EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		**Respondent**
Miss J Ingram	AND	Gloucestershire County Council

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT Bristol ON 10 and 11 August 2020

EMPLOYMENT JUDGE J Bax

Representation

For the Claimant: Miss Ingram (in person)
For the Respondent: Mr Small (Counsel)

JUDGMENT

1. The claim of accrued but unpaid holiday is dismissed upon the Claimant's withdrawal.

2. The claim of constructive unfair dismissal is dismissed.

3. The claim for notice pay is dismissed.

4. The claim that the Claimant was not provided with a statement of changes to her employment particulars is dismissed.

REASONS

1. In this case the Claimant, Miss Ingram, claimed that she had been constructively unfairly dismissed, she had not been paid accrued but untaken holiday and that she should be paid notice pay. The Respondent contended that the Claimant resigned, that there was no dismissal, and in

any event that its actions were fair and reasonable and that no further sums were due to the Claimant.

Procedural Background

2. The Claimant presented her claim on 10 July 2019. She notified ACAS of the dispute on 23 April 2019 and the certificate was issued on 5 June 2019. The Claimant originally brought claims of associative direct disability discrimination and for a redundancy payment, in addition to the claims already mentioned.

3. On 6 February 2020, Employment Judge Roper conducted a Telephone Case Management Preliminary Hearing at which the Claimant withdrew the claims of disability discrimination and for a redundancy payment and those claims were dismissed upon that withdrawal. The parties confirmed the issues to be determined. In relation to constructive unfair dismissal the Claimant alleged that the Respondent was in breach of the implied of trust and confidence by: (1) imposing changes to her working week in November 2018, (2) by failing in November/December 2018to reply to her request for a meeting, (3) failing to investigate her grievance dated 26 March 2019, (4) being contacted by her line manager whilst on sick leave at 6.45 pm, outside of normal working hours and (5) being issued with a written warning in April 2019.

4. At the start of the final hearing the Claimant confirmed that the issues to be determined remained as those recorded by Employment Judge Roper. It was clarified that the second allegation related to the Claimant's request at the meeting with Mr Spencer on 22 November 2018.

5. At the start of the hearing, discussion took place about the accrued but untaken holiday pay claim. The Claimant had been absent on sick leave for about a third of the leave year 2018 to 2019. Consideration was given to the principles set out in Stringer v Revenue & Customs [2009] ICR 932 and Pereda v Madrid Movilidad [2009] IRLR 959. The parties had not included documentation in relation to the amount of leave taken by the Claimant in the leave year 2018 to 2019. The Claimant had taken some notes of leave she had taken, but was not completely sure of the actual amount. It was agreed that the Respondent would obtain the records and disclose them to the Claimant. After the conclusion of evidence on the first day, the parties considered the documentation and reached an agreed position. The Claimant was owed holiday pay of £263.20, however she had been overpaid at the end of her employment by £737.50. It was agreed that the Claimant had been overpaid by £474.30, once the accrued but unpaid holiday pay had been taken into account. On the basis that the Claimant had received the money for her accrued but unpaid holiday, she withdrew the claim.

6. In order to inform me that the parties were ready to re-join the CVP hearing, after the parties had discussed the holiday records, Mr Small sent an e-mail at 1618 on 10 August 2020 titled "Ready when you are now!". There was no text in the body of the e-mail. The Claimant was not copied into the e-mail. When the hearing resumed, I informed the Claimant about the e-mail and its contents. The Claimant was not concerned about the e-mail and was content to proceed with the hearing.

The evidence

7. I heard from the Claimant. On behalf of the Respondent I heard from Ms Henderson (Head of Service for the Disabled Children and Young Peoples Service and the Claimant's line manager) and from Ms Marfell (Assistant HR Business Partner).

8. I was provided with a bundle of approximately 275 pages. Any reference in square brackets, within these reasons, is a reference to a page in the bundle.

The facts

9. There was a degree of conflict on the evidence. I heard the witnesses give their evidence. I found the following facts proven on the balance of probabilities after considering the whole of the evidence, both oral and documentary, and after listening to the factual and legal submissions made by and on behalf of the respective parties.

10. On 14 March 2002, the Claimant started working for Barnados. In 2004 the Claimant's employment, under the Transfer of Undertakings (Protection of Employment) Regulations 2006, transferred to the Respondent.

11. The Claimant was employed by the Respondent as a Team Manager of its Family Link Service, within the Disabled Children and Young People's Service.

12. The Respondent's absence management policy [B209 to 225] defined long term absence as longer than 4 weeks. If the absence was likely to or reached 8 weeks, an assessment of its impact and implications for the council and employee should be made and a management hearing convened. Employees, among other things, are required to keep their manager informed of any prognosis or workplace factors which may affect their attendance at work or wellbeing.

13. The Claimant's contract of employment provided that she worked 18.5 hours per week. Prior to July 2018 the Claimant's hours of work, which had

been agreed locally, were Tuesdays, 0930 to 1600, Wednesdays 0915 to 1500 and Thursdays 0830 to 4pm. The Claimant's contract of employment, included an express flexibility clause which provided, "All posts are subject to a requirement that the employee exercises such flexibility in the performance of their role as may reasonably be required by the council consistent with the grade of the post." [B274]

14. Ms Henderson became the Claimant's line manager in 2015, when she became Head of Service.

15. The Claimant has a daughter with additional needs and the Respondent and Ms Henderson were aware of this at all relevant times.

16. On 19 June 2018, the Claimant raised a grievance against Ms Henderson [B4-11] in which she complained about the level of administrative support, Ms Henderson's managerial style and that her supervision lacked understanding and quality support. A grievance hearing took place on 20 July 2018, at which the Claimant's representative suggested that there had been a breakdown in relationship. Ms Henderson was sorry about the way the Claimant felt and considered that they had different perceptions. On 29 August 2018, the grievance was not upheld, but recommendations were made including mediation, supporting a request to transfer and monitoring administration support. The grievance outcome letter did not say who was to organise the mediation. The Claimant did not appeal the outcome. The issues concerning administration affected everybody in the department, in that it was centrally organised and there had been a history of temporary workers who had not stayed long in post and a back log had developed. The Respondent accepted in oral evidence that the Claimant had properly raised the administration concern, but that it had sought to resolve the problem.

