgan as "good",

(b) Adele Hollywood arranged to speak with the claimant informally on 15 April 2019 to discuss concerns the claimant had raised with Kirsty Muldoon but the call did not take place.

81. The claimant and Adele Hollywood agree in evidence that the reason the meeting between the claimant and Adele Hollywood was cancelled on 15 April 2019 was because of Adele Hollywood's illness. The claimant did not dispute this in her evidence in chief and did not challenge Adele Hollywood on this under cross examination.

82. The claimant admitted under cross examination that she was not critical of Adele Hollywood for not turning up to the meeting and because she had not been given the opportunity to discuss the matter, it was necessary to submit the

grievance. The claimant also agreed that it was ok for both Adele Hollywood and Margaret Morgan to take a step back from the situation once the grievance had been submitted.

(c) The claimant received a WhatsApp group message from her team leader relating to a message left on the table at Norma Street whilst on the way to a funeral of a friend's son which the claimant says were false allegations against her.

83. The message sent by Margaret Morgan was, by her own admission, a query as to who had written the graffiti on the garden table. Margaret Morgan gave evidence that she did not expect the claimant to answer the message in light of her attendance at a funeral. The claimant gave evidence that she could not ignore such a message.

84. Under cross examination the claimant admitted it was not the message itself that caused her offence but the idea of a conspiracy between Joan Shannon and Margaret Morgan. The claimant said that this became apparent when Joan Shannon immediately informed the claimant that the tenants had nothing to do with it. The claimant also admitted that the conspiracy theory took shape as the conversation went on between her and Joan Shannon, and she agreed under cross examination that it was Joan Shannon that was lying and making the effort to implicate the claimant and not Margaret Morgan.

85. Felicity Pilson was of the view that the message sent by Margaret Morgan was an open question, and I am in agreement that it was a question rather than an allegation. The claimant and Joan Shannon clearly had an issue with one another during the group WhatsApp and the subsequent WhatsApp message between them, but this cannot be attributed to Margaret Morgan.

(d) The claimant did not receive any contact from her team leader to apologise or mediate following the WhatsApp group message.

86. The claimant sent a text message to Margaret Morgan following the group WhatsApp but did not receive a response. Margaret Morgan explained that by this time the matter had been referred to HR and she did not think it appropriate to do so.

87. Given the ongoing relationship between the claimant and Margaret Morgan, it is incumbent on an employer to respond to an employee query at the very least with a benign explanation so that the employee is aware that they are not being ignored.

(e) On 25 April 2019 the claimant was informed by two team leaders visiting Norma Road that an allegation had been made against her and that she was being transferred from Norma Road to Silvester Street on a permanent basis, and was told to take her possessions with her. The claimant was advised days later that the allegation was unacceptable behaviour and conduct.

88. The claimant was aggrieved that she was moved but Joan Shannon was not. The claimant accepted that her managers were entitled to take matters to HR and she was subject to an investigation. It is however the claimant's case that not knowing the detail of the allegations caused her anxiety.

89. Adele Hollywood admitted that there were more issues with the claimant than with Joan Shannon. Adele Hollywood maintained that she made the decision to move both on 25 April but only the claimant was in work and could be moved. Adele Hollywood also outlined the reasons why the only sensible operational move for the claimant was to Silvester Street. Under cross examination Adele Hollywood admitted that she did not seek to explain to the claimant why she was being moved or the reasons she was being moved to Silvester Street, nor ensure that those tasked with moving the claimant were given that information. Adele Hollywood was of the view that because of the grievance and the investigation she could not speak with the claimant.

90. Adele Hollywood was clear that the claimant's behaviour had caused concern on three separate occasions, including the Unison WhatsApp messages, and that she was particularly concerned that the claimant used offensive language in a work forum. The claimant required comparable treatment with Joan Shannon. It was Adele Hollywood's evidence that Joan Shannon had been involved in a one-off incident and was advised about her social media use and subject to supervision.

