EMPLOYMENT TRIBUNALS

Claimant: Ms J Mehta

Respondent: Hill Eckersley & Co Limited

Heard at: Manchester **On:** 20 December 2019, 24 February and 21 August 2020 and 16 September 2020 (in chambers)

Before: Employment Judge McDonald (sitting alone)

REPRESENTATION:

Claimant: In person (assisted by her friend Ms Peploe)
Respondent: Mr L Bronze (Counsel)

JUDGMENT

The judgment of the Tribunal is that the claimant's claim of unfair dismissal fails and is dismissed.

REASONS

Introduction

1. The claimant claimed that she was constructively unfairly dismissed by the respondent. She had worked for the respondent, a firm of accountants, as a Payroll Clerk and then as a Payroll Manager. She resigned on 28 May 2019.

Preliminary Matters

2. This case was originally listed for one day. Unfortunately, it was not possible to conclude the evidence on that one day and so a second day was listed which could not take place until February 2020. After that second day there was one remaining witness and submissions to be dealt with, and a third day was listed for 23 March 2020. Unfortunately, the pandemic then intervened leading to all hearings

being cancelled. That meant that the third and final day of the hearing did not take place until 21 August 2020.

3. The claimant in this case represented herself and the respondent was represented by Mr Bronze of counsel.

Witness and document evidence

4. There was an agreed bundle of documents consisting of pages 1-281. References in this Judgment to page numbers are to pages in that bundle ("the Bundle").

5. In addition to the paper documents there were two discs consisting of the claimant's recording of the grievance appeal hearing which took place on 10 May 2019. The claimant had prepared a transcript of that recording (pages 188-246) which was agreed to be accurate. However, because part of the claimant's evidence was that at two points during that meeting Mr Nicholls had laughed under his breath or muttered something, I agreed it would be appropriate to listen to those extracts from the meeting. I did so using audio equipment during the first day of the hearing.

6. On the second day of the hearing the claimant produced diary notes which were added as page 251C to the Bundle. Although she had finished her evidence on the first day I directed that she re-swear the oath so that Mr Bronze could cross examine her about the circumstances in which the notes were made.

7. Towards the end of the third day the respondent produced Mr Nicholls's handwritten notes of his investigatory meeting with Stephanie Mort on 5 April 2019. They were added as page 117A-117F of the Bundle. Mr Nicholls had by then finished giving evidence. He re-swore the oath and I heard very brief evidence from him about those notes.

8. In terms of evidence, I heard from the claimant on the first day (and as mentioned above, briefly on the second day). On the second day I heard the respondent's first two witnesses. They were Ian Hampson ("Mr Hampson"), one of the Partners/Directors of the respondent and Stephanie Mort ("Ms Mort"), an Accounts Production/Payroll Senior employed by the respondent. On the third day I heard evidence from Andrew Nicholls ("Mr Nicholls"), the other Partner/Director of the respondent. Each witness had provided a written witness statement and was cross examined and answered my questions.

Submissions

9. At the end of the evidence I heard oral submissions from Mr Bronze. The claimant had prepared written submissions and she read those out. Mr Bronze made brief points in reply. At my request the claimant emailed a copy of her written submissions to the Tribunal. I have not set out the submissions I heard and read in full but have taken them into account in making my decisions on the case and have referred to them in the judgment where relevant.

Remedy

10. On the first day of the hearing the claimant confirmed that she had started a new job on the 16 June 2019. She had no loss of earnings from that date. The claimant had included in her schedule of loss (p.30A-30B) losses from before the dismissal. On the first day of the hearing I explained the claimant that the Tribunal could not award compensation for losses prior to the dismissal nor for "detriment/suffering".

11. That seemed to mean that if her claim succeeded the maximum compensatory award the Tribunal could award if her unfair dismissal claim succeeded was £824.25. If her claim succeeded she would also be entitled to a basic award which she calculated to be £7347.59. The respondent was not able to confirm that those figures were agreed so on the third day of the hearing I listed a remedy hearing on 20 November 2020. I have decided that the claim of unfair dismissal fails so that remedy hearing will now be cancelled.

Other Matters

12. On 18 August 2020 the claimant sent an email. The content of the email referred to an attachment. The Tribunal could not open the attachment. On 19 August 2020 the respondent's representatives wrote to the tribunal to say that the attachment was a without prejudice letter which ought not to have been sent to the Tribunal. As I confirmed to the parties at the start of the third day of the hearing I did not (and have not) seen that without prejudice letter. I explained to the claimant that the Tribunal does not look at without prejudice correspondence before reaching its judgment on a case. It may in some circumstances look at without prejudice correspondence after it has reached its judgment, for example in considering whether to order that one party pay the other party's costs of the proceedings.

Issues

13. The claimant's claim is that she was constructively unfairly dismissed. To establish that, she will need to show that she resigned in response to a fundamental breach of contract by the employer. In her written submissions the claimant confirmed that she had "lost confidence and trust" in the respondent as her employer. For her claim to succeed she will need to show that the respondent breached the implied duty of trust and confidence. The issues for me to decide were therefore:

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

(2) Has 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 of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a repudiatory breach? (If it was, there is no need for any separate consideration of a possible previous affirmation, because the effect of the final act is to revive the employee's right to resign even if there was a previous affirmation).

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

(6) If so, what compensation is the claimant entitled to?

14. In this case the term of the contract which the claimant says the respondent has breached is the implied term of trust and confidence. That is the obligation on the respondent that it would not, without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between the employer and the employee.

Relevant Law

Unfair Dismissal

15. S.94 Employment Rights Act 1996 ("ERA") gives an employee a right not to be unfairly dismissed by their employer. To qualify for that right an employee usually needs two years' continuous service at the time they are dismissed, which the claimant had in this case.

16. In determining whether a dismissal is unfair, it is for the employer to show that the reason (or if more than one the principal reason) for dismissal is one of the potentially fair reasons set out in s.98(2) of ERA or some other substantial reason justifying dismissal.

17. If the employer shows a potentially fair reason or dismissal then whether the dismissal is fair (having regard to that reason) will depend 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 sufficient reason for dismissing the employee and shall be determined in accordance with equity and substantial merits of the case (s.98(4) ERA).

Remedy for unfair dismissal

18. S.118(1) ERA says that:

"Where a tribunal makes an award of compensation for unfair dismissal under section 112(4) or 117(3)(a) the award shall consist of —

(a) a basic award (calculated in accordance with sections 119 to 122 and 126, and

(b) a compensatory award (calculated in accordance with sections 123, 124, 124A and 126)."

19. The basic award is calculated based on a week's pay, length of service and the age of the claimant.

20. The compensatory award is "such amount as the tribunal considers just and equitable in all the circumstances, having regard to the loss sustained by the claimant in consequence of the dismissal" (s.123(1) ERA).

21. A just and equitable reduction can be made to the compensatory award where the unfairly dismissed employee could have been dismissed at a later date or if a proper procedure had been followed (the so-called **Polkey** reduction named after the House of Lords decision in **Polkey v AE Dayton Services Ltd**).

22. Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the claimant it shall reduce the compensatory award by such proportion as it considers just and equitable having regard to that finding (s.123(6) ERA).

23. Where the tribunal considers that any conduct of the claimant before the dismissal (or, where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the tribunal shall reduce or further reduce that amount accordingly (s122(2) ERA).

Constructive dismissal

24. Section 95(1)(c) provides that "an employee is dismissed by his employer if the employee terminates the contract under which they are employed (with or without notice) in circumstances in which they are entitled to terminate it without notice by reason of the employer's conduct". This is known as "constructive dismissal". The test for constructive dismissal is whether the employer's actions or conduct amounted to a repudiatory breach of the contract of employment entitling the employee to resign: **Western Excavating (ECC) Ltd v Sharp [1978] 1 QB 761**.

25. The existence of the implied term of mutual trust and confidence was approved by the House of Lords in **Malik v Bank of Credit and Commerce International SA (in compulsory liquidation) 1997 ICR 606, HL**. It confirmed that the obligation on each party is that it will not, without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between employer and employee.

26. The question is whether, objectively, there has been a breach of the implied term. For the implied term to be breached the conduct must be such as, objectively, is calculated or likely to undermine the duty of trust and confidence and must be conduct for which there is, objectively, no reasonable and proper cause (**Bradbury v BBC [2015] EWHC 1368 (Ch)** and **Buckland v Bournemouth University Higher Education Corporation [2010] EWCA Civ 121**).

27. If the employer is found to have been guilty of such conduct, that is something which goes to the root of the contract and amounts to a repudiatory breach, entitling the employee to resign and claim constructive dismissal (**Morrow v Safeway Stores [2002] I.R.L.R. 9**).

28. Where the employee waits too long after the employer's breach of contract before resigning, he or she may be taken to have affirmed the contract and thereby lost the right to claim constructive dismissal. In the words of Lord Denning MR in **Western Excavating (ECC) Ltd v Sharp1978 ICR 221, CA**, the employee "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".