17. Following an Ofsted inspection in 2017, the Respondent commenced a planned process to reshape the Children's Services it provided, to ensure that the staffing structure and support was in place to deliver service improvement. In April 2018 staff were informed that a reshape was being considered. On 2 July 2019, the staff were informed by e-mail that formal consultation would start on 23 July 2019, and a reminder was sent on 20 July 2020. The proposals included that there would be 1 full time equivalent manager to have responsibility for Family Link (fostering service) and Early Help, with time to be split between the 2 service areas [B57]. At the Claimant's supervision meeting on 17 July 2018, the Claimant said that she would be on leave at the time of the consultation meeting, but that she would phone in, if she wanted to know about the proposal.

18. The proposals were presented at a meeting on 23 July 2018. At the Claimant's request the consultation period was extended by a week. On 2

August 2018, Ms Henderson forwarded the presentation slides to the Claimant and other team members and offered all staff, including the Claimant, individual consultation sessions if they were wanted.

19. The Claimant's role was effectively becoming full time. She was offered the opportunity to undertake it on a full-time basis or on a job share basis of 18.5 hours per week. The Claimant responded by requesting that she worked 25 hours per week over 5 days [B64].

20. On 16 August 2018, Ms Henderson discussed the working hours options with the Claimant. A working week of 25 hours would not meet the business needs of the Respondent, as cover was needed for the whole day of each day of the week. It was necessary to have management oversight during working hours in order to cater for the needs of approximately 300 disabled children. Ms Henderson was concerned that would be a detrimental impact on the service users, if the manager only worked 25 hours per week. The needs of the service required either a full-time role or a job share to a full time equivalent.

21. On 21 August 2018, Ms Henderson e-mailed the Claimant and confirmed that it was not possible for the Claimant to work 25 hours per week in the new structure. It was confirmed that the Claimant's post would be at her substantive hours of 18.5 hours per week. She was informed that there could be a need to review the current arrangement of working hours and that they might change due to business needs. It was recognised that the Claimant was flexible. She was told that any changes would be subject to consultation and a period of time would be allowed for her to make changes to carer arrangements. The job-share was advertised for recruitment, but not on the basis that it was required for the hours the Claimant did not work. This was because it would have been exceptionally challenging to find someone to work Monday and Friday and to complete the other hours the Claimant was not working.

22. On 22 August 2018, the Claimant replied, saying that she currently worked Tuesdays, Wednesdays and Thursdays and would like to continue working those days. She would not be in a position to change her working days as her children were about to return to school and changes to childcare arrangements would be challenging. She said she could complete tasks on a Monday or Friday.

23. On 29 August 2018, Ms Henderson informed the Claimant that there was no plan for an immediate short-term change, but it would need to be reviewed to ensure effective cover for the service. Any change in current working hours would be planned, within an agreed time frame. On 4 September 2018, the Claimant responded by saying it was unlikely she could change childcare commitments until September 2019.

24. On 20 September 2018, in a supervision session, Ms Henderson informed the Claimant that Darren Jones had been confirmed as her job share. The Claimant and Mr Jones were asked to work together to agree job share hours. The Claimant said that she was looking forward to a change.

25. On 26 September 2018, Ms Henderson confirmed in writing the details of the Claimant's new role as 'Fostering and Early Help Team Manager – Disability Services', on a job share basis. The changes to the Claimant's role were set out, namely the post title, her pay grade, the number of hours of work per week and a start date of 1 October 2018. The Claimant was informed that there would be continued discussion as to how the job share would be arranged.

26. On 30 October 2018, during a supervision meeting, the Claimant was informed of Mr Jones' preference of working 2 days one week and 3 days the next. The Claimant agreed to explore childcare arrangements and return to Ms Henderson on 13 November 2019 with some options and would try to provide an alternative.

27. On 6 November 2018, Ms Henderson e-mailed the Claimant and Mr Jones asking them to agree their working hours by the end of the week. It was recognised that both had different caring responsibilities. It was expected that new arrangements would be ready to start in January 2019. They were told that if they were unable to agree, Ms Henderson would set the patten and negotiate timeframes with them to implement it.

28. In November 2018, the Claimant conducted some interviews and was due to feedback the outcome to the candidates. An unsuccessful candidate discovered the decision from a third party, before she had been told by the Respondent, and as a result complained. The feedback had not occurred in the required time, because the Claimant used an incorrect telephone number to contact her. Ms Henderson asked the Claimant to explain to her what had happened so that she could respond to the candidate. Instead, the Claimant sent an e-mail to the candidate saying that she had the dialled number on the application form and had provided a screen shot to Ms Henderson. The Claimant did not proffer an apology. On 11 December 2018, Ms Henderson asked the Claimant to discuss the issue with her, because the number on the application form was correct and the screen shot had an incorrect number. Ms Henderson was concerned that the Claimant had not done as she had been asked. The Claimant was e-mailed because the Claimant had not answered telephone calls from Ms Henderson.

29. On 8 November 2018, the Claimant e-mailed Mr Spencer, Director of Children's Services about support for Early Help and arranged a meeting with him.

30. On 13 November 2019, the Claimant informed Ms Henderson that she could not change her working days at that time. She also said that Mr Jones had originally said he could work any days but it had changed to 2 days one week and 3 the next.

31. Ms Henderson discussed the situation with Mr Jones, who agreed to work Mondays, Tuesdays, and Wednesday mornings. He was unable to work Friday afternoons.

