Case Number: 3324760/2019

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Miss A Knights	v	Wrights of Welwyn Garden City Limited

Heard at: Watford **On**: 6 and 7 August 2020

Before: Employment Judge Hyams, sitting alone

Appearances:

For the claimant: In person
For the respondent: Mr H Sood, of counsel

JUDGMENT

1. The claimant's claim of unfair dismissal succeeds. She was dismissed within the meaning of section 95(1)(c) of the Employment Rights Act 1996 ("ERA 1996"), and that dismissal was unfair.

2. The claimant's conduct was such as to justify a reduction in the financial compensation payable to her under sections 119 and 123 of that Act. The awards made under those sections are reduced by 25%.

3. The basic award within the meaning of section 119 to which the claimant is entitled is £1,968.75.

4. The compensatory award to which the claimant is £5,739.81, from which will need to be deducted income tax and national insurance contributions under regulations 37 and 37A of the Income Tax (Pay As You Earn) Regulations 2003, SI 2003/2682.

REASONS

Introduction

(1) The claims

1 In these proceedings, the claimant originally claimed that she had been dismissed constructively, i.e. within the meaning of section 95(1)(c) of the Employment Rights Act 1996 ("ERA 1996"), that that dismissal was unfair, and that she was owed wages in the form of an unpaid commission payment.

2 At the start of the hearing before me, on 6 August 2020, the claimant said that she had been paid all but £30 of the outstanding commission owed to her, and that she was not pressing that claim. She said that she was withdrawing it and accepted that it would as a result be dismissed by me on its withdrawal.

(2) The issues

3 The claimant was employed by the respondent from 10 February 2014 to 11 October 2019, when her resignation on notice took effect. By the time of the claimant's resignation, she was employed as the Lettings Manager at the respondent's branch at Welwyn Garden City.

4 The factual situation was in large part not disputed, although during the course of the hearing before me on 6 August 2020, there was some cross-examination and several material matters were clarified by the oral evidence of the parties. By the end of the first day of the hearing, 6 August 2020, the issues which I was required to determine were these:

4.1 Was the claimant dismissed within the meaning of section 95(1)(c) of the ERA 1996, or did she simply resign? If she was so dismissed, then the respondent accepted that that dismissal was unfair. Accordingly, the only other question was this:

4.2 If the claim of unfair dismissal succeeded, what remedy should the claimant receive? In this regard, the claimant's losses were limited since she had, on 10 February 2020, obtained employment in which she earned as much as she had earned with the respondent. However, on the facts the question arose whether the claimant's conduct which led to the conduct of the respondent in response to which the claimant resigned was such as to justify a reduction in the amount of the basic award payable under section 119 of the ERA 1996 and/or the amount of the compensatory award payable under section 123 of that Act.

5 The provision which requires the reduction in the basic award is section 122(2), which is in these terms:

> "Where the tribunal considers that any conduct of the complainant before the dismissal (or, where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the tribunal shall reduce or further reduce that amount accordingly."

6 The provision which requires a reduction in the compensatory award is section 123(6), which is in these terms:

> "Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding."

The evidence

7 A bundle containing 120 pages of documents (ignoring the witness statements at pages 121-127) was put before me. I heard oral evidence from the claimant on her own behalf and, on behalf of the respondent, from

7.1 Ms Hayley Andrews, the Lettings Manager at the respondent's Hatfield branch,

7.2 Mr Salvatore Tona, who at the time of the claimant's resignation was the Sales Manager at the respondent's Welwyn Garden City branch; and

7.3 Mr Melvin Wright, a director of the respondent.

8 Having heard that oral evidence and read the material documents in the bundle, I made the following findings of fact.

The facts

The situation which gave rise to the claimant's resignation

9 The claimant and Mr Tona were the most senior employees of the respondent at the respondent's Welwyn Garden City ("WGC") branch. The respondent is an estate agency. Mr Tona was the sales manager. There was no branch manager at that branch.

10 In January 2019, Mr Melvin Wright discovered that the WGC branch of the respondent had for some years been operating on a skeleton staff at Christmas and permitting the staff who took time off work during the Christmas period to do

so without that time being counted as annual leave. That was not the practice at the other two offices of the respondent, and Mr Wright had a discussion about it with the claimant and Mr Tona at a meeting during that month (January 2019) of all of the respondent's managers on the level of the claimant and Mr Tona upwards. The upshot of that discussion (during which both the claimant and Mr Tona sought vigorously to retain the benefit for the staff of the office) was that the claimant and Mr Tona were required by the respondent's directors to tell the staff of the WGC office that they all (including the claimant and Mr Tona) could no longer take additional paid holiday at Christmas, as they had been doing for some years past, but would have to take any time off during that period as part of their ordinary annual leave.

