Case Number: 3326235/2019(V)

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mrs H McAllister	**v**	Transglobal Sports Ltd

Heard at: Reading Employment Tribunal (remotely) **On**: 20 August 2020

Before: Employment Judge George

Appearances

For the Claimant: Mr L McAllister, husband
For the Respondent: Mr D Crehan, counsel

RESERVED JUDGMENT

1. The claimant was not dismissed by the respondent.

2. The claim of unfair dismissal is not well founded and is dismissed.

REASONS

1. This hearing has been a remote hearing which was not objected to by the parties. The form of remote hearing was (V), held by Cloud Video Platform or CVP. A face to face hearing was not held because it was not practicable and all issues could be determined in a remote hearing. The documents that I was referred to are in a bundle of 125 pages. I heard evidence from Mrs McAllister who adopted a 7 page statement as her evidence and was cross-examined upon it. Ms Maria Aries, director and chairmen, gave evidence on behalf of the respondent with reference to an 8 page statement upon which she was cross-examined. I am grateful to both representatives for the constructive and focused way in which they conducted the hearing. No observations were made about the format, save that it had been helpful to take regular breaks.

2. Following a period of conciliation which took place from 29 to 30 October 2019, the claimant presented a claim form on 26 November 2019 (page 2) by which she alleged that she had been constructively dismissed from her role as a

senior accounts administrator with the respondent company. The company is an importer and distributer of sports protection and eyewear brands. The claimant's employment started on 1 July 2014 and ended with her resignation without notice on 28 October 2019.

3. In her particulars of claim (see page 14 and following) she complained of a number of incidents which she said had taken place between 20 November 2018 and 28 October 2019 which amounted to "personal harassment and bullying in the workplace which made my position within the organization untenable." The respondent defended the claims by a response entered on 31 December 2019 (page 18). On 15 February 2020 the claim was listed for a one-day hearing and case management orders were made. The in-person hearing was converted to a remote hearing because of the restrictions upon the numbers of in-person hearings which can be accommodated due to the requirements of social distancing in the pandemic.

The Issues

4. At the start of the hearing the issues to be decided were agreed between the parties. The clamant was relying upon an alleged breach of the implied term of mutual trust and confidence and was effectively arguing that the last straw was the letter written to her on 28 October 2019 by which disciplinary action was commenced against her.

5. The issues to be decided were agreed to be as follows:

   5.1. Was the claimant dismissed? This required me to consider:

      5.1.1. Was there a fundamental breach of the contract of employment, in particular, did the respondent breach the implied term of mutual trust and confidence - i.e. did it, without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously to damage the relationship of trust and confidence between it and the claimant?

      5.1.2. If so, did the claimant affirm the contract of employment before resigning? The respondent alleged that, if there had been a breach of the implied term of trust and confidence prior to 1 May 2019 then, by the claimant resigning and then withdrawing her resignation on 2 May 2019 (which was accepted) she affirmed the contract of employment.

      5.1.3. Did the claimant resign in response to the respondent's conduct (to put it another way, was it a reason for the claimant's resignation – it need not be the reason for the resignation)? The respondent argued that if I were to accept their argument that there had been an affirmation of contract on 2 May 2019 then I would need to consider whether the claimant could rely upon the so-called "last straw" doctrine in order to rely upon any pre-affirmation breaches of

contract. The claimant argued that she did resign in relation to a "last straw" act which entitled her to rely upon earlier incidents.

