



EMPLOYMENT TRIBUNALS

BETWEEN

Claimant
Ms G Smith

AND

Respondent
Age Concern Exmouth & District

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT Exeter

ON

21 September 2020

EMPLOYMENT JUDGE N J Roper

Representation

For the Claimant: Miss S Hornblower of Counsel

For the Respondent: Mr N Henry, Consultant

JUDGMENT

The judgment of the Tribunal is that:

1. The claimant was unfairly dismissed by the respondent; and
2. The respondent is ordered to pay the claimant the sum of £26,578.88 as compensation for unfair dismissal; and
3. The Employment Protection (Recoupment of Jobseeker's Allowance and Income Support) Regulations 1996 do not apply.

REASONS

1. In this case the claimant Ms Gillian Smith claims that she has been unfairly constructively dismissed. The respondent contends that the claimant resigned, that there was no dismissal, and in any event that its actions were fair and reasonable.
2. I have heard from the claimant, and I have heard from Mr George Eamer who is Chair of Trustees of the respondent charity on behalf of the respondent. I was also asked to consider a statement from Mr Sydney Langridge on behalf of the claimant, but I can only attach limited weight to this because he was not here to be questioned on this evidence
3. There was a degree of conflict on the evidence. I have heard the witnesses give their evidence and have observed their demeanour in the witness box. 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.
4. The Facts:
 5. The respondent Age Concern Exmouth and District is a registered charity which provides advocacy and support to older people and their carers in the East Devon region. It is affiliated to the National Age Concern charity. The respondent has approximately nine employees who manage the Centres and services which it provides. It also has just under 50 workers operating remotely in the community as well as several volunteers.
 6. The claimant Ms Gillian Smith commenced employment with the respondent in September 2014 as Home Support Assistant and was promoted to Home Services Manager on 24 October 2014. She was promoted again to General Manager with effect from 1 January 2017, and then promoted again to Chief Executive Officer (CEO) with effect from the beginning of April 2017. She resigned her employment with immediate effect on 12 August 2019 in the following circumstances.
 7. The respondent has a Board of Trustees. The Trustees adopted a Policy Document on 14 December 2009 which specifically relates to their relationship with the Chief Officer (also referred to as the CEO). This Policy Document makes it clear that the Board of Trustees recognises and acknowledges that the CEO's responsibility includes managing the day-to-day operations of the respondent, with the specific authorisation of the Board of Trustees to operate and manage the respondent charity on a day-to-day basis. The respondent also recognised that the CEO was designated as "leader of permanent, part-time and voluntary staff". This Policy also provides: "Any member of the Board of Trustees cannot undertake a role of operational management and shall inform the Chief Officer of any concerns and/or issues arising through "informal" contact with staff". The Policy also provides: "In order that staff are not confused, the Board of Trustees shall ensure that unsolicited and derogatory remarks, to them, from staff concerning governance and operational matters are brought to the attention of the Chief Officer such that he is given the authority on which to act."
 8. The claimant had signed a written contract of employment, which had an attached job description. This included a number of roles with regard to Personnel Management, paragraph 6 of which required the claimant: "to carry out regular staff reviews, dealing with any performance issues as required. To take action over any disciplinary issues if needed after consultation with the trustees ensuring our employment law obligations are met." This effectively mirrored the Policy Document referred to above. In addition, there was a formal written Grievance Procedure in place.
 9. Mr Sydney Langridge, who has provided a statement in support of the claimant but who was too unwell to attend today, joined the respondent as a Trustee in 2008. He became Vice Chairman of the Trustees, and then Chairman for two years before his retirement in May 2019. After his retirement the role of Chairman was undertaken by Mr George Eamer, who has given evidence today on behalf of the respondent. Following Mr Langridge's retirement, and at the time of the claimant's resignation, there were four Trustees. These were Mr Eamer, his wife Mrs Jan Eamer, Mrs Sue Moreton and Mr Simon Wood.
 10. The claimant complains of a course of conduct by the Trustees as a result of which she asserts that her position was undermined; that there was a breach of the implied term of trust and confidence between the Trustees and her; and that she resigned her employment as a result. She refers in particular to three specific incidents, which are now set out below. These Three Incidents were identified in a Case Management Order dated 8 April 2020. Despite this the respondent has adduced no witness evidence to address the first two incidents, and for this reason where there was any dispute I preferred the evidence of the claimant on these first two incidents because she was able to give her first-hand account, which was also supported by the statement of Mr Langridge.
 11. The First Incident
 12. The First Incident occurred in April 2018. The claimant had witnessed behaviour by two members of staff, namely Sarah Cripps and Beverley Alexander, which she deemed to constitute potential bullying. She explained to both members of staff that if such behaviour were to continue then disciplinary proceedings were likely. Ms Cripps was immediately