11 The other staff of the WGC office were understandably not happy about that. As a result of such unhappiness, it appears, a number of them said that they would not be attending the respondent's Christmas party of 2019. That led to Mr Tona inviting the members of the sales team for a coffee at his expense during working hours, with a view to persuading them to go to the Christmas party.

12 The claimant was not happy about the manner in which she saw Mr Tona as now supporting the directors' decision to refuse to permit the staff of the WGC office to take what was in effect additional paid leave at Christmas time. That led to an altercation between the claimant and Mr Tona on 10 September 2019, after which Mr Tona made a complaint in writing to the directors of the respondent, following which the claimant was given a written warning. The warning was at pages 13-14 (i.e. pages 13-14 of the hearing bundle). It was dated 11 September 2019 and bears repeating in full:

> "Dear Amiee
>
> **RE; WRITTEN WARNING**
>
> I write with reference to a formal written complaint I have received from Salvatore Tona regarding an incident that happened on Tuesday 10th September 2019 in the office.
>
> The details of the incident are as follows.
>
> In the afternoon of the 10th September 2019 Phil Cook asked Salvatore to come out the back of the office for a chat, when Salvatore went out the back you were present along with Karen Sanger and Charlotte Standbrook. Salvatore was shocked to see that the whole lettings team were there and asked if everything was ok, to which you replied "No". Salvatore has informed me that you then interrogated him in front of your department about the company Christmas party, insinuating that that [sic] he knew about the Christmas Party before anyone else and the date. I fail to see why this is relevant and why you would have a problem with that even if it was the case.

You then questioned Salvatore, again in front of your department as to why Salvatore was having a meeting the following day with his team off site regarding the company party. Salvatore was stunned why you felt the need to even involve yourself with this planned sales meeting, however Salvatore explained that he was disappointed that his department had decided not to attend the event. I am aware that the branch in Welwyn has decided to boycott the Christmas Party because of the annual leave arrangements surrounding leave at Christmas. This Issue was discussed in January 2019 at the managers meeting when it was brought to my attention that for a number of years Welwyn had not been adhering to the company policy regarding annual leave at Christmas. My decision made at the meeting for all branches to comply still stands and as your role as letting Manager I expect you to control this and any frustration by other employees is for you to deal with, not encourage them to make a stand.

You then continued to intimidate Salvatore who went on to explain his reasons regarding the party, to which you responded with “well it’s not the Salv Christmas Party”. Salvatore responded with “I know it’s not however I do wish to have my team supporting me in my role”. You then stated that Salvatore was forcing his team to attend and then that reflected badly on the lettings team and they would also have to attend. Salvatore responded with “I do not mind if any of you are not coming, I would just like the support of my team.” You felt this was negative and Salvatore advised that he felt that you not being present as a manager isn’t respectful behaviour.

After some backwards and forwards comments on either side, you then again in front of the lettings department that you should be setting an example too [sic] said “oh fuck off you nonce”. At this point Salvatore walked away.

Amiee I will not tolerate this behaviour from you or towards other members of staff. I am disappointed in the whole office that this situation has occurred and that this all stems from rules over Christmas holidays that you as an office felt did not apply to you, whilst Hatfield and Stevenage have implemented this for nearly 10 years.

Rather than calm the situation with staff members as a manager should, you have engulfed it and dragged your team down with you. I also have to ask myself that whilst you and the whole lettings team were outside the office swearing abuse at the sales manager, clearly no work was being carried out during this lime. I am disappointed that my honeymoon has been interrupted to deal with your actions and conduct over the Christmas party that you have allowed to escalate out of control. I have entrusted you and Salvatore in positions of authority to ensure the smooth running of the branch, I am yet to see this from you. We cannot move the business forward whilst you insist in

working against Salvatore We must all be pulling together and working as a team.

This is not the first time I have had to speak to you concerning your conduct and behaviour, you leave me no choice than to issue you with a written warning regarding your conduct yesterday and verbal abusive comments to Salvatore.

I am out of the country until the end of this month and we shall meet on my return."

13 The claimant told me, and I accepted, that the reference in that letter to a previous incident of being "[spoken] to concerning [her] conduct and behaviour" related to the manner in which the respondent gave effect to the then-recently introduced ban on tenants paying fees to estate agents in order to be able to lease properties via those agents.