5.2. There was no wrongful dismissal claim in the present case.

5.3. The conduct the claimant relies on as breaching the trust and confidence term is:

5.3.1. The alleged threatening and bullying behaviour of Ms Aries on 20 November 2018 and the email from Ms Aries to all staff of the same date;

5.3.2. The alleged hostile behaviour of Ms Aries towards the claimant about her agreed amended working hours and timekeeping;

5.3.3. An email of 1 April 2019 to all staff members;

5.3.4. Ms Aries's alleged behaviour on 14 October in aggressively addressing the claimant about mistakes;

5.3.5. Denying the claimant access to particular files on 15 October 2019;

5.3.6. The notice of disciplinary action dated 28 October 2019.

5.4. If the claimant was dismissed: what was the principal reason for dismissal and was it a potentially fair one in accordance with sections 98(1) and (2) of the Employment Rights Act 1996 (hereafter referred to as the ERA); and, if so, was the dismissal fair or unfair in accordance with ERA section 98(4), and, in particular, did the respondent in all respects act within the so-called 'band of reasonable responses'?

The Law

6. Section 95(1)(c) of the ERA makes it clear that a dismissal includes the situation where an employee terminates the contract of employment (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct. This is commonly referred to as constructive dismissal and the leading authority is Western Excavating (ECC) Ltd v Sharp [1978] ICR 221 CA. If the employer is guilty of conduct which goes to the root of the contract or which shows that he no longer intended to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance of it. The employer's conduct must be the cause of the employee's resignation and thus the cause of the termination of the employment relationship. If there is more than one reason why the employee resigned, then the tribunal must consider whether the employer's behaviour played a part in the employee's resignation.

7. In the present case the claimant argues that she was unfairly dismissed because she resigned because of a breach of the implied term of mutual trust

and confidence; a term implied into every contract of employment. The question of whether there has been such a breach falls to be determined by the guidance given in the case of Malik v BCCI [1998] AC 20 HL. The term imposes an obligation that the employer shall not, without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee. One question for the tribunal is whether, viewed objectively, the facts found by me amount to conduct on the part of the respondent which is in breach of the implied term as explained in Malik v BCCI. Whether the employment tribunal considers the employer's actions to have been reasonable or unreasonable can only be a tool to be used to help to decide whether those actions amounted to conduct which was calculated or likely to destroy or seriously damage the relationship of trust and confidence and for which there was no reasonable and proper cause.

8. If that conduct is a significant breach going to the root of the contract of employment (applying the Western Excavating v Sharp test) and the employee accepted that breach by resigning, then he or she was constructively dismissed. The conduct may consist of a series of acts or incidents which cumulatively amount to a repudiatory breach of the implied term of mutual trust and confidence (see Lewis v Motorworld Garages Ltd [1986] ICR 157).

9. Once he or she has notice of the breach, the employee has to decide whether to accept the breach, resign and claim constructive dismissal or to affirm the contract. Any affirmation must be clear and unequivocal but can be express or implied. Mere delay in resigning is unlikely to amount to affirmation by itself but delay can be taken as evidence that the employee has affirmed the contract and decided to carry on working under notwithstanding the breach.

10. An authoritative explanation of the last straw doctrine is found in the judgment of Dyson LJ in Omilaju v Waltham Forest London BC [2004] EWCA Civ 1493, [2005] ICR 481 CA. Omilaju is often referred to for the description by Dyson LJ of what the nature of the last straw act must be in order to enable the claimant to resign and consider him or herself to have been dismissed.

> "The quality that the final straw must have is that it should be an act in a series whose cumulative effect is to amount to a breach of the implied term. I do not use the phrase "an act in a series" in a precise or technical sense. The act does not have to be of the same character as the earlier acts. Its essential quality is that, when taken in conjunction with the earlier acts on which the employee relies, it amounts to a breach of the implied term of trust and confidence. It must contribute something to that breach, although what it adds may be relatively insignificant." (paragraph 19)

11. The doctrine was more recently considered by the Court of Appeal in Kaur v Leeds Teaching Hospital [2018] IRLR 833 CA. Having discussed the development of the authorities in this area, Underhill LJ explained that