32. On 20 November 2018, Ms Henderson asked the Claimant to call her, when the Claimant had finished interviewing, to discuss her hours of work. The Claimant did not respond. Ms Henderson therefore sent an e-mail to the Claimant setting out that her hours would be 1200 to 1630 Wednesdays and 0930 to 1700 on Thursdays and Fridays, to commence on 2 January 2019. Ms Henderson considered that the pattern was the best match for the hours already worked and she had taken into account both of their caring obligations on Fridays.

33. On 22 November 2018, the Claimant and her team had a meeting with Mr Spencer, Director of children's Services. Ms Henderson attended initially but was told it was a confidential meeting and she left. The Claimant said that Ms Henderson had a negative management style and was bullying. The team highlighted ongoing concerns about administrative support. The Claimant complained that her role had been increased to full time, with a job share, but that she had been asked to fit in with the new post holder and had been asked if she could work 2 days one week and 3 the next to accommodate his needs. It was agreed that Mr Spencer would speak to Ms Henderson to look at the issues raised and take some action.

34. On 28 November 2019, in a verbal catch up with Ms Henderson, the Claimant said that the mediation had not been organised. Ms Henderson immediately referred this to administrative support, who attempted to organise it. Ms Henderson, who would have been a party to the mediation, did not have responsibility for organising it and it should have been followed up by Mr Browne.

35. On 4 December 2018, the Claimant asked Ms Henderson for a meeting to discuss her hours. On 5 December, Ms Henderson telephoned and then e-mailed the Claimant at 1155 and 1343, to arrange discussing her hours. At 1449, Ms Henderson e-mailed the Claimant who she asked to telephone her, as she was seeking her views on workload management, completing her annual appraisal, supervision, the interview feedback and wanted to

update her about mediation. On 6 December 2019, the Claimant said she would book some time to do so.

36. On 12 December 2018, the Claimant e-mailed Mr Spencer and said that she had been signed off sick due to bullying from Ms Henderson.

37. On 14 December 2018, Mr Spencer e-mailed the Claimant. He had spoken to Ms Henderson, and was ready to feedback to the group, but thought that given the Claimant was absent it was better to wait until she returned. The Claimant was told that she could make a formal complaint, although he suggested mediation. Mr Spencer said he did not want to bother the Claimant when she was off sick, unless he was reassured that she wanted a telephone conversation, and if she did, she should let his assistant know. The Claimant did not respond.

38. On 18 December 2018, the Claimant informed Ms Henderson that she had been signed off sick with work related stress. Ms Henderson replied the next day asked if an occupational health referral would assist and provided her with other potential sources of help.

39. On 20 December 2018, Jo Wright, HR business partner, asked the Claimant if she wanted to meet with HR to discuss queries about her working pattern.

40. On 2 January 2019, the Claimant, by an e-mail at 1610, informed Ms Henderson that she had been further signed off sick and asked to be referred to occupational health. Ms Henderson replied at 1717 and provided draft referral wording for the Claimant to consider. The Claimant did not respond to the e-mail or provide any comment on the wording. I did not accept that Ms Henderson delayed in organising the occupational health referral.

41. On 7 January 2019, Mr Browne confirmed that he wanted the mediation between the Claimant and Ms Henderson to go ahead.

42. On 8 January 2019, Ms Henderson e-mailed the Claimant, enquiring how she was feeling and whether there were any amendments needed for the occupational health referral. The Claimant confirmed that she was happy with the referral. I was not satisfied that Ms Henderson delayed sending the referral.

43. On 15 January 2019, by e-mail, the Claimant was offered a meeting with Ms Wright, to discuss matters and was also given an explanation about the mediation process and the details of the mediator. The Claimant was also asked if she wanted to discuss the matters she had raised with Mr Spencer. The Claimant did not respond.

44. On 18 January 2019, Ms Henderson e-mailed the Claimant saying she had called to find out how she was and had got a voicemail saying the number was no longer available. The Claimant replied by saying that she had just come out of her occupational health appointment.

45. On 22 January 2019, Ms Henderson e-mailed the Claimant, saying she had tried to call to find out how she was and how the occupational health appointment had gone.

46. The Occupational Health Report, dated 21 January 2019, considered that the Claimant's absence was related to underlying management issues and a breakdown in relationship with her manager. It recommended that a discussion took place with management about her concerns and commented that she was still waiting for mediation. It was recommended that the Claimant's perceptions were explored, a formal risk assessment was undertaken for managing stress at work, and a stress questionnaire was given to all employees. An increase in manager support for 3 months after her return together with a wellness recovery plan was also recommended. She was referred for counselling, which she undertook. The report confirmed that the Claimant was fit to attend formal meetings with management. [B156]

47. On 30 January 2019, Ms Henderson telephoned the Claimant at 1845 to find out how she was. I accepted Ms Henderson's evidence that she often worked late and had lost track of time.

48. On 31 January 2019, the Claimant e-mailed Ms Henderson apologising for missing her call and reminded her that she is not obliged to take calls at unsociable hours. She confirmed she wanted to undertake counselling and asked for someone else to liaise with her whilst off sick.

49. On 31 January 2019, Ms Henderson wrote to the Claimant, in which she said Ms Wright had offered to meet the Claimant, to understand her concerns and ascertain what could be done to resolve them and also to get an understanding of her current views and an anticipated period of recovery. The Claimant was also told that the mediation process could begin on her return to work.

50. On 1 February 2019, Ms Marfell confirmed that the Claimant would have a new point of contact. Ms Tammy Wheatley, and that Ms Henderson had apologised for contacting her later than usual working hours. The Claimant was asked to respond to Ms Wright or Ms Marfell about the matters raised in the letter of 31 January 2019 by Friday 8 February 2019. [B166].

51. On 6 February 2019, the Respondent noted that the Claimant's sick leave had been extended by 3 weeks. The Respondent was concerned that if the

Claimant did not respond to the e-mail, a formal request would have to be made for the Claimant to attend a meeting.