14 Having heard from both Mr Tona and the claimant about the circumstances described in the letter from Mr Melvin Wright as set out in paragraph 12 above, I concluded that the description in it of the events to which it related was accurate so far as it went. What it did not do, however, was to refer to the fact that Mr Tona (as the claimant said in her witness statement and as Mr Tona agreed when I asked him about it) had called Mr Phil Cook a "nonce" that day, and that the term had been bandied around the WGC office during the previous two weeks in a jokey fashion, having been introduced after one or more of the staff had heard it used during an episode of the television series entitled "Peaky Blinders", which (it was my understanding) purports to be a depiction of a criminal family which operated in Birmingham in the first part of the twentieth century.

15 The claimant in fact did not know at the time that she used it, that the word "nonce" meant "paedophile".

16 The claimant said that she had used the words "oh fuck off you nonce" in a jokey fashion with a view to ending the conversation which she had been having with Mr Tona, which appeared to be going round in circles with Mr Tona simply repeating himself. Mr Tona's evidence was that she had used those words "in hate".

17 The written warning which I have set out in paragraph 12 above was given to the claimant by Ms Andrews in the manner described by Ms Andrews in the following passage of her witness statement (the accuracy so far as material the claimant accepted):

'5. On the 11 September 2019 I rang AK [i.e. the claimant] around 2pm and advised AK I would be over to see her later around 5pm.

6. I arrived at the Welwyn Garden City office just after 5pm and AK came out and got in my car.

7. I advised AK that I was purely there because Melvin Wright (MW) was abroad on honeymoon and GW [Graham Wright, another director] was at home following a knee op.

8. I informed AK that GW and MW had received a written complaint about AK following an incident that had happen the day before with ST.

9. Having told AK about the complaint I handed AK with an informal written warning, (Copy is enclosed in the bundle at pages 13-14). She opened the letter and read it briefly but not fully. She said to me "I don't know what you want me to say to this, GW & MW just want me out'' I told her that was not the case, she was not wanted out, the purpose of the informal warning was because you cannot speak to other members of staff like that. I pointed out this was an informal warning about her behaviour the previous day and that we would not tolerate this to other members of staff and that was all this was. I advised she should be setting an example to her team and this was not the behaviour we expected from anyone let alone management.

10. She said that the word NONCE is commonly used in the office in a joking way. I told AK that when you use the wording that she did in a heated argument and in an abusive and aggressive way, it is no longer a joke. I informed her that she had instigated an argument with ST [i.e. Mr Tona] and that she had all of her team there as back up and this was unacceptable behaviour. I informed her she should [have] discussed this on a one to one basis with ST in a professional manner without the need for swearing and being aggressive and not the way she had dealt with it. I also pointed out that whilst all this was going on at the back of the office, no one was actually doing any work at this point.'

18 The claimant resigned initially by sending at 18:07 on 12 September 2019 the email at page 16, in which she did not give a reason for resigning, but gave notice of the termination of her contract of employment. She then gave the respondent the letter at page 15, also dated 12 September 2019, which she had signed. Again, she did not give in that letter a reason for her resignation. Rather, the penultimate paragraph of the letter was in these terms:

> "Please except my sincere thanks for all that you have done for me during my time working for you. I am more than happy to assist in the transition period for a seamless transition."

19 The claimant then, at 12:06 on 13 September 2019, sent the email at pages 18-21. It was headed "Re: RESIGNATION / RESPONSE TO WRITTEN WARNING & FORMAL COMPLAINT". It started in this manner:

> "Dear Melvin & Graham,
>
> RE: WRITTEN WARNING - 11/09/2029 [sic]
>
> Your letter has been received, handed to me by Hayley Andrews on 11/09/2019 sometime after 5pm as Melvin you are on your honeymoon and Graham you cannot drive.
>
> The details of the incident are some what incorrect and had this been investigated you would [have] been made aware of this."

20 In the text of the email (the whole of which was relevant, in fact; I draw attention here only to those parts that were of particular importance to my deliberations), the claimant went into detail about the reasons why staff of the WGC office were not intending to attend the respondent's Christmas party. She also wrote this (at page 19):

> 'I will add here that the word NONCE/NONCEY has been freely said over the last 2 weeks by ALL members of staff including Salvatore himself in a joking way and by no way maliciously - this is currently from a show "the peaky blinders" on TV. The whole office can vouch for this .. Salvatore has called myself this and Philip in the last week, we have not taken offence and simply laughed this off.
>
> I tried to make light of the situation by referring to this before Salvatore walked back to the office as the conversation had finished, had I known he was upset I would [have] apologised.'

21 At the bottom of page 20, the claimant wrote this:

> "I feel like I have nowhere to turn between you both and I am stuck between a rock and a hard place, it is very apparent not only to myself but other staff members that Salvatore is favoured in the Welwyn garden office.
>
> This has made me feel I have no choice, nowhere to turn other than to hand my notice in as I do not see the situation getting any better. I have zero support from the upper management whereas Salvatore does."