> "there are two theoretically distinct legal effects to which the 'last straw' label can be applied. The first is where the legal significance of the final act in the series is that the employer's conduct had not previously crossed the *Malik* threshold: in such a case the breaking of the camel's back consists in the repudiation of the contract. In the second

situation, the employer's conduct has already crossed that threshold at an earlier stage, but the employee has soldiered on until the later act which triggers his resignation: in this case, by contrast, the breaking of the camel's back consists in the employee's decision to accept, the legal significance of the last straw being that it revives his or her right to do so. I have thought it right to spell out this theoretical distinction […] but I am bound to say that I do not think that it is of practical significance in the usual case. If the tribunal considers the employer's conduct as a whole to have been repudiatory and the final act to have been part of that conduct (applying the *Omilaju* test), it should not normally matter whether it had crossed the *Malik* threshold at some earlier stage: even if it had, and the employee affirmed the contract by not resigning at that point, the effect of the final act is to revive his or her right to do so." (paragraph 45)

Before giving the following guidance,

"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)[6] breach of the *Malik* term? (If it was, there is no need for any separate consideration of a possible previous affirmation, for the reason given at the end of para [45], above.)

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

None of those questions is conceptually problematic, though of course answering them in the circumstances of a particular case may not be easy." (paragraph 45)

12. If I decide that there was a dismissal, I must consider whether it was fair or unfair in accordance with s.98 ERA 1996.

"Section 98 Employment Rights Act 1996

(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show-

(a) the reason (or, if more than one, the principal reason) for the dismissal, and

(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it-

(a) Relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,

(b) Relates to the conduct of the employee,

(c) Is that the employee was redundant, or

(d) ...

(3) …

(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal was fair or unfair (having regard to the reason shown by the employer)-

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case."

13. If I finds that the dismissal was unfair and have to go on to consider whether there should be deductions from compensation then, on the authority of Polkey v A E Dayton Services Limited [1987] IRLR 503, compensation may be reduced on the basis that had the employer taken the appropriate procedural steps which they did not take then that would not have affected the outcome.

14. The provisions of s.122(2) and 123(6) of the ERA set out the powers of the tribunal to reduce any basic and compensatory awards because of conduct or contributory fault respectively which I am asked to use in the event that I conclude that any dismissal was unfair.

Findings of Fact

15. I make my findings of fact on the balance of probabilities taking into account all of the evidence, both documentary and oral, which was admitted at the hearing. I do not set out in this judgement all of the evidence which I heard but only my principle findings of fact, those necessary to enable me to reach conclusions on the remaining issues. Where it was necessary to resolve conflicting factual accounts, I have done so by making a judgment about the credibility or otherwise of the witnesses I have heard based upon their overall consistency and the consistency of accounts given on different occasions when set against contemporaneous documents where they exist.

16. I start by describing a little more about the respondent company. At the time the claimant started her employment it was run by the then chairman, Tony Aries, Ms Aries's former husband. Ms Aries ran the division of the company which distributed a range of eyewear which was described by the claimant as "the company's main revenue stream" and in 2018 was the Brand Director and a Shareholder. The claimant also worked alongside CW, the then Sales

Director and there were a total of 9 employees. She described in her paragraph 4 that Mr Aries had started to take a less active role in the business, and CW became Managing Director (see Ms Aries's paragraph 6 which mirrored this evidence). It was part of the narrative of both witnesses that Mr Aries lived in Thailand for a considerable part of the year and worked from there. Ms Aries's evidence was that he would go away 2 to 3 times a year for 1 to 2 months at a time and when he was in the country, he would come into the office for 1 to 2 days per week.

17. Mr Aries suddenly and unexpectedly died on 23 September 2019 from a heart attack. This must have been a shocking and tragic event for his family and for his work colleagues. Ms Aries became the majority shareholder as she inherited Mr Aries's shares. She took over as chairman and that announcement was made on about 21 October 2019.