29. The leading case on the doctrine of affirmation as it applies where an employer is in fundamental breach of an employee's contract is W E Cox Toner (International) Ltd v Crook [1981] IRLR 443. Mr Justice Browne-Wilkinson in his judgment said:

> "13. … Mere delay by itself (unaccompanied by any express or implied affirmation of the contract) does not constitute affirmation of the contract; but if it is prolonged it may be evidence of an implied affirmation: **Allen v Robles [1969] 1 WLR 1193**. Affirmation of the contract can be implied. Thus, if the innocent party calls on the guilty party for further performance of the contract, he will normally be taken to have affirmed the contract since his conduct is only consistent with the continued existence of the contractual obligation. Moreover, if the innocent party himself does acts which are only consistent with the continued existence of the contract, such acts will normally show affirmation of the contract. However, if the innocent party further performs the contract to a limited extent but at the same time makes it clear that he is reserving his rights to accept the repudiation or is only continuing so as to allow the guilty party to remedy the breach, such further performance does not prejudice his right subsequently to accept the repudiation …"

30. A breach of that implied term can result from the cumulative conduct of the employer rather that one repudiatory act. In many cases there can be a final act or "last straw" before the resignation.

31. In **Omilaju v Waltham Forest LBC (No.2) [2005] I.R.L.R. 35** the Court of Appeal explained that that "last straw" need not itself be a breach of contract and need not be unreasonable or blameworthy. However, the act complained of had to be more than very trivial and had to be capable of contributing, however slightly, to a breach of the implied term of mutual trust and confidence. It would be rare that reasonable and justifiable conduct would be capable of contributing to that breach

32. The Court of Appeal clarified the correct approach for the Tribunal to take in such cases in **Kaur v Leeds Teaching Hospitals NHS Trust [2019] ICR 1, para 55:**

> "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, because the effect of the final act is

to revive the employee's right to resign even if there was a previous affirmation).

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

33. If the "last straw "conduct of the employer which tips the employee into resigning could not contribute to a breach of the implied duty of trust and confidence, the claim of constructively dismissed must fail if (a) there was no prior conduct by the employer amounting to a fundamental breach; or (b) there was, but it was affirmed. But if, in such a case, there was prior conduct amounting to a breach which was not affirmed, and which also materially contributed to the decision to resign, the claim of constructive dismissal will succeed (**Williams v Governing Body of Alderman Davies Church in Wales Primary School [2020] I.R.L.R. 589**).

Health and Safety at work

34. In her resignation letter and the grievance appeal hearing on 10 May 2019 the claimant alleged that the respondent had failed to comply with a statutory obligation to conduct a risk assessment when she returned to work after a period of stress-related sickness absence in August 2018. She also alleged that was a breach of contract.

35. **Regulation 3(1)(a) of the Management of Health and Safety at Work Regulations 1999 Regulations** ("the 1999 Regs") states that every employer

> **"…must make a suitable and sufficient assessment of:**
>
> **(a) the risks to the health and safety of its employees to which they are exposed while they are at work…**
>
> **for the purpose of identifying the measures it needs to take to comply with the requirements imposed upon it by the relevant statutory provisions.**"

36. **Regulation 3(3) of the 1999 Regs** requires that any such assessment

> **"..shall be reviewed by the employer…who made it if..**
>
> **(a) there is reason to think it is no longer valid; or**
>
> **(b) there has been a significant change in the matters to which it relates;**
>
> **and where as a result of any such review changes to an assessment are required, the employer…shall make them."**

37. **Section 47** of the **Health and Safety at Work Act 1974** (as amended) says that breach of a duty imposed by health and safety regulations does not give rise to civil liability unless the regulations under that section expressly so provide. The 1999 Regs do not so provide in relation to a breach of the requirement to carry out or review a risk assessment under regulation 3 of those regulations.

38. A failure to carry out such a risk assessment is not automatically a fundamental breach of an employment contract. However, in **Bunning v GT Bunning & Sons Ltd (No.2) [2005] EWCA Civ 104** the Court of Appeal accepted that it was arguable that a company's repeated failure to adequately carry out its risk assessment obligations under the 1999 Regs constituted a fundamental breach of the implied term of trust and confidence sufficient to entitle an employee to terminate her contract of employment.

Findings of Fact

39. I have set out my findings of fact below. I have not made findings about every incident I heard evidence about only those relevant to deciding the issues in the case. For convenience, I have set out my findings under the following headings:

- Background facts
- What happened up to March 2018
- 1 March to 26 June 2018 – the claimant's verbal grievance and its outcome
- 27 June 2018 to 13 August 2018 – the office move, tax code incident and July 30 sick note
- 14 August 2018 to February 2019 – return to work, Powerswitch and February payroll cover
- 1 March to 11 March 2019 – leaving the office and the written grievance
- 11 March 2019 to April 2019 - the grievance meeting and outcome
- May 2019 – the grievance appeal and resignation

40. I have not referred to all the evidence I heard. I have, however, referred to it where there is a significant dispute of fact between witnesses.

41. When it comes to the credibility and reliability of the witnesses, I find that the claimant was a sincere witness in the sense that she believed that her version of events was true. However, the reliability of her evidence was undermined by her inability to accept that there might be more than one interpretation of events and her tendency to describe the actions of Ms Mort in particular in heightened language, e.g. her description of Ms Mort adding handwritten processing notes to her payroll file notes as "tampering and defacing". There were other occasions in her Tribunal evidence and in the written transcript of the grievance and grievance appeal meetings where she refused to accept that matters which she saw as objective "facts" were matters of subjective perception.

42. In general I found Ms Mort's evidence to be reliable but it was notable that she omitted evidence in her statement about some key events which might show her in an unprofessional light such as the incident in April 2018 which prompted the claimant's "verbal grievance". In general I found Mr Hampson's evidence to be

reliable. Mr Nicholls I found to be a credible witness who gave his evidence in a straightforward manner and was willing to say when he did not recollect matters.

Background facts

43. The respondent is a firm of Chartered Accountants and business advisers. At the time the incidents giving rise to the claimant's claim took place it had 12-13 employees, 6-7 of who were part-time. One of the services it provides to its clients is a payroll service. Mr Hampson and Mr Nicholls are the partner-directors. One of Mr Hampson's roles is to manage the Payroll function. Mr Nicholls has primary responsibility for managing staff and workload related issues.

44. The claimant joined the respondent as a Part-time Payroll Clerk on 4 August 2008 working Mondays, Tuesdays and half-days Wednesdays. From 28 November 2011 she became a full-time Payroll Manager. She worked in that role until her employment ended when she resigned on 28 May 2019 with immediate effect (p.251A). Although there was a dispute about the exact number of payroll clients the respondent had, it was agreed that it was around 200. The claimant was responsible for dealing with almost all of those payroll clients. That involved running their payroll either weekly or monthly and dealing with payroll related queries.

45. At the heart of this case is the relationship between the claimant and Ms Mort. She was employed by the respondent from 31 May 2016 as "Accounts Production/Payroll Senior". The claimant and Mr Hampson interviewed Ms Mort for the job. I find that Ms Mort had started her accounts training prior to joining the respondent and that at her interview she made it clear that one reason she had left her previous job was that she was not getting accounts experience. It was agreed that Mr Hampson would help Ms Mort get that accounts experience.

46. Ms Mort's understanding of her role was that it was focussed on the accounts work but that she would be required to provide cover for the payroll work (e.g. when the claimant was on holiday) or provide help when the claimant asked for it. I find that that understanding of Ms Mort's role was shared by Mr Hampson and Mr Nicholls. That is the view set out in the respondent's response to the grievance lodged by the claimant in March 2019 (especially the "Points of Clarification" at p.128 and p.130).

47. I find, however, that the claimant had a different understanding of where the balance lay between Ms Mort's payroll duties and her accounts duties. The claimant believed that (as she put it in her grievance letter dated 11 March 2019 (p.61) Ms Mort's duties were "primarily to assist with any aspect of the payroll where needed" (p.61 para 3). In other words, it seems to me, although Mr Hampson was officially Ms Mort's line manager, the claimant saw Ms Mort as primarily working for her in her role as Payroll Manager.

What happened up to March 2018

48. The claimant and Ms Mort shared an office. Initially their relationship was good. However, from around February 2017 things started to deteriorate. I find there were three particular sources of friction.

49. The first was a dispute about a clash of holiday bookings which meant that both the claimant and Ms Mort would be on leave at the same time. I find that Ms Mort had booked a week off when her children were on school holidays. The claimant had booked the same week off. She had assumed Ms Mort's mother could provide childcare to allow Ms Mort to cover for her whereas in fact Ms Mort's mother could not do so.

50. The second was the claimant's perception that from around February 2017, Ms Mort began to interfere with the claimant's workload and working practices. Ms Mort accepted that she had made some suggestions about doing things differently. I accept her evidence that the claimant did not take kindly to such suggestions. The claimant had run the respondent's payroll successfully for 11 years and viewed it as "her" payroll function. She referred to it in that way in her evidence. I find that she viewed suggestions that methods which were tried and trusted should be changed as "interference".

51. The third source of friction was the claimant's perception that from around February 2017 Ms Mort "lost interest" in the payroll work and (to use the claimant's words) manipulated her workload so she was no longer responsible for as many payroll clients. Ms Mort accepted that by mid-2018 she had 3 payroll clients which means that the claimant would have deal with the balance of around 200 clients. The claimant did accept in cross examination that the 3 clients which Ms Mort had were "quite large" while the evidence was that over half of the payroll clients were one-man band companies with regular non-changing payroll figures (p.130). However, it is clear that the bulk of the payroll work fell to the claimant. I find that the claimant was frustrated by what she saw as Ms Mort's unwillingness to provide support with the payroll work.