- apologetic but Ms Alexander took great exception and became very abusive. She shouted at the claimant: "Shove your job up your arse", and then shouted the same phrase again to the entire office. She then said: "Just in case you think I am coming back, there's my bloody keys". Unsurprisingly the claimant considered this to have been appalling and unacceptable behaviour. She took advice and wrote to Ms Alexander confirming that her behaviour was accepted to be her resignation, and the claimant then reported the matter to the Trustees.
13. No action was taken by the Trustees, until several months later when the matter was raised to the claimant at a Trustee meeting on 13 September 2018. Unbeknown to the claimant Ms Alexander had written a letter of complaint to the Trustees which had not been brought to her attention in accordance with the Policy Document referred to above. The Trustees had met with Ms Alexander to discuss her complaint, but had not made the claimant aware of this. The claimant was then able to explain the situation to Mr Langridge who at the time was Chair of Trustees, and confirmed that there was no substance to Ms Alexander's allegations. Mr Langridge confirmed that Ms Alexander had not provided any evidence to support her accusations and she had not denied behaving in an inappropriate manner. The respondent now claims in its notice of appearance in response to these proceedings that they had "identified a number of factors they were concerned with all of which were the responsibility of the claimant". The claimant denies that this was the case, as does Mr Langridge. The claimant felt unsupported and untrusted, but thought that the matter was resolved. However, it was brought up again by Mr Wood of the Trustees at the claimant's annual appraisal on 31 January 2019 which compounded the claimant's disappointment at the way in which she had not been supported.
 14. The Second Incident
 15. The Second Incident occurred during January and February 2019 and involved another member of staff, namely Ms Michaela Sharman. The claimant had supported Ms Sharman's increase in hours and her promotion to Home Support Manager. However, the claimant asserts that Ms Sharman had lied to her about owning a car which then hindered her ability to undertake home visits necessitated by her role. This then caused friction between them. The respondent originally asserted in its response to this claim that the claimant had no conversation with Ms Sharman about her car, and that she has fabricated the allegation that Ms Sharman lied about owning a car. This allegation is now withdrawn by the respondent and I accept the claimant's evidence in this respect.
 16. Ms Sharman was pregnant and was planning her maternity leave, and the amount of sickness absence, holiday pay, and maternity pay when grouped together was likely to have an impact on the pay and benefits which she ultimately received. However, with regard to her sickness absence, the claimant confirmed to her that she would only receive statutory sick pay (SSP) for these periods of absence, which may well have had an impact on her other expectations. Ms Sharman subsequently put in a letter of complaint against the claimant. By email to the Trustees dated 3 February 2019 the claimant responded to Ms Sharman's complaints. Her email included the following comments: "Due to the malicious and untrue comments that have been made against me I have taken legal advice ... She has defamed my good name and character in a malicious and vindictive manner, I believe to discredit me ... If you override my decision I will be undermined and discredited, and secondly could potentially set a dangerous precedent that could cost the charity dearly."
 17. The Trustees then met with Ms Sharman on 27 February 2019, and they found her complaints to be baseless and untrue. Mr Langridge has confirmed that the essence of the complaint effectively involved whether Ms Sharman would receive full pay rather than SSP during her periods of absence. The Trustees then sent the claimant an email on 5 March 2019, which included the following comments: "We have now received written confirmation from Michaela that her grievance is now resolved ... As part of our agreement as we discussed yesterday, we have agreed to pay full pay whilst on sick leave as a one-off exception at the discretion of the trustees and with your agreement ..."
 18. The claimant was very disappointed by this decision. The claimant denies that she had any say in the decision and denies that it was discussed with her or that she agreed it as