22 Nowhere in that email did the claimant expressly refer to the written warning as being the trigger for her resignation. However, in box 8.2 of the ET1 claim form, at page 38, the claimant had put this:

> "On 11/09/2019 I received an instant written warning from Melvin Wright (DIRECTOR) and handed to me by Hayley Andrews (another LETTINGS MANAGER) regarding an incident that occurred the day before.
>
> Salvatore Tona (COLLEAGUE/ SALES MANAGER) had solely blamed myself for one of his staff members not wishing to attend the Wrights Christmas party, a discussion was had in the car park of the office grounds where I tried to make light of the situation by referring to an ongoing joke by all members of staff. Salvatore Tona decided that on this day he took an offence [to] it, although he referred to another colleague that same morning with the same joke. This, as I understand, was explained to Melvin Wright who ordered an immediate written warning without investigating my side or to even ask 2 other colleagues who [were] present for their version of events (PHILIP COOK & CHARLOTTE STANDBROOK).
>
> The following day (12/09/2019), with no one to turn to feeling deflated, depressed and bullied/pushed out I handed in my notice."

23 During cross-examination, when pressed as to the reason for her resignation, the claimant said that she felt that she had no option but to resign when she was given the written warning the text of which I have set out in paragraph 12 above.

The respondent's disciplinary procedure

24 The respondent's handbook contained (at pages 90-102 of the hearing bundle) a "Disciplinary and Poor Performance Procedure". At the bottom of page 91 and the top of page 92, there was this passage, under the heading "Informal Resolution":

> "If the Company is concerned about your conduct or performance, it will attempt, where possible, to discuss the matter with you to see if it can be resolved informally.
>
> In cases of minor misconduct, such informal resolution will usually take the form of an informal warning. If an informal warning is given, you will be advised of the consequences of any future incidents of misconduct. A note that an informal warning has been given will be placed on your personnel file but this will not constitute formal disciplinary action."

25 On page 92, there was this passage:

> "*Procedural Steps*
>
> The following steps will be taken, as appropriate, in all cases covered by this procedure.
>
> *Investigation*

(a) No disciplinary or poor performance hearing will take place until a thorough investigation of the issues has been undertaken by the Company.

(b) If appropriate, the Company may, by written notice, suspend you for a specified period during which time such an investigation will be undertaken. During any period of suspension you will continue to receive your salary and benefits and your employment will continue on the terms and conditions set out in your contract of employment. However, you will not be entitled to access the Company's premises or contact the Company's customers or suppliers except at the prior request or with the prior consent of the Company at such times and subject to such conditions as the Company may impose. Such suspension is not a disciplinary sanction.

(c) If you have any documents which you want the Company to consider as part of its investigation, you should provide copies to the relevant manager as soon as practicable during the investigation process. You should also let the HR Manager know if you are aware of any witnesses who may be able to provide evidence on the issues being investigated, again as soon as practicable.

(d) In some cases it may be appropriate to hold an investigatory meeting where witness evidence and relevant documentation can be considered in more detail. Such an investigatory meeting will not constitute disciplinary action.

Disciplinary Hearings

(a) If, after investigation, the Company considers that formal disciplinary action may be appropriate, it will hold a hearing, which is a formal meeting. You will be given full written details of the allegations made against you and you will be invited to attend a hearing to discuss the matter. Normally you will be given at least three days' notice. The hearing will be held during working hours at the Company's premises, unless otherwise agreed by you and the Company.

(b) The hearing is your opportunity to respond to the allegations against you and so you should prepare carefully. You should inform the HR Manager of any special arrangements needed at the hearing (for example, to cater for any language difficulty or disability)."

26 On page 94, under the heading "Sanctions for Gross Misconduct and Misconduct", this was said:

> "The following sanctions will apply in cases of alleged misconduct or gross misconduct. The Company may apply these sanctions at whatever level it deems appropriate given the nature and severity of the alleged misconduct or gross misconduct.
>
> (a) First Written Warning: In cases of misconduct, or further minor misconduct (of the same or other type) when you have already been given an informal oral warning as outlined above, you will normally be given a first written warning. You will be advised of the consequences of any future incidents of misconduct. The first written warning will be placed on your personnel file. The warning will automatically lapse after 12 months or such other period as the Company specifies in the warning."

The relevant legal principles

27 The claimant in my judgment plainly (despite Mr Sood's professed inability at the start of the hearing to understand on what term of the contract of employment the claimant relied on here) relied on the implied term of trust and confidence. That is an obligation not, without reasonable and proper cause, to act in a way which is likely seriously to damage or to destroy the relationship of trust and confidence which exists, or should exist, between employer and employee as employer and employee. The question whether that term has been breached is determined objectively: see *Omilaju v Waltham Forest London Borough Council* [2005] ICR 481. A breach of that term is (as was confirmed in *Omilaju)* a repudiation or fundamental breach of the contract of employment (two separate concepts which are now routinely, despite what Lord Denning said in the case to which I am about to turn, combined and referred to as a repudiatory breach of contract).