52. I find that the main reason that Ms Mort's payroll duties decreased was that her accounts worked increased (by around July 2018 the balance of her work was 75% accounts and 25% payroll). That seems to me to reflect what she saw as her role and reflected the assurances she was given at her interview that she would be given support by the respondent to progress her accounts training.

53. I also find that both the claimant and Ms Mort had fallings out with other employees. Mr Nicholls at the grievance appeal hearing in May 2019 accepted there had been incidents between Ms Mort and other staff and that at one point those staff were not talking to Ms Mort except as necessary for work (pp.164-167). The claimant had not spoken to one colleague for 2 months after falling out with them.

<u>1 March to 26 June 2018 – the claimant's verbal grievance and its outcome</u>

54. In April 2018 the tension between the claimant and Ms Mort escalated. There was another clash of holiday dates. The claimant had booked two weeks off in in June and July and had put those dates in the holiday calendar at the start of 2018. Ms Mort then booked a holiday in June, 2 days of which overlapped with the claimant's holiday. The claimant saw this as Ms Mort deliberately booking holiday when the claimant was off so the payroll would not be covered and alleged Ms Mort "goaded" her about this. Ms Mort's explanation, which I accept, was that she had had no choice but to book the holidays then because it was to celebrate a 40th birthday and there were no flights available except on the dates she booked.

55. The Claimant and Ms Mort were still sharing an office but were not speaking unless necessary for work purposes. At some point in early April 2018 there was an incident which the claimant characterised in her written grievance in March 2019 as "an aggressive verbal assault" (p.61) by Ms Mort.

56. The claimant's evidence was that Ms Mort stood up at her desk, with her hands in the air and in a very aggressive manner shouted very loudly "I am fucking sick of this job". The claimant said "Why don't you leave" and Ms Mort replied "Do you want me to leave?" to which the claimant answered "It is your choice but look at the way you are angry with the world and it is your choice what you need to do if you're not happy".

57. I accept the claimant's evidence about what was said but not her characterisation of it as a "verbal assault". In her written grievance some 11 months later, the claimant said that Ms Mort's behaviour became so aggressive that "[the claimant] felt that she may have physically assaulted [the claimant]" (p.61). At the Tribunal she referred to Ms Mort's behaviour as "threatening". However, her note at the time (p.251C) refers to "aggressive" rather than "threatening" behaviour and in her witness statement (para 15) she said she could "hear the anger" in Ms Mort's voice and left the payroll office because "I felt quite threatened by her aggression". Based on the claimant's own evidence of what was said I find that Ms Mort was angry and exasperated but that that aggression was not targeted at the claimant in the way she later suggested.

58. That finding seems to me to be supported by the fact that the claimant did not immediately raise the matter with Mr Hampson or Mr Nicholls. Had there been an immediate threat to the claimant I find she would have done so. Instead, the claimant raised it on 13 April 2018 in the context of a disagreement she had with Mr Hampson about payroll file notes (p.85). The claimant's view was that Mr Hampson was always taking Ms Mort's point of view and that he always accepted her suggestions about changes to processes while ignoring the claimant's point of view. Mr Hampson went to get Mr Nicholls and brought him to the claimant's room where the claimant told them about the problems she was having with Ms Mort and about what she saw as Ms Mort's unacceptable behaviour. I find that included referring to her aggressive behaviour during the incident in para 56 above (p.251C).

59. The parties both referred to the meeting on 13 April 2018 as the claimant's "verbal grievance". It was not put in writing by the claimant and the respondent did not record it in writing. In terms of the respondent's grievance procedure (p.42-43) it seems to me that it was an "informal" grievance. I find that neither Mr Hampson nor Mr Nicholls was aware of the how bad the relationship between the clamant and Ms Mort was until that meeting. They told the claimant that they would consider the issues she'd raised then get back to her.

60. Mr Nicholls and Mr Hampson then met to discuss possible solutions to the situation. They considered moving Ms Mort from the payroll office but decided that would not be conducive to the efficient running of the payroll function. It was still part of Ms Mort's role to assist with payroll when needed and that would be less likely to happen efficiently if she and the claimant were not in the same room. I find they took the view that formally investigating the matter would just make matters worse between the claimant and Ms Mort. Instead, they agreed to adopt a "wait and see" approach in the hope that whatever the disagreement was between the claimant and

Ms Mort it would blow over. That was partly because the claimant had had fallings out with fellow employees before which had resolved themselves. They agreed, however, that if the situation did not improve the solution would be to separate the claimant and Ms Mort by moving Ms Mort to a different room.

61. On the 24 April 2018 they met with again with the claimant to report back on their discussions. I find that Mr Nicholls told the claimant that raising the matter with Ms Mort now would be "like a bomb going off" but that they would see how things went and he would raise it with Ms Mort in her review which was due to take place within a few weeks in May. The possibility of a room move was discussed but I find that the claimant was not told at this meeting that Mr Nicholls and Mr Hampson had agreed that if the situation did not improve they would move Ms Mort to a different room.

62. I find that at the meeting the claimant agreed that they would see how things went and that Mr Hampson would monitor the situation. The claimant suggested that she did so reluctantly and there was nothing she could have done once Mr Nicholls and Mr Hampson had made their decision. She also suggested that she was told she had to continue to share a room with Ms Mort. I prefer the evidence of Mr Nicholls that the claimant who agreed to leave things as they were and see if matters improved rather than being ordered to stay in the room against her will.

63. When Mr Nicholls did raise the issue with Ms Mort at her review a few weeks later she told him that it was the claimant who was aggressive towards her. Mr Nicholls concluded that it was one person's word against another and that there was no further action the respondent could take in the absence of evidence corroborating the claimant's or Ms Mort's version of events. I find that Ms Mort was not told at that point that Mr Nicholls and Mr Hampson had agreed that if the situation did not improve they would move her to a different room.

64. There was no further investigation of the incident. Mr Nicholls in oral evidence accepted that it may have been naïve of him not to take a more formal approach to the issue but that he had no prior experience of dealing with such a grievance. I also find that Mr Nicholls and Mr Hampson had genuinely formed the view that investigating matters would just make the situation between the claimant and Ms Mort worse and that if they left it alone it might blow over.

65. The claimant did not pursue the matter further under the respondent's grievance procedure until her written grievance in March 2019. She accepted in cross examination evidence that Mr Hampson had on a few occasions afterwards checked with her whether everything was going ok and she had said it was going ok. Mr Nicholls spoken to Ms Mort to check how things were going and she had confirmed that she and the claimant "were working together".

66. I find that by the end of April 2018 Mr Nicholls and Mr Hampson were aware that there was a poor relationship between the clamant and Ms Mort. They hoped it would fix itself but if it did not their next step would be to separate them by moving Ms Mort to a different room. I find that they did not accept the claimant's portrayal of Ms Mort's behaviour as being "aggressive" or "threatening" and bullying the claimant but instead viewed the situation as a squabble between two employees who simply did not get on.

27 June 2018 to 13 August 2018 – the office move, tax code incident and July 30 sick note

67. The claimant suggested that for a further two months after the April meeting she had to deal with "continuing bullying" from Ms Mort but did not provide evidence of any specific incidents of bullying. Her handwritten diary notes (p.251C) do not refer to any incident between 24 April 2018 and 31 July 2018. It is clear, however, that the relationship between the claimant and Ms Mort did not improve and that it was causing stress and anxiety for both of them.

68. On Wednesday 27 June 2018 (when the claimant was on a week's leave) Ms Mort approached Mr Hampson and asked to move rooms because the atmosphere between her and the claimant was becoming intolerable. Mr Hampson spoke to Mr Nicholls and they agreed to implement the "Plan B" agreed in April of moving Ms Mort to another room. By that point relations between the claimant and Ms Mort were so poor that the need to separate them outweighed the impact that their being in separate rooms would have on the efficiency of the payroll function. Ms Mort moved out of the office she shared with the claimant that day.

69. On the evening of Sunday 1 July 2018 Ms Mort rang the claimant at home to tell her about the office move. That was the day before the claimant was due to return to work after being on leave. In their witness statements the claimant and Ms Mort gave different accounts of what was said during the conversation. They agreed it was a short conversation and that it opened with Ms Mort telling the claimant she had requested an office move and that she had now moved out of their shared office. The claimant's evidence was that she had said "ok" and that the conversation had ended there. Ms Mort's evidence was that the claimant said "it was probably for the best", had asked about the payroll and Ms Mort had said that if the claimant needed any help she should ring her and she would come up to help". On balance I prefer Ms Mort's evidence. Given the claimant's focus on the payroll function it seems to me plausible that she would have asked about that. Given that she herself had raised the possibility of a room move it also seems to me plausible that her reaction to Ms Mort's news that the move had taken place would be to accept it as being "for the best". Ms Mort's evidence at the Tribunal was also consistent with the evidence she gave when interviewed by Ms Nicholls on 5 April 2019 in the context of the claimant's written grievance (p.117B).