52. The Claimant did not respond to the e-mail of 1 February 2019. On 15 February 2019, she was asked whether she wanted a further occupational health referral or an informal meeting with Ms Marfell or Ms Wright. The Claimant did not respond. [B170]

53. On 13 February 2019, Mr Spencer met the Claimant's team to give feedback on his discussions with Ms Henderson about their concerns. The team did not consider any further action or measures were necessary regarding Ms Henderson.

54. On 25 February 2019, the Claimant was asked to respond to the questions in the letter dated 31 January 2019. She did not respond.

55. On 26 February 2019, the Claimant, via her solicitor, informed the Respondent that she was no longer interested in mediation.

56. The Claimant remained signed off on sick leave. On 11 March 2019, it was concluded that a formal meeting under the absence management process was required and a formal report was compiled [B172-182]. The report incorrectly recorded the start of the Claimant's sickness absence was 12 November 2018, rather than December. The Claimant accepted in cross-examination that the chronology, set out in the report, was otherwise correct. The chronology included that the Claimant had not responded to communications.

57. The meeting was scheduled for 28 March 2019 with Ms Henderson. Following a request by the Claimant, the meeting was postponed for her to arrange a representative and for someone else to conduct it.

58. The Claimant was sent Ms Henderson's updated report on 25 March 2019 [B228-229], which set out the background and the recommendations in the occupational health report. It detailed that she had not responded to HR's offers of meetings and had not responded in relation to enquiries about mediation. The Claimant had told the Respondent that she would be unable to return to work on 1 April 2019. The Claimant agreed that the chronology was correct, apart from the date her sick leave commenced. The covering letter invited the Claimant to attend a meeting on 2 April 2019, to explore how they could move forward. She was informed of her right to be accompanied and was informed that an outcome could be a warning and that if so, she might not receive a pay increment or could be downgraded by an increment.

59. On 26 March 2019, the Claimant raised a grievance with Mr Spencer. The grievance included re-raising matters that had been considered in her June grievance but provided more detail than originally alleged. She referred to mediation not being organised until after she had gone off sick, the change of scheduled hours and that a response had not been given following the concerns raised in November 2018. She alleged that she had continued to be harassed by Ms Henderson. This was not responded to immediately, because Mr Spencer was on leave for the first half of April.

60. On 2 April 2019, Ms Allan conducted an absence review meeting in which the Claimant referred to having problems with Ms Henderson, the grievances, and the change of her working days. She complained about being contacted at home and said she could not return while her manager was being abusive and it was too late for mediation. The Claimant did not respond to the allegations that she had not responded to offers to meet and discuss the situation. The Claimant was issued with a first formal warning for 12 months. It was outside of Ms Allan's remit to move the Claimant to another post. The Claimant was informed of her right of appeal, but did not exercise it. The outcome was confirmed in a letter dated 3 April 2019, which also confirmed that, due to the warning, the Claimant would be downgraded by an increment in line with the absence management policy. It was confirmed that as part of the decision the Claimant would consider mediation.

61. The Respondent did not initiate the absence management process until 3 months after the Claimant had gone off sick, rather than after 8 weeks as set out of the policy. The Respondent required the Claimant to return to work, however the Claimant would not respond to requests to meet with the Respondent to seek a resolution.

62. On 16 April 2019, the Claimant resigned with immediate effect. She said that there had been a fundamental breach of contract, that the newly appointed staff member had been given priority of hours, her concerns had not been acted on, her grievance had not been addressed and the final incident was being issued with a warning.

63. On 18 April 2019, Mr Spencer set out his reasons why the informal stage of the Claimant's grievance was not upheld [B268-271].

The law

64. Under section 95(1)(c) of the Employment Rights Act 1996 ("the Act"), an employee is dismissed if he 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.

65. If the Claimant's resignation can be construed to be a dismissal then the issue of the fairness or otherwise of that dismissal is governed by section 98 (4) of the Act which provides "... the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) – (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and – (b) shall be determined in accordance with equity and the substantial merits of the case".

66. The burden of proof is on the Claimant to establish that the Respondent was in breach of contract.

67. I also considered the ACAS Code of Practice on Disciplinary and Grievance Procedures 2009 ("the ACAS Code").

68. The best known summary of the applicable test for a claim of constructive unfair dismissal was provided by Lord Denning MR in Western Excavating (ECC) Limited v Sharp [1978] IRLR 27: "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 his employer's conduct. He is constructively dismissed. The employee is entitled in these 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 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."

69. In Tullett Prebon PLC and Ors v BGC Brokers LP and Ors [2011] EWCA Civ 131, Maurice Kay LJ endorsed the following legal test at paragraph 20: "… whether, looking at all the circumstances objectively, that is from the perspective of a reasonable person in the position of the innocent party, the contract breaker has clearly shown an intention to abandon and altogether refuse to perform the contract."

70. In Courtaulds Northern Spinning Ltd v Sibson [1987] ICR 329, it was held that reasonable behaviour on the part of the employer can point evidentially to an absence of significant breach of a fundamental term of the contract. However, if there is such a breach, it is clear from Nottingham County

Council v Meikle [2005] ICR 1 CA; Abbey Cars (West Horndon) Ltd v Ford EAT 0472/07; and Wright v North Ayrshire Council [2014] IRLR 4 EAT, that the crucial question is whether the repudiatory breach "played a part in the dismissal" and was "an" effective cause of resignation, rather than being "the" effective cause. In need not be the predominant, principal, major or main cause for the resignation.