28 The law of constructive dismissal was clarified particularly helpfully by Lord Denning MR in *Western Excavating v Sharp* [1978] ICR 761, at page 769A-C:

> "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, 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. The employee is entitled in those circumstances to leave at the instant without giving any notice at all or, alternatively, he may give notice and say he is leaving at the end of the notice. But the conduct must in either case be sufficiently serious to entitle him to leave at once. Moreover, he must make up his mind soon after the conduct of which he complains: for, if he continues for any length of time without leaving, he will lose his right to treat himself as discharged. He will be regarded as having elected to affirm the contract."

29 There is this helpful passage in the notes to section 95 of the ERA 1996 in *Harvey on Industrial Relations and Employment Law* ("*Harvey*"):

> "The employee must leave in response to the breach of contract, which may mean the tribunal deciding what was the effective (but not necessarily the sole) cause of the resignation: *Jones v F Sirl & Son (Furnishers) Ltd* [1997] IRLR 493, EAT; the employer's conduct subsequent to a resignation cannot convert that resignation into a constructive dismissal *(Gaelic Oil Co Ltd v Hamilton* [1977] IRLR 27). Earlier cases suggested that the employee must indicate clearly that he is treating the contract as repudiated: *Logabax Ltd v Titherley* [1977] IRLR 97, [1977] ICR 369, EAT; *Walker v Josiah Wedgwood & Sons* [1978] IRLR 105, [1978] ICR 744, EAT; however, the Court of Appeal held that there is no legal requirement that the departing employee must tell the employer of the reason for leaving: *Weathersfield Ltd v Sargent* [1999] 1 IRLR 94, CA (disapproving on this point *Holland v Glendale Industries Ltd* [1998] ICR 493, EAT). The acceptance of the repudiation must be unequivocal (*Hunt v British Railways Board* [1979] IRLR 379, EAT—employee filed IT 1 but continued to report for work; 'can't have his cake and eat it'). A fortiori where the termination is by mutual agreement there cannot be constructive dismissal (*L Lipton Ltd v Marlborough* [1979] IRLR 179, EAT).
>
> Where the employer's repudiatory breach of the employment contract is only anticipatory (ie threatened but not yet actual), the employer may withdraw it before the employee accepts the repudiation; in such a case there is no constructive dismissal: *Harrison v Norwest Holst Group Administration Ltd* [1985] IRLR 240, [1985] ICR 668, CA. Likewise, if a situation arises that could lead to a repudiatory breach (eg through acts of an immediate manager) but the employer stops that happening (eg by upholding a grievance), there will be no constructive dismissal: *Assamoi v Spirit Pub Co* UKEAT/0050/11 (30 July 2012, unreported). Where, however, the employer's breach has taken place but the employer makes an offer of amends to the employee before the latter leaves, there is no principle that this 'cures' the breach; instead, it is for the employee to decide whether or not to waive the breach and affirm the contract, and in the absence of any such waiver the employee can still leave and claim constructive dismissal: *Buckland v Bournemouth University* [2010] IRLR 445, CA."

30 As for the application of the principles developed by the Court of Appeal in *Weathersfield v Sargant*, on which Mr Sood (to whom I was particularly grateful for his assistance and the helpful manner in which he presented the respondent's case) in submissions relied heavily, there is in *Harvey* at paragraph AII [447.07] this helpful passage:

> "Note also in this context the commonsense approach taken by the Court of Appeal in *Mruke v Khan* [2018] EWCA Civ 280, [2018] IRLR 526. The claimant lost her constructive dismissal claim because the employment tribunal held

that, although the employer was in repudiatory breach of contract in not paying the National Minimum Wage, as the claimant (who was illiterate and ignorant as to her rights) did not know she was entitled to it, she could not be said to have resigned because of the breach. Allowing an appeal, Lord Justice Singh held that this was an error of law. Knowledge by the claimant of her legal rights under the legislation was not necessary. The claimant was being paid the equivalent of 33p per hour and the breach of contract was so 'egregious' that it was 'simply obvious' that the termination of the contract was because of the repudiatory breach.