70. The claimant did not refer to Ms Mort's call in her grievance in March 2019 (p.62) nor is it mentioned in her notes in support of that grievance (p.86). However, in her witness statement the claimant said that Ms Mort rang her out of work hours on 1 July 2018 because she was "trying to disrupt and ruin my holiday" (para 28). I prefer Ms Mort's explanation that she rang out of courtesy. The alternative would be for the claimant to turn up to work on the Monday morning to find Ms Mort moved without any explanation.

71. When the claimant did return to work on Monday 2 July 2018 Mr Hampson asked her whether Ms Mort had explained what was happening with the payroll function. She said she had not so Mr Hampson asked Ms Mort to do so. Ms Mort did so by a short email explaining that she had taken the payroll files for the 3 payrolls she did. The claimant felt that Mr Hampson should have explained and consulted with her about what was happening as she was the payroll manager. I find that Mr Hampson had number of personal matters to deal with which meant he was not able

to do so. I also accept his evidence that he did not see the office move as fundamentally altering the way the payroll function worked – Ms Mort would carry on servicing her 3 payroll clients, the claimant would do the rest and Ms Mort would provide cover when the claimant was absent and help when the claimant asked for it. In terms of the office move I find it was reasonable for Mr Hampson to have assumed that the claimant would not have a problem with the move as it was something that had been mooted as a solution to the issues between her and Ms Mort back in April. The claimant did not raise a grievance about this incident at the time but included it in her written grievance in March 2019.

72. On 30 July 2018 Mr Hampson asked the claimant to download and print the electronic tax code notifications from HMRC for Ms Mort's 3 payroll clients. He did so because the claimant was doing this for her own payroll clients on a daily basis anyway. The claimant objected to what she saw as her doing Ms Mort's work for her. She suggested Ms Mort should download and print the tax codes for all the payroll clients including the claimant's. That evening the claimant went to her GP who provided a fit note signing her off due to "Stress related problems" from 30 July 2018 to 13 August 2018 (p.252).

73. However, the claimant did not take sick leave immediately. Instead, she went to work the following day, Tuesday 31 July, and made it clear to Mr Hampson that she was not willing to download the codes for Ms Mort's payroll clients and that if required to do so she would go off sick. Mr Hampson saw this as an attempt by the claimant to blackmail him into getting her own way. He and the claimant went into Mr Nicholls's office and the claimant handed Mr Nicholls the sick note in an envelope. The claimant described Mr Hampson as carrying out a "verbal assault" and then storming off. I find that Mr Nicholls was frustrated by the claimant not doing what he had asked her to do and angered by what he saw as her attempt to blackmail him using the sick note. However, I accept Mr Nicholls's evidence that this was not a "verbal assault" against the claimant. Mr Hampson was explaining to Mr Nicholls how he saw the situation and explaining his frustration with the claimant's behaviour. After doing so he left the meeting.

74. Mr Nicholls tried to calm the situation down, asking the claimant to sit down and see whether they couldn't sort matters out. His view of the matter was that the claimant had been asked to do a payroll task by Mr Hampson and had refused to do so. He also thought it odd that the claimant had been signed off sick but had nevertheless come to work. Although he did not refer to what the claimant did as blackmail he shared Mr Hampson's perception that she was using her sick note to get her own way. After the meeting with Mr Nicholls the claimant went back to work. The claimant accepted that after further discussion with the claimant Mr Hampson agreed that she and Ms Mort should each download and print off the tax codes for their own clients.

75. The claimant was back in work on 1 August but then took sick leave from the 2 to the 13 August 2018. In her written grievance in March 2019 (p.64) she said this was due to "continued harassment in the workplace" and "ongoing and escalating aggravation" (p.87). Other than the incidents involving Mr Hampson on 30 and 31 July 2018 she did not refer to any specific incident around that time.

<u>14 August 2018 to February 2019 – return to work, Powerswitch and February payroll cover</u>

76. At the grievance appeal meeting on 10 May 2019 (p.167-168) the claimant said that the respondent should have carried out a risk assessment on her return from sick leave in August 2018. She suggested that it was in breach of its statutory health and safety obligations by not doing so. Mr Nicholls accepted that there had not been a "return to work" meeting when the claimant came back to work nor had there been a risk assessment carried out. He explained that the respondent had an external consultant who dealt with health and safety matters for it.

77. The claimant's case was that Ms Mort continued to harass the claimant even though she had moved to a new office. However, neither her written grievance nor her supporting document (p.87) give details of other incidents of anything which could amount to harassment until January 2019. The only incident mentioned in the claimant's witness statement was one where she says Ms Mort made 4 mistakes when covering the payroll but Mr Hampson would not let the matter be raised with Ms Mort. In contrast, Mr Hampson did raise a mistake the claimant had made on a file and told her "not to do it again". The claimant saw this as preferential treatment of Ms Mort by Mr Hampson. I heard no evidence of the "continued" harassment by Ms Mort which the claimant alleged took place during this period.

78. I do find that Ms Mort during this period did cover the payroll files in the claimant's absence and did periodically ring the claimant to ask her if she needed help with the payroll files. The claimant accepted that was the case in the grievance appeal hearing (p.178). I also find that by this time the claimant was reluctant to ask for Ms Mort's help because she saw it as giving Ms Mort an opportunity, as the claimant saw it, to "interfere" with the claimant's files or suggest changes to processes which the claimant felt Mr Hampson would inevitably support.

79. In January 2019 there was an occasion where Ms Mort brought up a file for a payroll client called Powerswitch. Mr Hampson had told her to hand it over to the claimant because she would be dealing with it. The claimant told Ms Mort to take it back downstairs until the claimant had spoken to Mr Hampson about it. The claimant's evidence was that Ms Mort "did not appreciate this". Mr Hampson agreed with the claimant that Ms Mort would keep Powerswitch because the claimant had taken on the Fishers' payroll. The claimant's evidence was that Ms Mort had a bad attitude towards her when the claimant went downstairs to tell her what had been decided

80. On Tuesday 12 February 2019 the claimant was vomiting at work. Ms Mort told her to go home and that she would cover whatever needed doing. The only payroll that needed processing was the Fishers' payroll. The claimant gave Ms Mort verbal instructions about how that payroll was processed including that there was one employee on that payroll who was paid cash. Ms Mort did the payroll and added a written note to the claimant's file note to capture the instructions the claimant had given her verbally.

81. The claimant returned to work the following day. When Ms Mort rang to check she was in, the claimant asked her "not to change or deface her notes". There was then an email exchange in which Ms Mort suggested the claimant adding the points about the payroll to her file notes in case somebody else had to do the payroll in the claimant's absence. The claimant responded that she could not see a problem and that "this way had worked the 11 years I have been here". Ms Mort's reply was "Just thought if neither of us is here to relay your instructions, it would be clear. You know

best" to which the claimant replied "I would like to think so" (pp.59-60). In her grievance support document (p.88) the claimant referred to Ms Mort's "you know best" email as "sarcastic".

82. The claimant was due to be on leave the week of 18-22 February 2019. On 13 February 2019, the same day as the email exchange with Ms Mort, Mr Hampson asked the claimant either to provide a list of the payroll clients which needed to be processed while she was away or to leave the relevant files out. The claimant understood Mr Hampson to have asked for all the notes on each file to be typed out, which would be a big, time-consuming job. I accept Mr Hampson's evidence that this was a genuine misunderstanding. As he said in evidence (and the claimant pointed out in her grievance support document (p.88), it would not make sense for him to ask the claimant to type out notes and store them in a way which was different to that done for the previous 11 years when there were already handwritten notes on each file. It makes much more sense that what he wanted to do was to identify which files needed processing while the claimant was away. In the event the claimant was off sick on 14-15 February 2019 so did not complete the task she thought Mr Hampson had asked to be done.

83. Mr Hampson accepted that he miscalculated the number of payrolls which the claimant would need to process on her return from leave in February given that it was a short month. He accepted this meant that he had not appreciated the need for payroll cover and had instructed Ms Mort to leave the payrolls for the claimant's return. This meant that the claimant was under significant pressure when she did get back from leave. When the problem came to light, Mr Hampson and Ms Mort helped the claimant to get the payrolls done. I accept that this was a genuine miscalculation on Mr Hampson's part. It does not seem to me plausible that he would jeopardise the respondent's payroll business by deliberately putting the claimant in a position where she would not be able to process the client payrolls by the end of the month.

84. When the claimant returned to work after her leave she also found that about 15% of the payroll files had been put back in the cabinets the wrong way up. She believed that this had been done deliberately by Ms Mort to annoy her. Ms Mort's explanation was that her 11 year old son had been in work with her and had put the files back the wrong way round by mistake. That seems to me a plausible explanation and I prefer Ms Mort's evidence on this point.

<u>1 March to 11 March 2019 – leaving the office and the written grievance</u>

85. Both Mr Nicholls and Mr Hampson were on leave the week beginning 4 March 2019. On 1 March Ms Mort expressed to Mr Hampson her continuing concern about the poor relationship between her and the claimant and what might happen while both directors were away. I accept Mr Nicholls's evidence that he and Mr Hampson agreed that if there were any incidents between the claimant and Ms Mort in their absence Ms Mort had permission to go home. I find they decided it was more important for the claimant to remain in the office because her payroll work was more time critical than Ms Mort's accounting work. As a result of that discussion I find Mr Hampson told Ms Mort she could go home if there were any problems while he and Mr Nicholls were both out of the office.