71. With regard to trust and confidence cases, Dyson LJ summarised the position thus in Omilaju v Waltham Forest London Borough Council [2005] IRLR 35 CA: The following basic propositions of law can be derived from the authorities: 1. The test for constructive dismissal is whether the employer's actions or conduct amounted to a repudiatory breach of the contract of employment: Western Excavating (ECC) Limited v Sharp [1978] 1 QB 761. 2. It is an implied term of any contract of employment 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: see, for example Malik v Bank of Credit and Commerce International SA [1998] AC 20, 34H – 35D (Lord Nicholls) and 45C – 46E (Lord Steyn). I shall refer to this as "the implied term of trust and confidence". 3. Any breach of the implied term of trust and confidence will amount to a repudiation of the contract, see, for example, per Browne-Wilkinson J in Woods v WM Car Services (Peterborough) Ltd [1981] ICR 666 CA, at 672A; the very essence of the breach of the implied term is that it is calculated or likely to destroy or seriously damage the relationship. 4. The test of whether there has been a breach of the implied term of trust and confidence is objective. As Lord Nicholls said in Malik at page 35C, the conduct relied on as constituting the breach must: "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".

72. This has been reaffirmed in Buckland v Bournemouth University Higher Education Corporation [2010] IRLR 445 CA, in which the applicable test was explained as: (i) in determining whether or not the employer is in fundamental breach of the implied term of trust and confidence the unvarnished Malik test should be applied; (ii) If, applying Sharp principles, acceptance of that breach entitled the employee to leave, he has been constructively dismissed; (iii) It is open to the employer to show that such dismissal was for a potentially fair reason; (iv) If he does so, it will then be for the employment tribunal to decide whether the dismissal for that reason, both substantively and procedurally (see Sainsbury's Supermarkets Ltd v Hitt [2003] IRLR 23 CA) fell within the range of reasonable responses and was fair."

73. The same authorities also repeat that unreasonable conduct alone is not enough to amount to a constructive dismissal (Claridge v Daler Rowney

[2008] IRLR 672); and that if an employee is relying on a series of acts then the tribunal must be satisfied that the series of acts taken together cumulatively amount to a breach of the implied term (Lewis v Motorworld Garages Ltd [1985] IRLR 465). In addition, if relying on a series of acts the Claimant must point to the final act which must be shown to have contributed or added something to the earlier series of acts which is said, taken as a whole, to have broken the contract of employment (Omilaju v Waltham Forest London Borough Council [2005] IRLR 35 CA).

74. The judgment of Dyson LJ in Omilaju was endorsed by Underhill LJ in Kaur v Leeds Teaching Hospital NHS Trust [2018] EWCA Civ 978. Having reviewed the case law on the “last straw” doctrine, the Court concluded that an employee who is the victim of a continuing cumulative breach of contract is entitled to rely on the totality of the employer’s acts notwithstanding a prior affirmation by the employee. Underhill LJ formulated the following approach in relation to the Malik test:

"In the normal case where an employee claims to have been constructively dismissed it is sufficient for a tribunal to ask itself the following questions:

(1) What was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, his or her resignation?

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

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

(4) If not, was it nevertheless a part (applying the approach explained in Omilaju) of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a (repudiatory) breach of the Malik term? (If it was, there is no need for any separate consideration of a possible previous affirmation, for the reason given at the end of para. 45 above.)

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

75. If the suggested last straw was entirely innocuous, further guidance was given in Williams v The Governing Body of Alderman Davies Church in Wales Primary School UKEAT/0108/19/LA at paragraph 33. “If the most recent conduct was not capable of contributing something to a breach of the Malik term, then the Tribunal may need to go on to consider whether the earlier conduct itself entailed a breach of the Malik term, has not since been affirmed, and contributed to the decision to resign.”

76. In addition, it is clear from Leeds Dental Team v Rose [2014] IRLR 8 EAT that whether or not behaviour is said to be calculated or likely to destroy or seriously damage the trust and confidence between the parties is to be objectively assessed, and does not turn on the subjective view of the employee. In addition, it is also clear from Hilton v Shiner Ltd - Builders Merchants [2001] IRLR 727 EAT that even where there is conduct which objectively could be said to be calculated or likely to destroy or seriously damage the trust and confidence between the parties, if there is reasonable and proper cause for the same then there is no fundamental breach of contract.
77. A Claimant cannot rely upon a breach of contract which he/she has been taken to have affirmed. Affirmation can, of course, have been express, but it can also be implied by inaction and delay, although simple delay is rarely enough. In Chindove-v-Morrisons UKEAT/0201/13/BA, Langstaff J said this (paragraph 26);

    "*He [the claimant] may affirm a continuation of the contract in other ways: by what he says, by what he does, by communications which show that he intends the contract to continue. But the issue is essentially one of conduct and not of time…. It all depends upon the context and not upon any strict time test.*"

78. The case of Braganza v BP Shipping Ltd [2015] UKSC 17 held that if what the Claimant is objecting to is the way that the employer exercised a discretion under the contract (to the Claimant's detriment), it is not enough for the Claimant to argue that the decision was unreasonable; he or she must show that it was irrational under the administrative law Wednesbury principles, a much tougher test to satisfy; the rationale for this is to restrict the judge to consideration of the process adopted by the employer, rather than re-making the decision judicially. In IBM Holdings Ltd v Dalgleish [2017] EWCA Civ 1212 the Court of Appeal extended this principle to applications of the implied term relating to trust and confidence. If the alleged breach of the terms arises from generally bad behaviour by the employer, then the normal rules apply. However, If the term is being used to attack what is fundamentally an exercise of the discretion given to the employer by the contract of employment, the claimant must establish Wednesbury unreasonableness/irrationality as mandated by Braganza.