The following passages from the judgment of the Court of Appeal are illuminating:

> '**19**. It is well established that those circumstances are ones in which the employer commits a repudiatory breach of the contract: see *Western Excavating (ECC) Ltd v Sharp* [1978] IRLR 27, at 29 (Lord Denning MR). It is also well established that, "for a constructive dismissal to arise, the employee must resign in response to a fundamental breach of contract": see *Nottinghamshire County Council v Meikle* [2004] EWCA Civ 859, [2004] IRLR 703, at para 30 (Keene LJ). However, it is not necessary, as a matter of law, that the employee should have told the employer "that he is leaving because of the employer's repudiatory conduct": see *Weathersfield Ltd (t/a Van & Truck Rentals) v Sargent* [1999] IRLR 94, [1999] ICR 425, at 431 (Pill LJ). As Pill LJ went on to say in that passage:
>
> > "Each case will turn on its own facts and, where no reason is communicated to the employer at the time, the fact-finding tribunal may more readily conclude that the repudiatory conduct was not the reason for the employee leaving. In each case it will, however, be for the fact-finding tribunal, considering all the evidence, to decide whether there has been an acceptance."'

31 The exercise of an express power in a contract of employment may be affected by the implied term of trust and confidence: *United Bank Ltd v Akhtar* [1989] IRLR 507

32 If a successful claimant's conduct contributed to his or her dismissal, then the question whether there should be a reduction in the basic award should be considered separately from the question whether there should be a reduction in the compensatory award, because different considerations apply to those awards, the first being in the nature of a reward for long service: *Charles Robertson (Developments) Ltd v White* [1995] ICR 349. However, the norm will be that the reductions are the same: *University of Sunderland v Drosson* [2017] IRLR 1087.

My conclusions on liability and contributory fault

33 Despite Mr Sood's spirited attempt to persuade me to the contrary, in my judgment the claimant resigned in response to the giving to her of the written warning whose text I have set out in paragraph 12 above. I came to that conclusion because of (1) the claimant's oral evidence, (2) the fact that it appeared to me to be clear from the factual background and the speed with which the claimant resigned after being given that warning that the warning was the trigger for her resignation despite the failure by her to refer to it in terms in any of the three documents by means of which she communicated her resignation and the reasons for it (as described by me in paragraphs 18-22 above), and (3) the content of box 8.2 of her ET1 claim form (which I have set out in paragraph 22 above). While the email to which I refer in paragraphs 18-22 above referred to a number of other things as leading to the claimant's resignation, it was clear that the trigger for her resignation was the written warning, and I regarded the content of that email as not casting any doubt on the proposition that the claimant had resigned in response to the giving to her of a written warning.

34 That warning was given to the claimant without there having been any discussion with her about the circumstances about which Mr Tona had complained to the respondent's directors. The warning was given as a result of the respondent accepting what Mr Tona had said and was given without any inquiry having been made of the claimant. That meant that the warning was given without the claimant having been given any kind of opportunity to explain herself and, if she recognised that she was at fault, apologise, both to the respondent and Mr Tona.

35 In my judgment, irrespective of whether a written warning was justified for the use of the words "oh fuck off you nonce", giving the claimant a written warning without giving her an opportunity to respond to the allegation that she had used those words, was conduct which was likely seriously to damage or to destroy the relationship of trust and confidence, especially (but not only) in the light of the existence of the provisions of the respondent's disciplinary procedure which I have set out in paragraphs 24-26 above. In my judgment, there was not reasonable and proper cause for that conduct. The description by Ms Andrews of the warning as informal did not in my judgment detract materially from the impact of the giving of the written warning set out in paragraph 12 above. That is because

35.1 that warning was stated to be a written warning;

35.2 it was not stated to be an informal warning;

35.3 the respondent's disciplinary procedure made no provision for an informal written warning;

35.4 in so far as it referred to a warning being informal, it did so at the top of page 92, the material words of which are set out in paragraph 24 above, as an "informal warning" which would be the subject of a note placed on the employee's personnel file, and which would be (see page 94, the

material words of which are set out in paragraph 26 above) "an informal oral warning"; and

35.5 there was no attempt to discuss the matter with the claimant to see if it could be resolved informally, as promised by the respondent in the passage at the bottom of page 91, set out in paragraph 24 above.

36 That meant that in my judgment the respondent had, in giving the claimant the written warning set out in paragraph 12 above in the circumstances described by Ms Andrews in the passage of her witness statement set out in paragraph 17 above, breached the implied term of trust and confidence. In arriving at that conclusion, I bore it in mind that the claimant might not in fact have used the offending words. However, I concluded also that the fact that she did use those words in no way detracted from the conclusion that imposing a disciplinary sanction without first discussing with her the possibility of doing so and the circumstances which were thought to justify doing so, was in the circumstances of this case a breach of the implied term of trust and confidence.