86. On Tuesday 5 March 2019 the claimant logged on to Ms Mort's computer to check whether she had received payroll details from Fishers. She said that the

"sarcastic" emails from 13 February 2019 been deleted from her PC but were still on Ms Mort's machine in a folder marked with the claimant's initials. She forwarded those emails to her own computer. She also found copies of notes on the Fishers' file with Ms Mort's handwritten additions to her own notes.

87. Ms Mort was next in on 7 March (while the directors were still on holiday). Ms Mort came into the claimant's office to fetch some stationery. She asked the claimant for a copy of the year end instructions and the claimant said she would sort that out for her. The claimant then asked Ms Mort why she had put a copy of the altered notes on the Fishers' file saying that she had already told Ms Mort not to do so. I accept Ms Mort's evidence that the claimant did this angrily. That seems to me consistent both with the claimant's attitude to Ms Mort by this point and the particular issue which the claimant had with anyone "tampering" with what she saw as "her" payroll files. Ms Mort told the claimant that it was Mr Hampson who had put the duplicate notes with Ms Mort's additions on the file while processing the Fishers' payroll. The claimant asked whether Mr Hampson knew that she had told Ms Mort not to alter the file notes and Ms Mort said she thought so but that the claimant should raise that with Mr Hampson. I find that it was Mr Hampson who had put those notes on the file.

88. Ms Mort then left but popped back some 20 minutes later to ask whether the claimant could now give her the year end instructions she'd agreed to provide. The claimant's evidence was that by this point she had decided to leave the office because of the stress she was feeling so had put all her belongings on the spare table in her office. She believed it was "obvious to Ms Mort what my intentions were" (p.91). Ms Mort's evidence was that she only stood at the door of the claimant's office and saw her doing something behind a filing cabinet but thought nothing more of it. I prefer Ms Mort's evidence that she did not realise that the claimant was intending to leave the office. I find she asked the claimant for the year end instructions and the claimant told her angrily "I'll do them in minute". Ms Mort then went back to her office in distress, collected her belongings and went to her mother's house.

89. The claimant told Ian Leyland, who was in de facto charge of the office in the directors' absence, that she needed to go home. He told her that Ms Mort had already left, Mr Hampson having given her permission to do so if there were any incidents in his absence. The claimant then went home. Before doing so she told Mr Leyland she intended to resign. He texted her later that evening to check she was ok and they had a phone conversation. Mr Leyland explained he needed to let Mr Nicholls and Mr Hampson know whether she had resigned. If she had but wanted to reconsider he confirmed he would be happy to retrieve any resignation letter she had sent for her. The claimant told him she was still distressed and had not taken any action to resign. Mr Leyland texted her again the following day to ask her whether she had had a chance to consider matters as he needed to let Mr Hampson and Mr Nicholls know the position. The claimant responded by text to say she was dealing with the issues and Mr Leyland confirmed that he would let Mr Hampson and Mr Nicholls know she had not sent a resignation letter.

90. On Monday 11 March 2019 the claimant delivered her written grievance (pp.61-65) to Mr Nicholls by hand. She did so outside the respondent's premises first thing at around 7.50 a.m. Mr Nicholls did not invite her in to the building but said he

would read the letter and get back to her. He thought the letter was her letter of resignation.

11 March 2019 to April 2019 - the grievance meeting and outcome

91. Clause 17 of the claimant's contract of employment (pp.31-43) confirmed that the grievance procedure at Appendix 1 to that contract (pp.42-43P applied to her employment. In his telephone conversation with the claimant on 11 March 2019 acknowledging her formal grievance Mr Nicholls confirmed that was still the relevant grievance procedure (pp.66-67). In summary it provides as follows:

- If a grievance cannot be resolved informally it should be raised formally by putting it in writing to a Partner in the respondent.

- Under Stage 1 of the procedure, a grievance meeting is held by a Partner to discuss the grievance. The employee has the right to be accompanied to that grievance meeting by a trade union official or fellow employee of their choice.

- Following the grievance meeting the respondent "will endeavour to respond to the grievance as soon as possible and, in any case, within five working days of the grievance meeting". If it is not possible to respond within that timescale the employee "will be given an explanation for the delay and be told when a response can be expected."

- The employee will be told the outcome of their grievance in writing and notified of their right to appeal against that outcome if not satisfied.

- Stage 2 is the grievance appeal procedure. It is triggered by the employee lodging an appeal within five working days of the grievance decision with the "Senior Partner" in the respondent.

- A grievance appeal meeting is held at which the employee can choose to be accompanied by a trade union official or fellow employee of their choice.

- Following the grievance meeting the respondent "will endeavour to respond to the grievance as soon as possible and, in any case, within five working days of the grievance meeting". If it is not possible to respond within that timescale the employee "will be given an explanation for the delay and be told when a response can be expected."

- The employee will be told the outcome of their grievance appeal in writing and that decision is final.

- The procedure applies to ex-employees who raise a grievance unless both parties agree in writing that a modified form of procedure applies instead.

92. The claimant's grievance letter dated 11 March 2019 consisted of 5 pages (pp.61-65). At the grievance meeting held on the 20 March 2019 (p.81) the claimant agreed that it could be summarised as follows:

1. Ms Mort's attitude to the claimant: the claimant cited a number of occasions where Ms Mort's attitude towards her was, in her opinion, unacceptable and intimidating.

2. Ms Mort amending the claimant's procedure notes: the claimant said she was aggrieved that Ms Mort had "altered, defaced and tampered" with the claimant's file notes.

3. Ms Mort persistently belittling her to Mr Hampson.

4. Mr Hampson supporting Ms Mort and never listening to what the claimant had to say: the claimant said she felt Mr Hampson always supported and listened to Ms Mort and what she had to say but when the claimant wanted to make a point, Mr Hampson did not listen to her.

5. The claimant feeling there had been a significant shift in Ms Mort's workload: the claimant said that Ms Mort had been employed to assist the claimant with payroll duties, that that had been the case for the first 9-12 months of her employment but there had been a shift such that Ms Mort now only looked after 3 payroll clients leaving the claimant to look after the remaining 200 or so payroll clients.

93. By way of supporting evidence, the claimant referred to the "sarcastic emails" on 13 February 2019 and that "the other employees, if you approached them, would tell you they feel there is no point in bringing to your attention the issues they have with Ms Mort as nothing is ever done" (p.64).

94. Mr Nicholls telephoned the claimant that same day to acknowledge her grievance and to ask her for further information including the "sarcastic emails" referred to and the names of the other employees who had witnessed Ms Mort's behaviour towards the claimant (note at pp.66-67). He also made it clear that the claimant would be expected to attend work during the period while the grievance was ongoing.

95. On 12 March 2019 Mr Nicholls sent the claimant a letter formally acknowledging her grievance and asking her to attend a grievance meeting on 18 March 2019. The letter advised her that she had the right to be accompanied at that meeting by a work colleague "or an external adviser of your choice". It also asked her to supply a copy of the "sarcastic emails" referred to in her grievance (p.68).

96. Before she received that letter the claimant emailed Mr Nicholls sending him the "sarcastic emails" and informing him that the employees she had suggested might be relevant witnesses were not willing to be named (pp.68-69). She also informed him she had a doctor's appointment the following day. The claimant was signed off sick due to "stress at work" from 7 March 2019 (p.273).

97. The claimant visited her GP on 13 March 2019 presenting with chest pains and stress. She was found to have high stress levels, low blood pressure and chest

pains so was referred to A & E for an emergency ECG. The A & E report detected nothing abnormal but she was advised to return to the GP for ongoing stress issues (p.273A). She was signed off sick due to "stress at work" from 14 March 2019 until her resignation on 28 May 2019 under a series of sick notes (pp.253-256).

98. The formal grievance hearing took place on 20 March 2019 having been rearranged at the claimant's request. That meeting was a "fact-finding" meeting and Mr Nicholls made clear during it that there would be a need for further investigation before a decision on the grievance was reached. Mr Nicholls chaired that meeting and Ms Peploe attended as the claimant's companion. There was a note taker and the typed notes (pp.77-82) were emailed to the claimant on 22 March so she could confirm they were accurate or suggest corrections (p.94). On 24 March the claimant confirmed there were some differences between the notes and what took place at the meeting (p.95). On 28 March the claimant responded to a chasing email from Mr Nicholls by sending a 6-page letter setting out corrections (pp.102-107). In her covering email she informed Mr Nicholls she had taken legal advice and that she would be submitting a claim through the county court for loss of earnings due to stress at work (p.97).

99. Based on the typed notes (pp.77-82) and the claimant's letter (pp.102-107) I find that at the grievance meeting Mr Nicholls explained the process he would be following. He told the claimant that the meeting was primarily a fact finding one to give her an opportunity to set out her grievance. He would then carry out further investigation before letting her know the outcome. He confirmed there was a right of appeal against the outcome. He also said that if the outcome was that both the claimant and Ms Mort continued to be employed by the respondent, it would consider engaging a mediator to try and resolve the differences between the claimant and Ms Mort.