- suggested. I accept the claimant's evidence in this respect. She felt that the Trustees had disregarded her concerns and without any explanation or further discussion with her had decided to give Ms Sharman what she wanted. The Trustees did not write to the claimant to support or acknowledge that there was no case to answer against her. The claimant felt that Ms Sharman had got exactly what she wanted by making hurtful and unfounded allegations about her and that once again she felt undermined and unsupported by the Trustees.
19. On 18 March 2019 Mr Langridge then sent an email to the claimant on behalf of the Trustees to confirm their view of the claimant's performance over the last 18 months. That email confirmed: "We all agreed that you have done an excellent job in promoting the interests of Age Concern Exmouth, which have then led us to expanding into the Sidmouth area ... You are to be congratulated and on behalf of the trustees I offer you their thanks ..."
 20. In addition, at that time the Trustees decided that the claimant was dealing with over 70 staff, and might well benefit from external HR support. The claimant asked the Trustees to secure approval for this expenditure, which the Trustees agreed, and which led to the appointment of Ms Jacqui Cousins from Belvedere HR, an HR consultancy said to specialise in employment law, with effect from March 2019.
 21. The Third Incident
 22. The Third Incident occurred in July 2019. Ms Sharman's mother, namely Mrs Debbie Bales, was also an employee of the respondent. She became very hostile towards the claimant, so much so that four other members of staff, namely Moya McLaughlin, Christine Gibbons, Millie Loaring (who is the claimant's sister), and Emma Donovan, all raised complaints about how Mrs Bales had acted towards the claimant. The claimant decided to take advice, and on 1 August 2019 met with Ms Cousins the HR consultant. Ms Cousins advised that Mrs Bales did not have sufficient length of service to bring an unfair dismissal claim, and that it would be appropriate in the circumstances to dismiss her.
 23. The claimant was concerned about the lack of support which she received on staffing matters previously, and therefore decided that it would be prudent to obtain approval from the Trustees before dismissing Mrs Bales. The claimant and Ms Cousins then spoke to Mr Wood who confirmed that he was in agreement provided that Mr Eamer, the Chair of Trustees, also agreed. The claimant and Ms Cousins then telephoned Mr Eamer and Mrs Eamer and a third trustee Mrs Moreton were also present. The claimant explained the position to them, and they asked to consider the matter. They called the claimant back after 15 minutes or so and Mr Eamer confirmed to the claimant that it was a "managerial decision" and that as long as the claimant followed Ms Cousins' instructions then the Trustees would support her. This was a conference call on loudspeaker and Ms Cousins also heard it.
 24. The initial position at that time was therefore this. Ms Cousins had advised that Mrs Bales should be summarily dismissed. The claimant checked with the Trustees who then authorised the claimant to act on that advice and to dismiss Mrs Bales immediately.
 25. Ms Cousins then took legal advice from solicitors to check the position, and advised the claimant that it was arguable that Mrs Bales had the benefit of a contractual disciplinary procedure, and that given the number of statements criticising the behaviour of Mrs Bales it would be sensible to follow a contractual disciplinary process rather than simply dismissing her, and advised that Mrs Bales should be suspended pending a disciplinary investigation. The claimant agreed with that course of action, and on 5 August 2019 Ms Cousins attended the Exmouth office and suspended the claimant on full pay. Ms Cousins also emailed the Trustees on 5 August 2019 explaining the rationale for this decision.
 26. This more cautious approach then raised doubts with the Trustees. On the afternoon of 5 August 2019 the Trustees held a meeting with Ms Cousins, but did not involve the claimant in that meeting. Two reasons have been given by Mr Eamer on behalf of the Trustees. The first is that another employee namely Mrs N Roberts had resigned her employment, apparently in sympathy for Mrs Bales, and had raised a complaint about the conduct of the claimant. Secondly, the claimant was about to go on holiday with her sister, and the resignation of Mrs Roberts, the suspension of Mrs Bales, and a departure on holiday of the