37 Accordingly, the claimant was dismissed within the meaning of section 95(1)(c) of the ERA 1996. That dismissal was (as Mr Sood wisely accepted it would be, if I found that there had been a dismissal) unfair. The claimant's claim of unfair dismissal therefore succeeds.

38 However, in my judgment the claimant's use of the words "oh fuck off you nonce" was conduct which justified a reduction in the basic and compensatory awards. The fact that the claimant meant those words to be taken in a jokey sense did not mean that they had to be understood in that way, and in any event in my view an employee who uses such words skates on thin ice as far as the possibility of a disciplinary sanction is concerned. In my view, the right reduction in both the basic award and the compensatory award was 25%.

39 I add that I could see that the claimant and Mr Tona were placed in a difficult position by Mr Melvin Wright's decision, imposed without consultation, on the staff of the WGC office to remove what had for a number of years been regarded by them as a right to additional paid leave at Christmas. However, Mr Wright had himself been placed in a difficult position by the discovery that one of the respondent's three offices had a practice which had (it seems) either come into or remained in existence without his knowledge and which involved inconsistent treatment of the staff of the three offices. However, if Mr Wright had taken the time himself to explain to the staff of the WGC office why he was removing what they thought was their right to additional paid leave at Christmas time, then the situation which arose on 10 September 2019 as described in the written warning of 11 September 2019 which I have set out in paragraph 12 above, might well not have arisen. In any event, these background factors did not affect my conclusion that there had been a breach of the implied term of trust and confidence as a result of the giving of that written warning. Nor did they affect my conclusion that the

claimant's conduct justified a reduction in the compensation payable for her resulting unfair dismissal. However, those background factors did affect my conclusion about the amount of the reduction which should be imposed for that conduct: they meant in my view that the reduction should be lower than it might have been if the claimant had been discussing something different with Mr Tona, such as something which was irrelevant to the workplace.

Remedy

40 Having given judgment and stated my reasons for it shortly after 10:00 on 7 August 2020, I heard oral evidence from the claimant about her losses and the manner in which she had sought to mitigate her losses. Both parties put further documentary evidence before me.

41 First, however, the parties and I agreed the figure for the basic award, calculated by reference to 5 full years of employment, a weekly wage of £525, and multiplied by 0.75. The result was £1,968.75.

The claimant's attempts to mitigate her losses

42 The claimant had looked for new work every day after resigning, she said, and I accepted that evidence. She had during her notice period (during which she was placed by the respondent on garden leave) seen an advertisement for a job with an estate agency on a salary which was comparable to that which she was receiving when she worked for the respondent, and she had applied for that job. However, when she was invited to an interview for the job, she discovered that it was for a fixed period of 6 months only. As a result, because she was keen to avoid being seen to have worked in a series of jobs in estate agencies, and was keen to maintain her record of working for long periods of time for any agency for which she worked (she had worked for only one agency before she worked for the respondent, she said, and she had worked for that agency for about 6 years), she decided not to go for the interview.

43 The claimant had subsequently obtained non-estate-agency employment starting on 16 October 2019, so that there had been a gap of only 5 days between the ending of her period of garden leave and the start of her new employment. However, she had earned in that employment less (initially rather more so, but subsequently, she obtained better-paying temporary, non-estate-agency work) than she had earned with the respondent, until she started work in a new (permanent, estate-agency) job on 10 February 2020. Thus, the claimant had obtained new congenial employment on a comparable remuneration package within 4 months of the ending of her employment with the respondent.

44 Mr Sood put before me several pages of website job advertisements that had been capable of being applied for by the claimant, one of which was for a housing association, and the other of which was in an estate agency in St Albans. The

claimant said that she had not seen those job advertisements, even though she had been looking every day for work. She pointed out that the basic salary for the post in St Albans was lower than that which she had been paid by the respondent, and I could see that the job for the housing association was rather different from that of working as a lettings manager for an estate agency.

The claimant's financial losses

45 The claimant's losses were capable of being calculated by reference to the gross income figures shown at page 82 together with the net income figures which were shown on the claimant's bank statement. Page 82 showed that the claimant had received gross income (from the respondent) in the 2018-19 tax year of £40,920.61, and that she had received at the time of the print-out shown on the left hand side of page 82 gross income in the 2019-20 tax year of £27,576.72. That gave a gross figure for the difference in pay of £13,343.89, i.e. before the deduction of income tax and national insurance contributions.