100. The claimant gave Mr Nicholls her grievance support document (pp.84-92) which set out the incidents she relied on set out over 26 points. Mr Nicholls did not go through all the points in the document at the meeting but the claimant agreed that his summary of her grievance (para 92 above) was accurate. She said that in a nutshell she felt that "Ms Mort was loading bullets into a gun and that gun was then given to Mr Hampson to fire" (p.80).

101. At the meeting Mr Nicholls asked the claimant what her ideal outcome was. She responded that she would expect that Ms Mort face some kind of disciplinary action and that should be an end of it (p.102). She made it clear that Ms Mort covering payroll in her absence was a problem and that there was always a "backlash" in terms of criticism of her work after such periods of cover. The claimant said she wanted to take payroll off Ms Mort's computer. Mr Nicholls pointed out that the claimant had said the payroll workload was causing her stress but was now suggesting she take it all on. The claimant said she would "give it a go". Mr Nicholls pointed out that even if the claimant took the payroll work back from Ms Mort there would still be a need for someone to cover that work when the claimant wasn't in. The claimant suggested that Stephen Wilson could provide that cover but Mr Nicholls said that his bookkeeping workload meant that he could not. The claimant also suggested that someone else could be brought in to assist her with the payroll but Mr Nicholls pointed out this would be an unsustainable cost for the respondent.

102. At the end of the meeting Mr Nicholls read out the 5 summary bullet points and the claimant confirmed they were the key issues. Mr Nicholls then confirmed he would read the 26-point document and send the claimant a copy of the notes of the meeting. He would let her know the outcome of her grievance when a decision had been reached.

103. On the 28 March, Mr Nicholls emailed the claimant suggesting an "informal meeting" which he thought "could hopefully bring this matter to a conclusion which is satisfactory to all sides" (p.100). The claimant agreed and after an exchange of emails about logistics the meeting took place at 8 a.m. on 2 April 2019 at a local McDonalds. At that meeting the claimant again suggested that the solution would be for Ms Mort to have no involvement with payroll. Although in its ET3 response (p.27 at para 24) the respondent stated that the claimant had "no desire to reach a compromise while Ms Mort remained in employment" Mr Nicholls accepted in cross examination evidence that the claimant had never said she wanted Ms Mort dismissed.

104. The 4 April 2019 meeting did not resolve matters. On 5 April Mr Nicholls interviewed Ms Mort (his handwritten notes at pp.117A-117F). The claimant suggested that the presence of Mr Hampson at that interview showed that Ms Mort was given preferential treatment. Mr Hampson said he attended as a "witness" and to provide clarification where required. I accept that the claimant's grievance contained detailed allegations about payroll matters which Mr Nicholls might need Mr Hampson to clarify. Mr Nicholls's notes do not suggest Mr Hampson took an active part in the interview and I accept Mr Hampson's evidence that he said very little at all during that meeting. In brief, Ms Mort denied any intimidating behaviour on her part and said it was the claimant who was intimidating her and had verbally attacked her on the 7 March 2019 about altering her file notes. She said that she did offer to help the claimant with payroll but those offers were declined. She confirmed that there was an ongoing joke between her and the clamant where she would say to the claimant "I'm not payroll you are". She also confirmed that her 11year old son had put files back on the 13 February 2019 and may have put them back upside down (pp.117A-F).

105. Mr Nicholls did not interview any other employees about the grievance because the claimant had not provided the names of those she said had relevant evidence about Ms Mort's behaviour. He and Mr Hampson did check on the claimant's computer and established that the emails which she had said had been deleted were in fact still on her computer in the "sent" and "deleted" folders as well as in a separate folder containing the emails forwarded by the claimant from Ms Mort's computer on 5 March 2019.

106. On 8 April 2019 the claimant emailed Mr Nicholls to ask him when he expected to have a decision (p.114) and he replied the same day to confirm that he expected to have a decision before he went away on holiday on 10 April (p.115). On 9 April 2019 Mr Nicholls sent the claimant the grievance outcome letter. That was 14 working days after the grievance meeting but 3 working days after the informal meeting on 4 April 2019.

107. The grievance outcome covering letter (pp.118-119) was short but included two further documents. The first was a document in table form going through each of the points in the claimant's grievance letter and providing the respondent's response

(pp.120-127). The second was a document headed "Grievance Procedure - Points of Clarification" (pp.128-132). This set out the key incidents in the claimant's grievance, the evidence and then whether the complaint was upheld or not. There were 12 complaints identified. The only one upheld was headed "workload on return from holiday" with Mr Hampson accepting full responsibility for failing to realise how many payrolls the claimant would have to do when she returned from holiday at the end of February 2019. In summary, the outcome was that Mr Nicholls did not accept that there was preferential treatment towards Ms Mort. He preferred Ms Mort's version of events and found that the claimant perceived what were innocent events as Ms Mort deliberately trying to annoy her. This was true of the allegation of "tampering" with file notes and of files deliberately being put back into the cabinet upside down.

108. The covering letter advised that given the outcome the respondent was of the view that no further action was necessary but that both the claimant and Ms Mort needed to be aware of acceptable behaviour towards each other. It stated that on the claimant's return to work after sickness an all parties Independent Mediation Meeting would be convened to try and resolve the difficulties. It asked the claimant to sign the tear off slip at the end of the letter to confirm her acceptance of the outcome of the grievance was accepted and "the matter is now resolved" but also confirmed that the claimant had a right of appeal within 5 days (p.119).

109. The claimant emailed on 15 April 2019 to confirm she was appealing against the grievance outcome (p.134). On 25 April Mr Nicholls suggested in an email to the claimant that it was not appropriate for the appeal to be chaired by him or Mr Hampson. He proposed that it be chaired by an independent person instead (p.135) but the claimant confirmed she was happy for Mr Nicholls to chair it (p.136). He also agreed to the claimant's request that the appeal hearing be recorded (p.138). He asked the claimant to provide her grounds of appeal in writing to enable the appeal hearing to be more structured. She did not do so, stating that she would go through the issues at the hearing (p.139). On 8 May 2019 Mr Nicholls emailed to confirm that the appeal hearing would take place on 10 May 2019 (p.140).

<u>May 2019 – the grievance appeal and resignation</u>

110. The grievance appeal hearing on 10 May 2019 was chaired by Mr Nicholls with a note taker. The claimant was accompanied by Nicola Myerscough, a long term employee of the respondent. The meeting was recorded and the respondent's and the claimant's transcripts of the recording were both in the bundle (pp.142-187 and pp.188-246 respectively). The meeting was a long one, lasting around 2 ½ hours.

111. The claimant said that Mr Nicholls was condescending, rude and unprofessional during the meeting and repeatedly dismissed all her complaints as her perception. I find that Mr Nicholls did get frustrated during the meeting. I find that was because despite his asking the claimant to clarify her grounds of appeal she instead treated the appeal as a re-hearing. She had prepared (and at the meeting gave Mr Nicholls) a document setting out her conclusions by reference to each of the points in the grievance outcome supporting documents and, in effect, interrogated Mr Nicholls about why he had reached his conclusions. I accept that Mr Nicholls did tell the claimant that matters which she insisted were matters of fact were matters of perception (e.g. whether Ms Mort's suggestions of changes to payroll procedure were "improvements" or not). In his cross examination evidence he accepted that he did at one point in the appeal hearing laugh. He explained that that was because the

claimant had told him that something that happened at a meeting at which he was present but she was not had not happened as he described it. I find that although Mr Nicholls did at times interrupt the claimant that was to try and get her to stick to the point and to articulate her grounds of appeal more clearly. I find that he gave her a significant amount of leeway to set out her case and explain why she thought the original grievance outcome was wrong. I do not accept that he was rude, condescending or unprofessional.

112. The key points raised by the claimant were:

- That she had been denied a room move when she asked for it in April 2018 but Ms Mort had been granted it when she asked for it;
- That there had been no discussion with her prior to the move about the impact on the payroll function;
- That there were other employees who had been bullied by Ms Mort (she gave 2 instances) and a client who had (who she refused to name);
- That the respondent had never given a satisfactory outcome to her verbal grievance of April 2018;
- That the respondent had breached its obligations under health and safety legislation by failing to carry out a risk assessment when she returned from a period of stress related absence in August 2018 (she had not raised this issue in her original grievance);
- That, contrary to the grievance outcome, the emails of 13 February 2019 were sarcastic and (she suggested at one point) nasty;
- That the room move and agreeing on 1 March 2019 that Ms Mort could go home if there was a problem with the claimant showed preferential treatment of Ms Mort by Mr Hampson;
- That the potential solutions were that the claimant took back all the payroll work either with Stephen Wilson covering instead of Ms Mort or with a new employee recruited to provide cover. The claimant suggested that although this would be a cost to the business it was a cost the respondent should bear in order to alleviate the stress on the claimant and enable her to return to work.

113. During the meeting Ms Myerscough confirmed that she had also had a problem with Ms Mort but that she had been able to deal with it because she did not have to work with her all the time as the claimant did.

114. At the end of the meeting Mr Nicholls confirmed he would investigate the points the claimant had raised before letting her know the outcome. He did so in a letter dated 17 May 2019 (pp.247-249). In addition to confirm that the original grievance outcome was upheld Mr Nicholls in that letter set out some further points of clarification:

- He confirmed that the outcome of the verbal grievance in April 2018 was that the claimant had agreed to see how it went, that he and Mr Hampson had agreed that if matters did not improve a room move would be needed and that was triggered in June 2018 by Ms Mort telling Mr Hampson the situation was intolerable. Between June 2018 and February 2019 there was no indication of dissatisfaction raised with Mr Hampson.