- claimant and her sister was said to leave the respondent understaffed at managerial level. The claimant disputes this latter point, and I accept her evidence, which the respondent was not in a position to challenge, that she had already clarified to Mr Wood of the Trustees exactly what holiday cover was in place, and reassured him that all would be well in her absence.
27. We do not know exactly what happened at the Trustees' meeting with Ms Cousins on the afternoon of 5 August 2019 because the respondent remains in breach of an order by the Tribunal to disclose the minutes of that meeting. In any event, they instructed Ms Cousins to reverse the suspension of Mrs Bales and to reinstate her in her place of work. Ms Cousins subsequently telephoned the claimant to say that she had been instructed to reverse Mrs Bales' suspension and that she was not going to be sacked. She said she was unable to discuss the matter further with the claimant. She then emailed the claimant to confirm that the suspension was lifted and that Mrs Bales would be returning to work.
 28. The claimant felt very shocked and undermined by this decision. She felt that the Trustees had reneged on their conversation with her just one day before, and had publicly humiliated the claimant in the eyes of the staff who would now witness the suspension of Mrs Bales being overturned and her return to work. The claimant felt that the Trustees had given no thought to her feelings or how her authority and reputation would be undermined by this decision. The claimant also felt that the Trustees had made a decision in a secretive and underhand manner because they had arranged a meeting with Ms Cousins behind her back and had excluded her from involvement in the discussion. The claimant felt that given the previous difficulties with Mrs Bales, it would now be impossible for her to manage any sort of working relationship with her. The claimant felt that Mrs Bales would now consider herself to be "untouchable" and that her already insubordinate behaviour would be bound to deteriorate. The claimant felt that it was impossible for her to continue in her position under these conditions.
 29. The claimant then emailed the Trustees on 6 August 2019 saying that she had just heard from Ms Cousins what had happened at the meeting and that she needed an urgent meeting with them to discuss her future at Age Concern. She also raised the serious matter that the respondent had apparently been unable to pay her salary on time the previous month. There was no immediate reply. By email to the Trustees on the following day 7 August 2019 the claimant confirmed that she had been signed off work for two weeks with work-related stress. None of the Trustees responded to the claimant in reply to either of her emails dated 6 and 7 August 2019.
 30. The claimant's resignation
 31. The claimant was very distressed by the way in which she had been treated, both in terms of the interference by the Trustees in her decision to suspend Mrs Bales, and the failure by any of the Trustees to discuss the matter with her. The behaviour of the Trustees had made her angry, upset and ill. The claimant felt then that she could not continue in her employment and she tendered her resignation with immediate effect by letter to the Trustees dated 12 August 2019.
 32. The claimant's resignation letter was headed: "Notice of Resignation and Grievance" and was a letter which ran to over four pages and which commenced: "Following the events of last week, I hereby tender my resignation with immediate effect. I am disgusted with the way I have been treated, particularly in relation to the lack of trust and lack of support shown by the Trustees when I have had to deal with sensitive staffing issues. You have completely undermined my credibility as CEO, my reputation and my ability to perform my job. In short, you have made my position completely untenable." The letter then went on to give details of her formal grievance and gave details of the Three Incidents mentioned above.
 33. Mr Eamer acknowledged the claimant's resignation by a short email dated 14 August 2019 which merely stated: "Dear Gill, as requested this is to acknowledge receipt of your email of Monday, 12 August 2019. Regards. George". The respondent did not seek to discuss the matter, or to provide a cooling off period or invite the claimant to reconsider her resignation, and in addition the respondent took no steps to address the claimant's formal grievance.