46 However, that was not the true figure for the losses of the claimant, as her bank statement showed that she had also received payments net of income tax and national insurance in the 2019-20 tax year of £1,829.56 and £2,040.19 (i.e. in total £3,869.75). Given that those sums were taxable at the marginal rate of (adding income tax at 20% and national insurance contributions at 12%) 32%, I worked out the claimant's losses by deducting 32% from the gross sum of £13,343.98, which gave a figure of £9,073.85 and deducting from that figure the sum of £3,869.75. That gave a figure of £5,204.10. That was in my judgment the net income loss that the claimant had suffered by reason of her constructive unfair dismissal. That had to be reduced by 25%. That gave a figure of £3,903.07. That needed to be grossed up, which in the circumstances meant dividing it by 0.68. That gave the gross figure of £5,739.81, which was payable in full unless the claimant had failed to make reasonable efforts to mitigate her losses.

Claim for mileage

47 The claimant also claimed the cost of travelling to and from Stevenage for 28 working days during 2019. She claimed £362.88 for such cost, calculating it on the basis that the distance travelled was 32.4 miles per day and on the basis that she should receive £0.40 per mile. She was cross-examined to an extent on that, but the issue of mitigation of losses became the main focus of the hearing at that point, and both the parties and I ended up failing to deal in detail with the claim for travelling costs for 28 days. After the hearing had ended and when I was writing these reasons, I realised that that had happened. Having looked again at the claim, I concluded that there was insufficient evidence before me to determine it reliably. I therefore decided to make no order in the claimant's favour on it, on the basis that if she wants to press it, then she should particularise it in writing by sending to the tribunal a detailed statement of the basis for that claim (copying, of

course, the document in which she does so to the respondent) and if necessary, I will resume the hearing for an hour on a later date.

The law relating to the mitigation of loss

48 As for whether or not the claimant had made reasonable efforts to mitigate her losses, I referred myself to chapter 9 of *McGregor on Damages* and paragraphs DI[2663]-[2680] of *Harvey on Industrial Relations and Employment Law* ("*Harvey*"). I noted the helpful summary of Her Honour Judge Eady QC (as she then was) in *Singh v Glass Express Midlands Limited* UKEAT/71/18 set out in paragraphs DI[2671-2680] of *Harvey*, as follows:

> "In *Singh v Glass Express Midlands Limited* UKEAT/71/18 (15 June 2018, unreported), HHJ Eady QC (sitting alone) set out a concise summary of the guidance given by Langstaff P in *Cooper* [i.e. *Cooper Contracting Limited v Lindsey* UKEAT/0184/15] on the correct approach to the question of mitigation:
>
> > (1) The burden of proof to show a failure to mitigate is on the wrongdoer; a claimant does not have to prove they have mitigated their loss.
> > (2) It is not some broad assessment on which the burden of proof is neutral; if evidence as to mitigation is not put before the ET by the wrongdoer, it has no obligation to find it. That is the way in which the burden of proof generally works; providing information is the task of the employer.
> > (3) What has to be proved is that the claimant acted unreasonably; the claimant does not have to show that what they did was reasonable.
> > (4) There is a difference between acting reasonably and not acting unreasonably. There is usually more than one reasonable course of action open to the employee. The employer needs to show that jobs were available and that it was unreasonable of the employee not to apply for them.
> > (5) What is reasonable or unreasonable is a matter of fact.
> > (6) That question is to be determined taking into account the views and wishes of the claimant as one of the circumstances, but it is the ET's assessment of reasonableness and not the claimant's that counts.
> > (7) The ET is not to apply too demanding a standard to the victim; after all, they are the victim of a wrong and are not to be put on trial as if the losses were their fault; the central cause is the act of the wrongdoer.
> > (8) The test may be summarised by saying that it is for the wrongdoer to show that the claimant acted unreasonably in failing to mitigate.
> > (9) In cases in which it might be perfectly reasonable for a claimant to have taken on a better paid job, that fact does not necessarily satisfy the test; it would be important evidence that may assist the ET to conclude that the employee has acted unreasonably, but is not, in itself, sufficient."

My conclusion on the issue of mitigation of loss

49 Having considered the matter carefully, and taking into account the facts that

49.1 the claimant had obtained new employment as soon as she could, i.e. with a period of only 5 days without pay between the ending of her garden leave period and the start of her new (albeit initially rather lower-paid) paid employment, so that I could see that she was making effective efforts to mitigate her losses, and

49.2 there was (I concluded) a genuine rationale for the claimant's initial decision not to continue with her application for the temporary estate-agency job to which I refer in paragraph 41 above, which I could not say was an unreasonable rationale,

I concluded that the claimant had not failed to make reasonable efforts to mitigate her losses. I therefore concluded that the respondent should pay the claimant as compensation for her unfair dismissal the sum to which I refer in paragraph 46 above.

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Employment Judge Hyams
Date: 11 August 2020

JUDGMENT SENT TO THE PARTIES ON **7/9/2020**

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FOR THE TRIBUNAL OFFICE