- That he had not made enquiries of any other employees. Of the 2 named by the claimant in the appeal, one of the incidents had already been dealt with at the time and the employee involved in the second incident had never raised the incident at the time. Mr Nicholls had reviewed email correspondence between Ms Mort and that second employee after the appeal hearing and there was only one email which included a "trivial disagreement over procedures" rather than the "nasty" emails (p.217) which the claimant alleged Ms Mort had sent the individual.

- That he rejected the suggestion of double standards in relation to Ms Mort being allowed to leave the office in March 2019.

115. The letter acknowledged that during the grievance process the claimant had made the respondent aware of pressures of work she was experiencing as payroll manager. The respondent had (in the claimant's absence on sick leave) carried out a review of how payroll worked and identified inefficiencies which it believed would lead to significant time savings. It included with the letter a summary document headed "Update to Payroll Department Procedures" (pp.51-52).

116. That document confirmed that Ms Mort would continue to process payroll for 4 major clients and would continue to provide cover for the claimant's payroll work during her holidays and vice versa. It provided that a formal handover document would be prepared for each holiday setting out a calendared list of payrolls that needed processing during the course of any holiday. At the end of each holiday a list of matters arising would be prepared for the person who had been on holiday. Stephen Wilson would be available to provide additional cover during holiday but an anticipated increase in his workload meant that he would have limited availability. Mr Wilson and Ms Mort would be available to provide support at other times though that was expected to be minimal.

117. The document said that "[the claimant] and [Ms Mort will not be working together. Interaction between [them] should as a result be reduced to the absolute bare minimum". The document concluded with a list of 8 points setting out changes made to ease the claimant's payroll workload. These were such things as greater use of online pay slips and multi-company processing which would reduce the payroll workload.

118. On 28 May 2019 the claimant tendered her resignation with immediate effect (pp.250-251) claiming constructive dismissal "in that [the respondent] failed to protect me from harassment and stress in the workplace." The letter went on to say that the respondent had broken the law and breached her contract by failing to carry out a risk assessment and acting on it. It also said the respondent had shown no duty of care towards the claimant during the grievance process and appeal by

constantly stating throughout her grievance process that her grievances were merely her perception and by not giving them “serious investigation”.

Discussion and Conclusions

119. In this part of my judgment I apply the law to my findings of fact.

What was the most recent act or omission on the part of the respondent which the claimant says caused or triggered her resignation?

120. In a narrow sense the most recent act or omission on the part of the respondent which triggered the claimant’s resignation was Mr Nicholls’s decision not to overturn the grievance outcome when the claimant appealed against it. That decision was set out in his grievance appeal outcome letter dated 17 May 2019 (pp.247-249). However, it seems to me to be overly artificial to separate out that final outcome from the grievance procedure and grievance appeal procedure which preceded it. I find that the most appropriate way to characterise the act which caused the claimant to resign was its rejection of her grievance and grievance appeal barring the one complaint which was upheld (see para 107).

Has she affirmed the contract since that act?

121. The claimant resigned on the 28 May 2019 (pp.250-251). There was no evidence that she did anything which could amount to affirming the contract between 17 May 2019 when the final outcome of the grievance process (including the appeal) was communicated to her and her resignation.

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

122. I remind myself that I am deciding whether the respondent breached the implied term of trust and confidence. The question I must ask is whether, viewed objectively, the decision not to uphold the grievance or grievance appeal was conduct calculated or likely to destroy or seriously damage the relationship of trust and confidence between employer and employee. It must be conduct for which there is, objectively, no reasonable and proper cause.

123. In summary, my findings of fact are that on receipt of the written grievance Mr Nicholls acknowledged it, asked the claimant for more information (including the names of witnesses to Ms Mort’s alleged behaviour) (paras 94-95), held a grievance meeting at which it allowed the claimant to be accompanied by a non-employee (para 98), attempted to resolve matters by way of an informal meeting (para 103), interviewed Ms Mort and talked to Mr Hampson about the allegations and then set out his conclusions in a very detailed outcome letter (pp.118-132). That letter also proposed that an independent mediator could be engaged to seek to resolve the differences between the claimant and Ms Mort.

124. The grievance outcome letter confirmed the claimant’s right to appeal which she exercised. Mr Nicholls proposed the appeal be dealt with by an independent person but the claimant was happy for Mr Nicholls to deal with it. Mr Nicholls agreed that the appeal hearing could be recorded, allowed it to proceed in the absence of the claimant not providing written grounds of appeal in advance (para 109) and held an appeal hearing over some 2 ½ hours during which he gave the claimant extensive

leeway to set out why she disagreed with the original grievance outcome (para 111). I do not accept the claimant's suggestion that Mr Nicholls was "rude, condescending and unprofessional during that appeal hearing. Although the claimant submitted that he left a number of questions raised at the appeal hearing unanswered his appeal outcome letter did provide the points of clarification discussed at that appeal hearing (para 114). The grievance appeal outcome letter also set out steps taken and to be taken to alleviate the payroll workload on the claimant and minimise the contact between the claimant and Ms Mort (pp.51-52).

125. The claimant submitted that the respondent's conduct of the grievance procedure was "unprofessional". In terms of specific criticisms that seems to me to boil down to four specific complaints.

126. The first was that Mr Hampson sat in when Mr Nicholls interviewed Ms Mort on 5 April 2019 and that this meant the process was biased. Given the nature of the grievances raised by the claimant I can see that in an ideal world (and in a bigger company) it might have been better to have a witness other than Mr Hampson present. As against that, the claimant's grievance involved allegations about payroll practices with which Mr Nicholls was not familiar but Mr Hampson was. Mr Hampson was also Ms Mort's line manager. I heard no evidence to suggest that Mr Nicholls played any active part in the interview or affected the evidence given by Ms Mort.

127. The second was that Mr Nicholls had failed to interview other employees who the claimant said would give evidence of Ms Mort's bad behaviour towards them. As Mr Bronze submitted however, the claimant had been asked and failed to provide the names of the relevant employees. At the appeal hearing she suggested that Mr Nicholls would know who to speak to but it seems to me it was not unreasonable for Mr Nicholls to refuse to ask all employees in the business their views in general about a colleague's behaviour. When the claimant did identify named individuals (in the appeal hearing) Mr Nicholls did take those matters into account in reaching his decision (p.248).

128. The third complaint raised by the claimant was that Ms Mort's version of events had been preferred to hers. The fourth was that Mr Hampson's evidence had been preferred to hers. When it comes to that, it seems to me that where there was conflict about what happened (and why) Mr Nicholls had to make a decision about whose version of events he preferred. When it comes to Mr Hampson, he had been his business partner for decades and given the trust that had built up between them it seems to me understandable that he would give his version of events a good deal of weight. When it comes to preferring Ms Mort's version of events to the claimant's, it seem to me that Mr Nicholls was entitled to do so. That was partly because the specific allegations put forward by the claimant about the "constant" bullying and harassment reduced down to a few specific incidents some of which (such as the Powerswitch incident) do seem to me correctly characterised as "trivial". Other allegations put forward by the claimant (such as the alleged preferential treatment given to Ms Mort by granting her office move and allowing her to go home in March 2019) he knew to be inaccurate because he was privy to decisions made with Mr Hampson about those matters of which the claimant was not aware. Other allegations made by the claimant he knew from his own knowledge to be inaccurate. The central such allegation was that the respondent had left unresolved her "verbal

grievance" in April 2018. I have found that the claimant agreed at the second meeting in April 2018 to see how matters went and that that (though never confirmed in writing) was the outcome of that verbal grievance. Finally, there were matters on which the claimant and Mr Nicholls simply had different views. The obvious example is the "sarcastic" emails of 13 February 2019. Mr Nicholls took the view that Ms Mort's "you know best" comment was not necessarily sarcastic and that the claimant response of "I would like to think so" could equally be seen as sarcastic. That seems to me to be a reasonable view for him to take.

129. Although the claimant clearly did not agree with the outcome, viewed objectively and taking into account its size and resources I find the respondent had dealt with the written grievance and appeal fairly and thoroughly and reached conclusions it was entitled to reach. Although Mr Nicholls had not agreed to the alternative proposals put forward by the claimant which would mean Ms Mort having no involvement in the payroll in future (Mr Wilson covering or employing a new payroll assistant) there were good reasons for that (Mr Wilson's workload and cost respectively). In addition, the respondent had proposed a way forward to both reduce the claimant's workload and minimise the contact between her and Ms Mort (pp.51-52).

130. Viewed objectively, I do not accept that the conduct of the grievance procedure and grievance appeal procedure was conduct calculated or likely to destroy or seriously damage the relationship of trust and confidence between employer and employee. It was not itself a repudiatory breach of contract. I also find it was not conduct which could contribute to a cumulative breach of the implied term of trust and confidence.