Breach of contract

79. Under the Employment Tribunals (Extension of Jurisdiction England and Wales) Order 1994 an employee may bring a claim for breach of contract

"3 Extension of jurisdiction

Proceedings may be brought before an employment tribunal in respect of a claim of an employee for the recovery of damages or any other sum (other than a claim for damages, or for a sum due, in respect of personal injuries) if—

*(*a*) the claim is one to which section 131(2) of the 1978 Act applies and which a court in England and Wales would under the law for the time being in force have jurisdiction to hear and determine;*

*(*b*) the claim is not one to which article 5 applies; and*

*(*c*) the claim arises or is outstanding on the termination of the employee's employment."*

80. S 86 of the Employment Rights Act 1996 makes provision for the minimum amount of notice due to an employee:

(1) The notice required to be given by an employer to terminate the contract of employment of a person who has been continuously employed for one month or more—

(*a*) is not less than one week's notice if his period of continuous employment is less than two years,

(*b*) is not less than one week's notice for each year of continuous employment if his period of continuous employment is two years or more but less than twelve years, and

(*c*) is not less than twelve weeks' notice if his period of continuous employment is twelve years or more.

(2) The notice required to be given by an employee who has been continuously employed for one month or more to terminate his contract of employment is not less than one week.

Statement of initial employment particulars

81. The Claimant was employed before the amendments to s. 1 and 4 of the Employment Rights Act 1996 took effect in April 2020. The sections at the relevant times provided:

S. 1 Statement of initial employment particulars
(1) Where an employee begins employment with an employer, the employer shall give to the employee a written statement of particulars of employment.

(2) The statement may (subject to section 2(4)) be given in instalments and (whether or not given in instalments) shall be given not later than two months after the beginning of the employment.
(3) The statement shall contain particulars of—
(a)the names of the employer and employee,
(b)the date when the employment began, and
(c)the date on which the employee's period of continuous employment began (taking into account any employment with a previous employer which counts towards that period).
(4) The statement shall also contain particulars, as at a specified date not more than seven days before the statement (or the instalment containing them) is given, of—
(a)the scale or rate of remuneration or the method of calculating remuneration,
(b)the intervals at which remuneration is paid (that is, weekly, monthly or other specified intervals),
(c)any terms and conditions relating to hours of work (including any terms and conditions relating to normal working hours),
(d)any terms and conditions relating to any of the following—
(i)entitlement to holidays, including public holidays, and holiday pay (the particulars given being sufficient to enable the employee's entitlement, including any entitlement to accrued holiday pay on the termination of employment, to be precisely calculated),
(ii)incapacity for work due to sickness or injury, including any provision for sick pay, and
(iii)pensions and pension schemes,
(e)the length of notice which the employee is obliged to give and entitled to receive to terminate his contract of employment,
(f)the title of the job which the employee is employed to do or a brief description of the work for which he is employed,
(g)where the employment is not intended to be permanent, the period for which it is expected to continue or, if it is for a fixed term, the date when it is to end,
(h)either the place of work or, where the employee is required or permitted to work at various places, an indication of that and of the address of the employer,
(j)any collective agreements which directly affect the terms and conditions of the employment including, where the employer is not a party, the persons by whom they were made, and
(k)where the employee is required to work outside the United Kingdom for a period of more than one month—
(i)the period for which he is to work outside the United Kingdom,
(ii)the currency in which remuneration is to be paid while he is working outside the United Kingdom,

(iii)any additional remuneration payable to him, and any benefits to be provided to or in respect of him, by reason of his being required to work outside the United Kingdom, and
(iv)any terms and conditions relating to his return to the United Kingdom.
(5) Subsection (4)(d)(iii) does not apply to an employee of a body or authority if—
(a)the employee's pension rights depend on the terms of a pension scheme established under any provision contained in or having effect under any Act, and
(b)any such provision requires the body or authority to give to a new employee information concerning the employee's pension rights or the determination of questions affecting those rights.

S.2 Statement of initial particulars: supplementary
(1)If, in the case of a statement under section 1, there are no particulars to be entered under any of the heads of paragraph (d) or (k) of subsection (4) of that section, or under any of the other paragraphs of subsection (3) or (4) of that section, that fact shall be stated.
(2)A statement under section 1 may refer the employee for particulars of any of the matters specified in subsection (4)(d)(ii) and (iii) of that section to the provisions of some other document which is reasonably accessible to the employee.
(3)A statement under section 1 may refer the employee for particulars of either of the matters specified in subsection (4)(e) of that section to the law or to the provisions of any collective agreement directly affecting the terms and conditions of the employment which is reasonably accessible to the employee.
(4) The particulars required by section 1(3) and (4)(a) to (c), (d)(i), (f) and (h) shall be included in a single document.
(5)Where before the end of the period of two months after the beginning of an employee's employment the employee is to begin to work outside the United Kingdom for a period of more than one month, the statement under section 1 shall be given to him not later than the time when he leaves the United Kingdom in order to begin so to work.
(6)A statement shall be given to a person under section 1 even if his employment ends before the end of the period within which the statement is required to be given.

S. 4 Statement of changes
(1)If, after the material date, there is a change in any of the matters particulars of which are required by sections 1 to 3 to be included or referred to in a statement under section 1, the employer shall give to the employee a written statement containing particulars of the change.
(2) For the purposes of subsection (1)—