18. The first incident on which the claimant relies occurred on Monday 20 November 2018. What is not disputed is that, on that day, Ms Aries (who normally worked in an upstairs office) came to the claimant at her desk and told the claimant that she had been informed by a manufacturer that the claimant had received a package which she was waiting for (see the correspondence with the manufacturer at page 77 to 80). The parcel had arrived on Friday 16 November when Ms Aries was out of the office. Mrs McAllister had put it on a table intending to take it upstairs to her the following Monday.

19. According to the claimant, she had been covering a colleague's duties due to annual leave and "hadn't had the opportunity to take the package up to her office" (C statement paragraph 6). Her explanation in oral evidence was that she had not been told that it was important. She denied forgetting it and said that she would have taken it upstairs but had been extremely busy. In reality, as I find, the parcel slipped her mind (see her email to CW of 20 November 2018 at page 81), probably because she was busy, but the difference between that and forgetting to take it upstairs is only a matter of choice of words.

20. The parcel had been signed for at about 10.40 am and had not been put in a place where Ms Aries would become aware of it. She had chased with the supplier on Monday evening (page 77).

21. The claimant's complaint is that instead of asking "has anyone signed for a parcel", Ms Aries came to her very aggressively, insinuated that the claimant did not understand the importance of her role, was incapable of handling parcels appropriately and referred to a parcel which had gone astray some weeks earlier which had not been the claimant's fault. Her evidence about her own behaviour was that she had initially responded by apologising and finding the parcel but that Ms Aries had subjected her to screaming and shouting and accusations of incompetence because she had overlooked the parcel. To that the claimant said she replied "please remove yourself from me or I am going to leave the office". Her evidence was that Ms Aries seemed to think that it was acceptable to speak to a colleague in that way and was taken aback by what the claimant said. She said that she had spoken calmly.

22. Ms Aries's evidence was that she had been expecting delivery of a very important parcel and, on receipt of the email at p.76-77 she had asked Mrs McAllister about it. The claimant had indicated the table that the parcel was on without speaking and continued to look at her computer screen. She had "expressed to her the importance of letting people know when parcels are received" and the claimant had shouted at her and yelled "Go away" Go away! Don't talk to me!" (see paragraph 7 of Ms Aries's statement).

23. The claimant wrote an email of complaint to CW about Ms Aries (page 81). She told him that she found Ms Aries's "threatening and sometimes bullying behaviour completely unacceptable". Two colleagues wrote short emails on 30 March 2020 (pages 88 & 89) confirming that they had witnessed the event and that the claimant's version of events was true. Neither of them gave evidence at the hearing and the claimant accepted that little weight could be given to those emails as evidence of what happened since they were not present. She acknowledged in cross-examination that they had been asked the write the emails more than 4 months after the event in question.

24. Ms Aries also wrote to CW on 20 November 2018 (page 82) saying that "an important parcel we have been waiting for from supplier […] was found at Hannah's since 16/11. … I concerned that there was no sign of responsibility with misled parcels. I reminded Hannah that 'there are many important parcels happen to have to go through you'. She walked away and shouting in the office "DON'T TALK TO ME, JUST GO AWAY GO AWAY!"". However, Ms Aries copied her email to the claimant herself and also to 4 other members of staff. In it she asked CW to "have this issue sorted once for all".

25. She was asked in cross-examination why she had copied everyone in the office. Her response was that she had not copied everyone in the company but the team downstairs where the incident happened. In fact, her later evidence was that JP shared the office upstairs with her. She considered the need to do so "because I had been humiliated and ignored and other team members will have lost respect [because of] the way the claimant treated me". It had not been retaliation. She accepted that it could come across as humiliating for the claimant. Mr Aries (page 86) advised Ms Aries to restrict her emails to CW in a mail on 22 November saying "please contact [CW] next time as emailing the staff makes life very hard for him as it would have done for me".

26. Separately, she mailed CW to make a complaint about the claimant's "verbal violence, harassment and discrimination". She was asked about that in cross-examination and said that her belief was that when the claimant told her to "go away" it was for no other reason than she is of Chinese ethnicity and divorced and that was what she meant by discrimination.