91. I accept that there were operational reasons why the claimant could not move anywhere other than Silvester Street. The move of Joan Shannon never took place, because she remained off sick until, August 2019.

(f) The claimant was given an oppressive rota for Silvester Street.

92. Whilst the claimant was off sick she received a rota for the latter part of April and May 2019 in which she was asked to work three weekends out of four. The claimant, whose husband works Monday to Friday, felt this was oppressive. It was Margaret Morgan's evidence that the claimant was slotted into gaps so her hours would show on a rota and she would receive sick pay. The claimant used the rota as an example of mistreatment for which she would be entitled to claim constructive dismissal in an email to Helen Mullarkey on 30 April 2019. In response to that email, Helen Mullarkey advised the claimant that she would ask the manager at Silvester Street to get in touch to align her shifts similar to those she had performed at Norma Road. The claimant states she never received that call and believed it was the intention of the respondent to push her out of employment.

93. I am in agreement that the rota imposed on the claimant compared to her previous rota was oppressive. There was no discussion with the claimant about this rota nor any subsequent attempt to discuss the rota with the claimant prior to her resignation. However, Margaret Morgan gave a reasonable explanation that it was necessary to insert the claimant into a rota so she could claim sick pay. It is unfortunate this explanation was not provided to the claimant when she raised the query.

(g) Following the conclusion of the respondent's investigation the claimant was advised she could return to Norma Road. During the investigation meeting, the claimant was shown copies of WhatsApp group messages that she had sent after she was removed from post. There was no other social media evidence to support the allegations. She was not exonerated and was advised to undertake social media training. No mediation was offered between the claimant and her team leader and the claimant was to return to

work with her team leader and the staff member who had conspired against her.

94. The disciplinary investigation outcome was sent to the claimant after she had submitted her resignation. Notwithstanding this, there is evidence that the respondent had taken the decision to investigate the claimant because: there was a complaint of insubordination on 4 April, the claimant's reaction to the group message on 18 April, the claimant's conversation with Joan Shannon in a private message conversation on 18 April and the content of the Unison WhatsApp messages. It is therefore wrong of the claimant to say that there was only one group of WhatsApp messages, that she submitted after her removal, that were relied upon by the respondent during the disciplinary investigation meeting.

95. The claimant admitted under cross examination that her conversations during the WhatsApp groups were inappropriate, but it was an emotional day. The claimant confirmed that she had no complaint about the conclusions drawn by Michelle McCusker at the end of the investigation. The claimant also confirmed that the disciplinary report and investigation was not the reason that she resigned.

96. The claimant was asked to reconsider her resignation by Helen Mullarkey on 24 May 2019. The claimant was clear that she could not do this because she would have to return to Norma Road with Margaret Morgan and Joan Shannon.

97. It is understandable that the claimant would have concern in this regard as it was her view that there was a conspiracy and she had been set up. The claimant said that the situation had been orchestrated against her and she would be continually on her guard waiting for it to happen again.

98. However, by the time the claimant knew that she was expected to return to Norma Road and work with Margaret Morgan and Joan Shannon, she had resigned. The reason for resignation was, in her view, because she had been set up. The claimant had formed this view when informed of the detail of the allegations at the disciplinary investigation meeting on 15 May 2019.

(h) The respondent failed to adequately investigate the allegations made by the claimant in her grievance;

(i) No witness statements were produced to the claimant as part of the grievance process and the witnesses were not given the opportunity to review and sign the statements they made.

99. The grievance outcome was not conveyed to the claimant until 31 May 2019. Any alleged failings in the grievance investigation after 23 May cannot have contributed to the cause of the claimant's resignation.

100. Before 23 May, the claimant had met with Elaine Denby on 15 May and had agreed at the end of that meeting that should she receive a genuine apology from Margaret Morgan and be allowed to return to work at Norma Road the matter would be resolved. This meeting took place before the disciplinary investigation meeting and before the claimant knew the details of the allegations against her.