(a)in relation to a matter particulars of which are included or referred to in a statement given under section 1 otherwise than in instalments, the material date is the date to which the statement relates,
(b)in relation to a matter particulars of which—
(i)are included or referred to in an instalment of a statement given under section 1, or
(ii)are required by section 2(4) to be included in a single document but are not included in an instalment of a statement given under section 1 which does include other particulars to which that provision applies,
the material date is the date to which the instalment relates, and
(c)in relation to any other matter, the material date is the date by which a statement under section 1 is required to be given.
(3)A statement under subsection (1) shall be given at the earliest opportunity and, in any event, not later than—
(a)one month after the change in question, or
(b)where that change results from the employee being required to work outside the United Kingdom for a period of more than one month, the time when he leaves the United Kingdom in order to begin so to work, if that is earlier.
(4)A statement under subsection (1) may refer the employee to the provisions of some other document which is reasonably accessible to the employee for a change in any of the matters specified in sections 1(4)(d)(ii) and (iii) and 3(1)(a) and (c).
(5)A statement under subsection (1) may refer the employee for a change in either of the matters specified in section 1(4)(e) to the law or to the provisions of any collective agreement directly affecting the terms and conditions of the employment which is reasonably accessible to the employee.
(6) Where, after an employer has given to an employee a statement under section 1, either—
(a)the name of the employer (whether an individual or a body corporate or partnership) is changed without any change in the identity of the employer, or
(b)the identity of the employer is changed in circumstances in which the continuity of the employee’s period of employment is not broken,
and subsection (7) applies in relation to the change, the person who is the employer immediately after the change is not required to give to the employee a statement under section 1; but the change shall be treated as a change falling within subsection (1) of this section.
(7)This subsection applies in relation to a change if it does not involve any change in any of the matters (other than the names of the parties) particulars of which are required by sections 1 to 3 to be included or referred to in the statement under section 1.
(8)A statement under subsection (1) which informs an employee of a change such as is referred to in subsection (6)(b) shall specify the date on which the employee’s period of continuous employment began.

Decision.

Constructive Unfair Dismissal

Was the Respondent in fundamental breach of contract by:

In November 2018, imposing changes to the Claimant's working week which she was unable to accept, in part at least because of her caring responsibilities for her disabled daughter?

82. The Claimant's contract of employment included a flexibility clause, which required her to undertake her role flexibly as may reasonably be required by the Respondent. Following the Ofsted report in 2017 the Respondent considered that the service needed to be re-shaped in order to better to provide that service to the service users. As a consequence, it was concluded that the Claimant's role would need to be full time. The Respondent took into account the needs of the service users and considered the resources that it had and reached a reasonable conclusion. The Respondent consulted with the team and the Claimant. Further the Claimant was offered the full-time position, if she wanted to accept it, or if not that she could job share and continue to work the same number of hours. The Respondent reasonably concluded that the Claimant could work Monday to Friday, because she had suggested that she worked 25 hours per week over 5 days and at no stage, before Ms Henderson imposed a work pattern, did she say that there was an absolute bar on working on Fridays. The Respondent was reasonable to conclude that it would be difficult to recruit a job share around the Claimant's existing hours. The Claimant was consulted about the working pattern after Mr Jones had been appointed. I did not accept the Claimant's argument that Mr Jones was preferred to her. Both employees had caring problems on Fridays, however the Claimant's communications with Ms Henderson tended to suggest that it was more an organisational issue for her rather than an absolute bar. Mr Jones did not get the working pattern he sought of working 2 days one week and 3 the next. Both employees had been appointed to a managerial position and had been asked to see if they could agree between themselves the best way to undertake the job share. The Claimant did not respond to Ms Henderson's e-mail to discuss matters with her on 20 November 2018, by which stage nearly 2 months had been allowed to make arrangements. The imposition of the pattern was not to take effect until the new year which enabled time for arrangements to be made. In any event even after 20 November 2018 the Claimant was offered opportunities to further discuss the change, which she did not take up. I was satisfied that the Respondent reasonably required the change and the Claimant failed to establish that it was irrational.

83. The change was pursuant to a clause in the Claimant's contract of employment and was not immediately imposed, but followed a prolonged period of consultation and negotiation with her and included the offer of meetings after she had gone on sick leave, to which the Claimant did not respond. I was not satisfied that the change was something calculated or likely to destroy or seriously damage the relationship of trust and confidence. The Respondent had reasonable and proper cause for changing the Claimant's working pattern. It was necessary to do so to ensure that the service had sufficient managerial cover 5 days per week. The Claimant had been consulted and given time to provide alternative suggestions and to make caring arrangements. The Respondent did not side with one party and neither got what they wanted.

In late November or early December2018, failure by the Respondent's HR department and/or more senior management to reply to the Claimant's request to discuss these issues?

84. This allegation related to concerns raised by the Claimant and her team on 22 November 2018 with Mr Spencer. It was agreed with those present that Mr Spencer would first speak to Ms Henderson, which he did in the first part of December 2018. Mr Spencer informed the Claimant that he was ready to provide feedback, but wanted to give it to the team as a whole and during that time the Claimant was off sick and he wanted to wait for her return. At this stage, the Respondent would not have known how long the Claimant would have been absent. Suggesting that the feedback was provided orally was not something that would be like to destroy or seriously damage trust and confidence. In any event Mr Spencer offered to speak to the Claimant on the telephone, an offer she did not take up. I was satisfied that Mr Spencer had reasonable and proper cause for these actions. When the Claimant did not return to work, he held a meeting with the team on 13 February 2019, the Claimant did not attend because she was absent from work on sick leave.

85. I was not satisfied that the Respondent failed to discuss these issues or action them. After the discussion with Ms Henderson, it was necessary for there to be a period of time to see if the situation had improved, which it had by 13 February 2019. The Respondent acted promptly in response to the concerns and did as it agreed. I was not satisfied that this conduct was calculated or likely to destroy or seriously damage trust and confidence and, in any event, I was satisfied that there was reasonable and proper cause for the actions taken. Further the Claimant was invited to discuss the matters with Mr Spencer but chose not to and did not suggest she would be happy with feedback in writing.

Failure to investigate the Claimant's grievance raised with Chris Spencer and Peter Bungard on 26 March 2019?

86. The Claimant raised the grievance on Friday 26 March 2019 with Mr Spencer and he was on holiday for the first part of April 2019, which was an innocent explanation and was not calculated or likely to seriously damage trust and confidence. In any event the Claimant sought to reopen matters which had been previously concluded and which she had not appealed. Mr Spencer investigated the matters complained of and provided a response; however, the Claimant had already resigned on 16 April 2019. In the circumstances I was not satisfied that the Respondent acted without reasonable and proper cause.