27. This was not pursued with the claimant in cross examination who is not the subject of an allegation of discrimination and I do not make any determination about that. It was suggested to the claimant in cross-examination that she had not apologised saying something to the effect "Yeah, yeah. I'm sorry, it's over there. Julie was off yesterday and I meant to bring it up." She denied making a mistake and she was clearly of the view that Ms Aries had behaved

unreasonably in not coming and asking whether anyone had signed for a parcel before chasing it with the supplier.

28. Having listened to the oral evidence of both of the main protagonists in the incident on 20 November 2018, it seems to me that both are probably influenced in their recollections of events by their own perspectives. The claimant had forgotten to take the parcel up to Ms Aries's desk either on the day it arrived or on the following Monday but did not think that omission particularly important. I reach that conclusion because of her evidence, which I accept, that she hadn't known that an important parcel was being expected. She clearly thought that there was an acceptable excuse for her omission because of the pressures of the previous day. She struck me as being generally calm under pressure when being cross-examined and, for the most part, as a composed individual. I think it more likely than not that she did apologise but that the words of apology used were brief, commensurate with her impression that this was an omission of little importance for which there was a reasonable excuse.

29. Ms Aries, from her description of the work of the company and the development of the brand (and from the way she explained the incident in her email at p.82), struck me as being someone with exacting standards who believes that attention to detail is important for success. This is a perfectly reasonable position, indeed some might think necessary, for someone in business to take. I conclude that she thought that the claimant had not, in this instance, met those standards and that she needed to explain the importance of details such as passing on parcels in good time to her. It is probable that the claimant's view that this was not of great importance probably came across and Ms Aries was "concerned that there was no sign of responsibility with misled parcels" (see page 82). She describes herself as having lost face with the staff because of the claimant's response to her and I conclude that she was also embarrassed to have chased the supplier when the parcel was, unknown to her, already in her organisation.

30. When Ms Aries took the step of emailing 4 members of staff in addition to the claimant and the managing director essentially to give her version of events and to complain about the claimant this would have been humiliating for the claimant. It is an email based public dressing down. The fact that Ms Aries chose to circulate her complaint which included the allegation that the chairman was "very much hurt" to hear of what the claimant had done and the comment that the business might have to close down if the staff don't work closely together causes me to conclude that she probably did, as alleged by the claimant, carry out, in essence, a public dressing down about the failure to bring the parcel to her desk. As the claimant said, "in [Ms Aries'] mind she felt it was acceptable to speak to a colleague like this" and had been taken aback when the claimant said, calmly as I find, "please go away from me, I am not prepared to be spoken to like that. It is unacceptable" or words to that effect.

31. My conclusions about the 20 November 2018 are therefore that the claimant's description of Ms Aries's behaviour is, in its essentials, credible and I accept it. I am of the view, however, that the claimant had forgotten to deliver the parcel and did not quickly take sufficient responsibility for her own omission because

she did not see the importance of it. This did not make the public dressing down she received reasonable or acceptable. It was not. It was not the way which one would expect a manager to behave towards an employee.

32. It was also not appropriate for Ms Aries to circulate her email to all of the staff. I find that she did this because she felt that she had "lost face" because the claimant had stood up to her.

33. The managing director held a meeting with the claimant (see her paragraph 7) and she agreed not to take further action provided that Ms Aries addressed any issues that she had with the claimant through CW. He also spoke with Ms Aries (see her email to Mr Aries at page 85). CW dealt with the issue by circulating an email to the same people as had been on the circulation list for page 82 (see page 84). In it he both made clear that bullying behaviour would not be tolerated and also that refusal to comply with a reasonable request by "a manager, director or anyone else in a supervisory position" was not acceptable. He drew attention to the staff handbook essentially pointing out that there were grievance procedures and disciplinary procedures.