34. The claimant commenced the Early Conciliation process with ACAS on 4 September 2019 (Day A) and the Early Conciliation Certificate was issued on 30 September 2019 (Day B). The claimant presented her originating application on 25 October 2019.
35. In its response to these proceedings the respondent had suggested (in paragraph 6.2.16) that the claimant did not have a conversation with Ms Sharman about owning a car and that the claimant has fabricated the suggestion that Ms Sharman has lied about this, and that there was never any “friction” between them. The respondent also asserts (in paragraphs 6.2.33, 34 and 35) that: “the Trustees feel they were deliberately misled by the claimant ... That the above would have ultimately led to an investigation into the claimant’s conduct which could have included her being dismissed for failure to follow reasonable management instructions and a wilful dereliction of her duties which could have resulted in the respondent’s business being put at substantial risk” ... and that if (which is denied) the claimant was constructively dismissed, then “any such dismissal would be fair by reason of the claimant’s misconduct”. However, the respondent withdrew those allegations this morning and did not pursue them.
36. Having established the above facts, I now apply the law.
37. The Law:
38. 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.
39. 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”.
40. I have considered the cases of Western Excavating (ECC) Limited v Sharp [1978] IRLR 27 CA; Malik v Bank of Credit and Commerce International SA [1997] IRLR 462 HL; Courtaulds Northern Spinning Ltd v Sibson [1987] ICR 329; Kaur v Leeds Teaching Hospital NHS Trust [2018] EWCA; Omilaju v Waltham Forest London Borough Council [2005] IRLR 35 CA; Woods v WM Car Services (Peterborough) Ltd [1981] ICR 666 CA; Buckland v Bournemouth University Higher Education Corporation [2010] IRLR 445 CA; Tullett Prebon PLC and Ors v BGC Brokers LP and Ors [2011] EWCA Civ 131; Claridge v Daler Rowney [2008] IRLR 672; Sainsbury’s Supermarkets Limited v Hitt [2003] IRLR 23 CA; Lewis v Motorworld Garages Ltd [1985] IRLR 465; 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; Leeds Dental Team v Rose [2014] IRLR 8 EAT; Hilton v Shiner Ltd - Builders Merchants [2001] IRLR 727 EAT; and Upton-Hansen Architects (“UHA”) v Gyftaki UKEAT/0278/18/RN.
41. I have also considered section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992, and in particular section 207A(2), (referred to as “s. 207A(2)”) and the ACAS Code of Practice 1 on Disciplinary and Grievance Procedures 2009 (“the ACAS Code”).
42. 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.”
43. In Tullett Prebon PLC and Ors v BGC Brokers LP and Ors 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.”
 44. In Courtaulds Northern Spinning Ltd v Sibson 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 Meikle, Abbey Cars and Wright, 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. It need not be the predominant, principal, major or main cause for the resignation.
 45. 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”.
 46. 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.”
 47. 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).
 48. The judgment of Dyson LJ in Omilaju has recently been endorsed by Underhill LJ in Kaur v Leeds Teaching Hospital NHS Trust. 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.
49. In addition, it is clear from Leeds Dental Team v Rose 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 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.
 50. As re-emphasised by the EAT in the decision of Upton-Hansen Architects ("UHA") v Gyftaki, it is for the employer to advance in pleadings, assert in evidence, and prove a potentially fair reason for the dismissal, and a failure to do so may preclude them from a defence to a claim of constructive dismissal.
 51. Decision:
 52. The respondent has not addressed either of the First Incident or the Second Incident in its evidence. I accept the claimant's evidence that in connection with the First Incident she felt unsupported and untrusted, but thought the matter was resolved. Her disappointment was compounded when the matter was subsequently raised by Mr Wood again on 31 January 2019. I also accept the claimant's evidence in connection with the Second Incident that she felt disappointed and undermined at the decision of the Trustees to overrule and reverse her decision that Ms Sharman should only receive SSP rather than her full pay during any period of sickness. In my judgment the claimant was entitled to feel that the Trustees had interfered in staff management issues which were clearly within her remit, and that she was not supported and effectively undermined in a managerial position by their actions.
 53. With regard to the Third Incident, in my judgment the claimant was also entitled to feel unsupported and undermined by the Trustees. The respondent seeks to argue that they did not undermine the claimant because the only thing they reversed was a decision to suspend Mrs Bales. However, this seems unsupportable. In the first place they previously agreed to dismiss Mrs Bales and it seems bizarre to suggest that they had to overturn a suspension because it was not agreed when they had already agreed Mrs Bales' summary dismissal. Secondly, by overturning the suspension, they effectively allowed Mrs Bales to assume the position of the main accuser against the claimant. This was at a time when they had failed to respond to the claimant's clear request for an urgent meeting.
 54. There was a clear course of conduct by the Trustees throughout the Three Incidents. In each case they assumed the claimant's remit of responsibility for the management of staff issues, and took a course of action which was contrary to that adopted by the claimant, and as a result undermined her managerial position as CEO. Immediately following the Third Incident the claimant asked all Trustees for an urgent meeting to discuss her future. They failed to respond to this request. Subsequently she became too ill to continue as a result of work-related stress and there was no attempt by the Trustees to discuss or explore the position further with her.
 55. The Trustees now assert that they had to take action to revoke Mrs Bales' suspension because of concerns over holiday cover, but I accept the claimant's evidence that this had already been explained and approved by Mr Wood. Their secondary assertion that the suspension had to be revoked because it was somehow unsafe or a litigation risk seems far-fetched when they had earlier approved Mrs Bales summary dismissal.
 56. Even when the claimant resigned, there was no attempt to dissuade her from resigning or to explore the reasons for that decision, and her formal grievance was ignored.
 57. In my judgment at the time of the Third Incident and the claimant's resignation the respondent was in fundamental breach of contract in respect of the implied term that an employer will not without reasonable cause act in a way which is calculated or likely to destroy or seriously damage the trust and confidence between employer and employee. There was both a cumulative breach in respect of the combination of the First, Second and Third incidents, and in any event a fundamental breach at the time of the claimant's resignation, particularly the Trustees' failure to acknowledge or act upon a request from their own CEO for an urgent meeting to discuss her future. In my judgment the claimant