87. Whilst not forming part of the allegation I address some further issues which arose. The Claimant made a legitimate complaint that mediation had not been organised and the Respondent was only able to say that it had been an oversight. When this was realised, before the Claimant went on sick leave, steps were taken to put mediation into place. Whilst the Claimant was on sick leave, the Respondent attempted to set up a mediation, which the Claimant eventually confirmed she no longer wanted. Although the failure to set up the mediation was damaging to the trust and confidence the Claimant had in the Respondent, it was not seriously damaging, the Claimant felt able to raise that it had not been organised with Ms Henderson, who then took immediate steps to arrange for it to be implemented. Thereafter the Respondent sought to hold a mediation, but the Claimant did not respond to the communications. I was therefore not satisfied that this was a fundamental breach of contract.

88. I was also satisfied that Ms Henderson had reasonable and proper cause to raise the issue of the interview candidate with the Claimant. The candidate had complained that she had found out she had been unsuccessful from a third party, which Ms Henderson was dealing with. The Claimant did not follow a reasonable management instruction. Ms Henderson was seeking to speak to the Claimant informally about it. This was not calculated or likely to destroy trust and confidence.

89. The examples given by the Claimant in evidence did not tend to show a negative management style by Ms Henderson. The e-mails raised legitimate concerns and are not constructed in an aggressive or overbearing style. Accordingly, I was not satisfied that they were sent without reasonable or proper cause.

The Claimant being contacted by her line manager, Amanda Henderson, while she was absent on certified sick leave and/or at 0645 pm outside of normal working hours?

90. I accepted that Ms Henderson lost track of time. The purpose of the call was an enquiry as to the Claimant's wellbeing and in any event, it was not answered. The Claimant had not said that she did not want Ms Henderson contacting her and the previous communications were all of a type showing concern, rather than any form of animosity. I was not satisfied that it was calculated or likely to seriously damage or destroy trust and confidence. Ms Henderson had reasonable and proper cause for making the telephone call, namely, to enquire as to the Claimant's wellbeing. I was not satisfied that this was a fundamental breach of contract.

In April 2019 receiving a written warning from Helen Allen under the sickness absence policy?

91. The Claimant had been absent since 12 December 2018. She had not responded to invitations to discuss matters with HR and was not responding to correspondence about mediation. The Respondent needed the Claimant to return to work but was left in an impossible position whereby the Claimant said she was unable to return but would not engage with the Respondent's attempts to resolve the situation. The Respondent waited a considerable period of time before commencing formal proceedings but there was no indication when the Claimant would return to work. It was notable that the Claimant did not dispute that she had failed to respond to the Respondent's offers of meetings and requests for information. The Claimant had significantly exceeded the trigger point for formal action and I accepted the Respondent's submission that it had done all it could to try and get the Claimant to return to work. The Respondent was left with little option but to commence the process. I was satisfied that the Respondent acted with reasonable and proper cause to commence the process and to make the decision it did in order to try and get the Claimant to return to work. It delayed implementing the formal stage in order to assist the Claimant and imposed a warning and reduction of increment in accordance with its policy. I was not satisfied that it was calculated or likely to destroy or seriously damage the relationship. I was not satisfied that this was a fundamental breach of contract.

<u>Did the Respondent have reasonable and proper cause for the way it acted?</u>

92. I was satisfied that the Respondent had reasonable and proper cause for the way it acted, apart from failing to arrange the mediation promptly, however as soon as it became apparent it had not been organised in November 2018 steps were immediately taken and thereafter it acted with reasonable and proper cause.

<u>Was such conduct calculated or likely to destroy or seriously damage the trust and confidence the Claimant had in the Respondent?</u>

93. None of the conduct was calculated or likely to destroy or seriously damage the trust and confidence the Claimant had in the Respondent. The Respondent acted in accordance with the Claimant's contract of employment and within its absence management policy. The Claimant was given extra time before the absence management process started and was offered various informal meetings which she rejected.

Was the last of the alleged breaches sufficient to constitute a final straw?

94. The Respondent had reasonable and proper cause for issuing a first warning to the Claimant under its absence management policy and this was not something that was by itself a repudiatory breach of contract. The only matter in which the Respondent did not have reasonable and proper cause was in the way it acted related to organising the mediation, however this on its own was not sufficient to constitute a fundamental breach. I was not therefore satisfied that a final straw, within the meaning of Omilaju had occurred.

Conclusion on whether the Respondent was in breach of contract and whether the Claimant resigned in response to the breach

95. The Respondent was not in fundamental breach of contract and therefore the Claimant did not resign in response to a fundamental breach.

Did the Claimant wait too long to resign?

96. Even if I am wrong in relation to the organisation of the mediation as not constituting a fundamental breach, the Claimant's conduct by raising that it had not been commenced and by remaining silent thereafter during the attempted organisation of the meeting affirmed the breach. The Claimant as of November 2018 wanted to continue with mediation and once matters were put in place it was the Claimant who did not engage. The Claimant's resignation was 5 months after the conversation in November and 2 months after she had rejected mediation. Accordingly, the Claimant delayed too long and would have affirmed the breach.

97. Therefore, the claim of constructive unfair dismissal was dismissed

Was the Claimant entitled to receive notice/notice pay?

98. The Respondent was not in breach of contract and the Claimant resigned without notice and therefore was not entitled to notice pay.

Statement of terms of conditions

99. To receive an award the Claimant must succeed on another element of her claim, which she did not. In any event the Claimant was informed in writing on 26 September 2018 of the changes to her job title, her pay grade, hours and start date of the changes. The only matter which had not been agreed was the working pattern, which was confirmed in writing on 20 November 2018. At the time, the information could be provided by instalments. The Respondent therefore complied with its obligations to notify the Claimant of changes to her initial employment particulars and this claim was dismissed.

Employment Judge Bax

Dated: 1 September 2020

Judgment sent to parties: 15 September 2020

FOR THE TRIBUNAL OFFICE