34. As the claimant put it, things "seemed to settle down" (her paragraph 8) but she complains about monitoring of her timekeeping. She had agreed with CW that she would adjust her working hours to finish at 4.00 pm rather than 4.30 pm by reducing her lunch break to 30 minutes following her return to work after maternity leave in June 2017. It became apparent that this arrangement was not formalised by a written change in terms and conditions but had nonetheless been agreed between employee and the managing director on behalf of the employer. Ms Aries's evidence was that she as unaware of that agreement. Her statement evidence (paragraph 11) was that, so far as she was aware, the claimant was paid to work 8.30 to 4.30 "which she frequently did not do". It is apparent from that statement both that Ms Aries did not know that the claimant had agreed a variation in her hours and that she believed that the claimant was not working her full hours as a result.

35. Given this misunderstanding, the claimant's evidence that when she arrived 10 minutes late one morning two of her colleagues warned her that Ms Aries was unhappy about her lateness is entirely plausible. I accept the claimant's evidence that the managing director asked her to revert to her previous hours citing Ms Aries's unhappiness with the arrangement. It is difficult to see why Ms Aries should have been countermanding the managing director on this and Ms Aries did not give evidence that the claimant had, to her knowledge, been taking 60 minute lunch breaks. The claimant agreed to revert to 8.30 am to 4.30 pm with a one hour lunch break on two days per week.

36. On 1 April 2019, the managing director sent an email to the team informing them that the claimant had called in sick and would not be in. It is Ms Aries' evidence (her paragraph 12) that the claimant had a habit of taking Mondays off in particular and citing her son's illness or childcare reasons. The claimant denies this and says that her only Monday absence in nearly five years had been on 3 December 2018 when she had suffered a miscarriage. This was put to Ms Aries. Her response was that the company had employed a "few girls at the same time taking Monday off" although elsewhere in her evidence it was

clear that this had been at an earlier time and the girls in question were no longer with the company. She said that she had not been aware of the Monday on which the claimant had been absent due to a miscarriage. The respondent has produced no attendance records to substantiate the allegation that the claimant had a habit of taking Mondays off. The claimant's evidence was that her son required regular hospital appointments which were managed by her husband and other family members in order that she avoided conflict with Ms Aries.

37. The claimant was also off sick on 2 April 2019 (MA paragraph 13). The company's sick pay policy was only to pay company sick pay at the discretion of management "but will otherwise be unpaid unless taken from your holiday allowance" (page 74). Statutory Sick Pay is to be paid from the 4th day of absence. The procedure to be following in the case of incapacity for work is found in the company handbook (page 39) which states that the employee must notify the respondent on the first day of absence no later than 30 minutes after the start of the normal working day. Doctor's certificates are not required for short term absences of less than 7 days (paragraph 6.2.1 on page 39). A return to work form should be completed regardless of the length of absence (paragraph 6.4.3).

38. The claimant consulted with her GP on 3 April 2019 and was diagnosed with depression. The history which she related to the GP included that one of the directors at work was being difficult and picking on her so she was going to lodge a formal complaint. She was prescribed sertraline.

39. It is clear from the respondent's chronology (page 97) that CW accepted the reasons given by the claimant for her absence on 1 and 2 April in a return to work meeting held on 3 April (page 97). She was deducted two days' pay for the two days' sickness absence (page 98).

40. She returned to the office the same day and saw an email sent by Ms Aries on 1 April 2019 (page 90). She had emailed all the staff who had been informed that the claimant was absent saying the following:

"I hope to see this Monday called sick situation improved as it does affect all of us.

During the past girls worked in our office will call in sick on Mondays. Whereas now we have a very good team that will still come in to work when they are sick.

I found this is affecting my work for the week. It made me feel confused, stressed, ill and motivation abused.

I look forward to seeing the situation improved, so it is fair for all."

41. Ms Aries' first explanation was that she felt the need to express how she felt to CW and that she found that it demotivated her and that she could not work for the day when someone called in sick on a Monday. When asked why she had copied everyone her first answer was that CW had copied everyone and then

she added that she hit reply all but had meant the mail to be for CW. She did not apologise.