- does not have to rely on an argument that the Third Incident was somehow the last straw in a course of conduct which on its own was not a fundamental breach of contract, but taking cumulatively with previous behaviour, can be said to be such a fundamental breach. In my judgement the action of the Trustees of the time of the Third Incident in overruling the suspension of Mrs Bales, undermining the claimant's managerial authority and position; and ignoring a request for an urgent meeting to discuss the matter which of itself amounts to a fundamental breach of the implied term of trust and confidence.
58. The claimant clearly resigned in response to that breach. It is clear from Meikle, Abbey Cars and Wright, 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. It need not be the predominant, principal, major or main cause for the resignation. I find that the fundamental breach of contract by the Trustees not only played a part in the dismissal and was an effective cause of the resignation but actually was the predominant principal and major cause of the claimant's resignation.
 59. Given that the claimant resigned in response to this repudiatory breach of contract I find that the claimant's resignation is to be construed as her dismissal, and that she was constructively dismissed on 12 August 2019.
 60. The respondent originally sought to argue that if there had been a constructive dismissal, then the reason for the dismissal was the claimant's misconduct. No evidence been adduced in support of this contention, which in any event no longer seems to be pursued. Applying Upton-Hansen Architects, it is for the employer to advance in pleadings, assert in evidence, and prove a potentially fair reason for the dismissal, and a failure to do so may preclude them from a defence to a claim of constructive dismissal. The respondent has not discharged this burden in this case, and there was no potentially fair reason for the claimant's dismissal.
 61. I therefore find that the claimant was unfairly dismissed.
 62. Remedy:
 63. The claimant does not seek reinstatement or re-engagement. I award compensation consisting of a basic award and a compensatory award.
 64. The claimant had four years' service between 1 September 2014 and 12 August 2019 and was aged 55 at the effective date of termination of her employment. Her gross salary was £35,000 per annum, which is £2,916.67 gross per month. Her net salary was £2,278.00 per month, which is £525.17 per week. The basic award is $4 \times 1.5 \times £525.00$ (the maximum applicable gross weekly pay) which is £3,150.00.
 65. With regard to the compensatory award, I first award £400.00 for loss of statutory rights. With regard to loss of earnings, the claimant seeks 57.5 weeks loss of earnings of £525.70 per week net from the date of dismissal on 12 August 2019 until the date of this hearing on 21 September 2020. This is a sum of £30,227.75. However, the claimant was able to obtain alternative employment with effect from 1 November 2019 albeit at the lower rate of £299.10 per week net. She suffered 21 weeks loss at this rate between 1 November 2019 and 31 March 2020 (£6,281.10) before being placed on furlough leave for 13 weeks between 1 April 2020 and 30 June 2020 during which time she received £259.18 per week net (£3,369.34). She was then reinstated to her former salary of £299.10 per week net for 11.5 weeks from 1 July 2019 until 21 September 2020 (£3,439.65). Allowing for these sums earned in mitigation, the claimant has suffered net loss of £17,137.66 from her dismissal until today's hearing.
 66. The claimant also claims six months' future loss of net salary in the sum of £13,668.00, less estimated future mitigation of alternative earnings for six months in the sum of £1,296.13 per month (£7,776.78) which is ongoing future loss of £5,891.22.
 67. The claimant has sought an uplift 25% in respect of a breach of the ACAS Code of Practice in that the respondent failed to process her formal grievance. However, the claimant has only brought a claim for unfair dismissal, and the request for a formal grievance was only made after the claimant had resigned and been constructively dismissed. In my judgment therefore, the provisions of section 207A do not apply but it cannot be said of the respondents failed to comply with the Code in relation to the claimant's dismissal.