101. The claimant emailed Elaine Denby on 16 May 2019 to update her about the disciplinary investigation meeting and asked Elaine Denby to conduct further

interviews as part of her grievance. The 16 May was a Thursday, and by the following Friday, 24 May, Elaine Denby had spoken with Margaret Morgan and Sarah McDonald. The claimant had asked Elaine Denby to speak to people, and it is not unreasonable to expect the respondent to arrange these discussions in the following week.

102. Instead, the claimant's complaint seems to be that after receipt of the grievance outcome on 31 May 2019 she was upset that it did not investigate the matter as she had requested. The appeal conducted by Andrea Roach sought to speak to everybody the claimant had named and review the grievance outcome. It was not substantiated.

103. I understood the claimant's case to be that it was the cumulative effect of the nine alleged breaches that led to her resignation because in the List of Issues it is stated that the claimant "*resigned because of spurious allegations and reckless actions taken against her which led to an irreparable breakdown of trust and confidence in the respondent.*"

104. In addition, on questioning the claimant she was clear that the incident on 4 April 2019 and the WhatsApp messages on 18 April 2019 did not, alone, cause her to resign. Of the move to Silvester Street on 25 April and the notification of an allegation, the claimant gave evidence that it was not knowing what the allegation was, fearing that it was some form of safeguarding issue, that caused the most anxiety, but did not cause her resignation.

105. Therefore, I must determine whether the nine alleged breaches cumulatively amount to a fundamental breach of the implied term of trust and confidence.

106. The claimant resigned after she learned that the respondent was concerned about her behaviour on 4 April, 18 April and in the Unison WhatsApp messages. Subjectively, the claimant viewed this as a conspiracy by Margaret Morgan and Joan Shannon and an attempt to frame her. However, the claimant was not subject to a discipline investigation for the alleged graffiti – the incident she says was created to get her into trouble.

107. The claimant chose to resign before she knew the outcome of the disciplinary investigation in which she was exonerated of unacceptable behaviour and conduct. At the time of the claimant's resignation she also did not know she would be required to return to Norma Road with Margaret Morgan and Joan Shannon. The claimant also did not wait until the outcome of the grievance was known and the outcome, therefore, had no bearing on her decision to resign.

108. The point of no return appears to be when the claimant went into the disciplinary investigation meeting on 15 May and learned of the allegations. The claimant admitted under cross examination that had the grievance concluded that she did not need to work with Margaret Morgan and Joan Shannon again she would have gone back to work. She knew that the grievance handler had to meet with other witnesses and had no real expectation of a particular date when she would receive the grievance outcome. But the grievance meeting preceded the disciplinary investigation meeting and the claimant's view of things changed after the latter.

109. The respondent had three sets of WhatsApp messages, either set up by the respondent or connected to the respondent, in which the claimant had become hostile, used swear words and made derogatory comments about a co-worker. There was also a complaint from her line manager that she had displayed challenging behaviour in a team meeting.

110. The claimant was a support worker for vulnerable adults. Adele Hollywood was clear that she was concerned that this behaviour could manifest towards the service users whilst the claimant was at work. Therefore, it was reasonable for the respondent to instigate a disciplinary investigation. I do not agree with the claimant that she was the subject of a conspiracy in order to manage her out of her role.

111. The nine alleged breaches do not cumulatively amount to a fundamental breach of the implied term of trust and confidence. The respondent acted in accordance with the claimant's contract. Any failure to adequately communicate with the claimant was at worst unreasonable, but cannot be said to contribute to a fundamental breach.

112. For this reason, the claimant's claim of constructive unfair dismissal fails.

Employment Judge Ainscough

Date: 18 August 2020

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON
28 August 2020

FOR THE TRIBUNAL OFFICE

Public access to employment tribunal decisions

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.