<u>If not, was it nevertheless a part of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a repudiatory breach?</u>

131. Turning then to the incidents prior to the written grievance in March 2019, the question I must ask is whether, viewed objectively, the respondent's conduct was cumulatively calculated or likely to destroy or seriously damage the relationship of trust and confidence between employer and employee. It must be conduct for which there is, objectively, no reasonable and proper cause.

132. The claimant's letter of resignation gave as the claimant's central complaint that the respondent had failed to protect her from harassment and stress in the workplace. The central theme of her grievance was that harassment and also the preferential treatment given to Ms Mort. The claimant in cross examination confirmed that the incident in April 2018 which led to her "verbal grievance" was the "high water mark" of what she referred to as the "continuous" bullying and harassment by Ms Mort. Although she referred to "constant harassment" she only provided evidence about a limited number of specific incidents of harassment.

133. In summary, my findings were that in April 2018 the claimant for the first time made Mr Hampson and Mr Nicholls aware of the poor state of relations between her and Ms Mort. Although in her written grievance the claimant characterised the outburst by Ms Mort (para 56) as "aggressive" and "threatening" behaviour, her own version of events did not suggest the outburst was aimed at the claimant. The respondent decided not to investigate the matter further at the time and did not

immediately raise it with Ms Mort. Instead, Mr Hampson and Mr Nicholls adopted a "wait and see" approach in the hope the falling out was a "blip" like a previous falling out the claimant had had with a colleague. They decided that if matters didn't improve the solution would be for Ms Mort to move out of the office she shared with the claimant. I found that at the follow up meeting in April 2018 the claimant agreed with this approach.

134. I do not accept that viewed objectively the respondent's approach amounted to conduct intended or likely to have the effect of destroying or seriously damaging the relationship of trust and confidence. Another employer might have decided that the best approach would be to investigate the matter immediately. However, it seems to me the respondent reasonably and justifiably decided that the more proportionate approach was to let matters calm down before deciding whether any action was necessary. It did so in agreement with the claimant. My finding on this point seems to me to be supported by the fact that the claimant took no steps to pursue the matter further, for example, by lodging a written grievance. I found that Mr Hampson did periodically check with the claimant whether things were ok and she gave no indication that they were not.

135. The claimant submitted at the Tribunal hearing that the failure to take written notes of the verbal grievance was itself a breach of the implied duty. I do not accept that that is the case.

136. I do not accept that Ms Mort's office move amounted to preferential treatment. The claimant is not comparing like with like. By the end of June 2018 when Ms Mort asked to be moved the it was clear that the problem between her and the claimant was not just a "blip" and that action was necessary. The respondent took that action by separating the claimant and Ms Mort. It was action that the claimant had herself suggested. There was no evidence to suggest that had it been the claimant who had asked for an office move in June the respondent would have acted differently.

137. The claimant was aggrieved that Mr Hampson did not discuss the office move with her. She said she would have expected him to do that as payroll manager. I accepted his explanation as to why he did not do so. I also accept that when Ms Mort rang the claimant on Sunday 1 July 2018 to tell her about the office move she was being courteous. Even if I am wrong about that, there was no evidence that it was the respondent who had instructed her to do so.

138. I do not accept that the office move and the way it was communicated was in itself (or cumulatively with the respondent's response to the "verbal grievance" in April 2018) conduct which viewed objectively was intended to or likely to destroy or seriously damage the employment relationship.

139. The same is true of the "tax code" incident on 30 July 2018 (para 72). The claimant said this was an example of Mr Hampson favouring Ms Mort. I accept the respondent's case that this was a reasonable management instruction but in any event, after discussion with the claimant Mr Hampson agreed that Ms Mort should download and print off her own tax codes rather than the claimant doing so.

140. I did not accept the claimant's submission that Mr Hampson's behaviour on 31 July 2018 amounted to a "verbal assault" on her. I do find that he was angry with her for not carrying out an instruction and genuinely thought she was trying to use her

sick note to get her own way. On the claimant's own account, however, what then happened was that Mr Nicholls sat down with her and sorted the matter out and she returned to work.

141. When it comes to the failure to carry out a risk assessment when the claimant returned from stress-related absence in August 2018 it was accepted that no such risk assessment was carried out. A failure to do so does not in itself necessarily amount to a breach of contract. In this case, there was no suggestion that the obligation to carry out a risk assessment was relevant until the claimant's grievance appeal in April 2019. The claimant never suggested that she had asked for a risk assessment to be carried out or approached either Mr Hampson or Mr Nicholls on her return to work to raise concerns about stress at work. Her sick note for this period refers to "stress" but not specifically stress at work. There was no evidence before me that this absence was one of many stress related absences that might have put the respondent on notice of the need to carry out a risk assessment. I accept it would have been good practice for an employer to check with an employee after an absence of a week or more on their return to work. However, failing to carry out good practice does not amount to a breach of the implied term of trust and confidence.

142. In summary, as at August 2018 I find that the respondent's cumulative conduct, viewed objectively, was not intended to or likely to destroy or seriously damage the employment relationship. It was not at that point in repudiatory breach of contract.

143. Although she maintained that she suffered "constant" harassment the next specific incident the claimant complained about in her grievance was the "Powerswitch" incident in January 2019. That did not involve any adverse conduct by the respondent-in fact it involved Mr Hampson agreeing with the claimant that Ms Mort should continue to deal with the Powerswitch account.

144. Of the two incidents in February 2019, the first involved an allegation that Ms Mort had "defaced" or "tampered" with the claimant's file notes. Based on my findings of fact, it seems to me that Ms Mort was doing no more than attempting to ensure that there was a clear note on the file of payroll procedures to be followed which the claimant had had to pass on to her orally. I do not see how that could be an act of harassment. Even if it was, there was no evidence that the claimant raised it with the respondent until her written grievance so I do not see how it could be alleged to contribute to a cumulative breach of the implied term on the respondent's part.

145. The second February incident was the failure by Mr Hampson to ensure that payrolls were processed while the claimant was on holiday leaving her with a heavy workload when she returned. I accepted this was a genuine miscalculation on Mr Hampson's part. I do not find it was conduct intended to destroy or seriously damage the employment relationship. I have considered carefully whether it was likely to have that effect. I have decided that viewed objectively it was not. The evidence is that once Mr Hampson realised his genuine error he and Ms Mort helped out the claimant to ensure that the payrolls were done. The error was rectified quickly so any damage to the employment relationship was minimal.

146. Finally, when it comes to the respondent's actions in allowing Ms Mort to go home if there was an incident when Mr Nicholls and Mr Hampson were away in March 2019, I find that this was not "preferential treatment" as suggested by the claimant. Again, it seems to me that she is not comparing like with like. Mr Hampson and Mr Nicholls had had to decide what their contingency plan would be when they were both away because Ms Mort had approached Mr Hampson to make him aware of the tensions still persisting between her and the claimant. They made a business decision that the priority was to ensure that the claimant remained at work because the payroll work was more time critical than the claimant's accounts work. It seems to me that was a justifiable decision. It resolved the tension between the claimant and Ms Mort by removing one of them from the office while ensuring that the time-critical work would still get done. Viewed objectively, I do not see that as conduct which in itself amounted to a breach of the implied term or conduct which could contribute to a cumulative breach.

147. In summary, I find that none of the incidents complained of by the claimant by themselves or cumulatively amounted to conduct intended or likely to have the effect of destroying or seriously damaging the employment relationship. That is not to say the respondent could have handled certain things such as her return to work in August 2018 or communication about the office move better. However, the evidence does not support the claimant's case that there was a continuing course of harassment and bullying of the claimant by Ms Mort aided and abetted by Mr Hampson which the respondent failed to prevent. It also does not support her allegation that Ms Mort was always given preferential treatment by Mr Hampson. The tax code and the Powerswitch incident both involved Mr Hampson agreeing with the claimant. The office move and the "permission to go home" decisions were both made jointly by Mr Hampson and Mr Nicholls for justifiable business reasons. The office move itself was an attempt to resolve the problem cause by the claimant and Ms Mort not getting on. The respondent took further steps to try and resolve matters by its review of the payroll process (pp.51-52).

148. The conduct by the respondent which came closest to a breach of the implied term was its decision not to investigate the claimant's "verbal grievance" in April 2018 and the failure by the respondent to carry out a risk assessment on her return to work in August 2018. If I am wrong and those incidents either in themselves or cumulatively did amount to a repudiatory breach I would have found that after August 2018 the claimant affirmed the contract. Between August 2018 and (at the earliest) February 2019 the claimant continued to work without making any complaint about the respondent's conduct. I find that none of the incidents after that date were such as to contribute to a cumulative breach such as to "revive" any affirmed breach.

149. In either case I find that there was no breach of the implied term of trust and confidence entitling the claimant to resign and claim constructive dismissal in May 2019. There was no constructive dismissal so her claim of unfair dismissal fails.

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

150. If I am wrong about there being no repudiatory breach of the implied term I would have found that the claimant did resign in response to the breach.

If so, what compensation is the claimant entitled to?

151. I have found that the claimant's unfair dismissal claim fails so this question does not arise.

Summary of conclusions and next steps

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

153. As a result, remedy hearing listed for 20 November 2020 is cancelled.

Employment Judge McDonald

Date: 27 October 2020

JUDGMENT AND REASONS SENT TO THE PARTIES ON

28 October 2020

FOR THE TRIBUNAL OFFICE