68. The respondent has also sought to argue that the claimant has failed in her duty to mitigate her loss because she should have obtained employment at a rate commensurate with or similar to her employment with the respondent within a period of three months from her dismissal. The claimant has explained that she has parental responsibilities and cannot leave the area of Exeter and East Devon and there are very limited opportunities for similar well-paid employment. She had made a number of enquiries but no similar jobs are available. The burden of proof is on the respondent to prove that the claimant has failed to mitigate her loss, given the claimant has obtained alternative employment within approximately 10 weeks from her dismissal I reject the respondent's argument that the claimant has failed to mitigate her loss. I also consider that the period of future loss claimed of only six months is reasonable, particularly given the difficult circumstances which pertain as a result of the Covid-19 pandemic.
69. The Employment Protection (Recoupment of Jobseeker's Allowance and Income Support) Regulations 1996 ("the Recoupment Regulations") do not apply in this case.
70. For the purposes of Rule 62(5) of the Employment Tribunals Rules of Procedure 2013, the issues which the tribunal determined are at paragraph 1; the findings of fact made in relation to those issues are at paragraphs 5 to 36; a concise identification of the relevant law is at paragraphs 38 to 50; how that law has been applied to those findings in order to decide the issues is at paragraphs 52 to 61; and how the amount of the financial award has been calculated is at paragraphs 63 to 69.

Employment Judge N J Roper

Dated: 21 September 2020

Judgment sent to Parties: 28 September 2020

FOR THE TRIBUNAL OFFICE