42. The implication from the mail sent by Ms Aries is that she presumed that the claimant was not genuinely sick. Despite what she says in her statement paragraph 12 she says that "we now have a very good team that will still come in to work when they are sick". The implication from that is contrary to her assertion that the claimant had a habit of not coming in on Mondays. Had this been in her mind at the time she wrote this email, she would have mentioned it. I also read the email of 1 April 2019 from Ms Aries to mean that her view is that people should come into work when they are sick. She was asked whether this was her view and she replied that if you have a GP note to say that you are unfit to work there was no requirement to come in. She claimed to be unaware that a GP will not produce a certificate unless the employee has been absent for 5 days. In any event, the respondent themselves do not require a GP note for short absences.

43. Ms Aries's stance that an employee should always provide a GP sick note to justify their absence is an impracticable position to take. An employee who is not required by the employer to obtain a GP note for short absences should not be suspected of malingering because they have not got such a certificate, which seemed to be the corollary of her answer. The claimant said in oral evidence that the email indicated that Ms Aries considered her to be letting the team down by calling in sick on a particular Monday. That conclusion is a reasonable one to draw.

44. It is clear that the managing director accepted the claimant's reasons for her absence. Had Ms Aries *intentionally* copied in all of the claimant's colleagues then for a director to so clearly make public the insinuation that she regarded the claimant as having claimed to be absent because of ill health when she wasn't without apparent grounds for doing so would be completely improper. As it was, the effect on the claimant was the same as if it had been intentional. It appears from Ms Aries's acceptance that she did not write in similar terms when anyone else was absent because of sickness that there was an element of targeting the claimant, possibly because of Ms Aries's mistaken belief that the claimant was regularly leaving before the end of her contractual working day.

45. The claimant's response was to bring a formal grievance (page 93). In that she complained of the 20 November incident, general hostility from Ms Aries, comments about her working hours and the generally addressed email of 1 April 2019. She said that she was "very hurt and shocked by this comment" and that the email was "unnecessary and victimising". She complained that no other people who had had sick days had received "this public humiliation". She informed CW that she had consulted her GP about the effect on her mental wellbeing.

46. I accept the claimant's evidence that she also had a conversation with CW (see her paragraph 9) in which she told that her grievance would be referred to an outside professional mediator. She decided against going through with the process and CW's note at page 97 suggests that she informed him of that

decision on 8 April. The claimant then verbally handed in her notice to CW and that must have been before her letter dated 1 May 2019 (page 102 – citing ongoing issues with Ms Aries's attitude) since Mr Aries texted the claimant on 30 April asking her to reconsider.

47. According to the claimant, she had a telephone conversation with Mr Aries, who was overseas, in which he persuaded her to withdraw her resignation. At the relevant time, Ms Aries was unaware both of the resignation and that Mr Aries had persuaded the claimant to withdraw it. She was not in a position to challenge the evidence of the claimant that Mr Aries assured her that if Ms Aries had any issues in the future she would not address them directly with the claimant but through him and that she would not address the workforce as a whole. Since that evidence was unchallenged, I accept it and find that the conversation between the claimant and Mr Aries took place in the way she described.

48. In her witness statement, the claimant explains that, following this conversation with Mr Aries, what she described as the "hostile behaviour" from Ms Aries stopped, the working relationship improved significantly and "I would go as far as to say that we were getting on very well." Both she and Ms Aries refer to a birthday present which the director had given to the claimant's son and which had been very much appreciated.

49. The events which were the trigger for the claimant's resignation occurred after Mr Aries's unexpected death. On Monday 14 October 2019 the claimant mistakenly sent commercially sensitive information to a supplier. She accepted in her evidence that that was an embarrassing mistake and said that when she was informed of it she had held her hands up to it and returned to her desk and had been able to recall the email before it was read.

50. She describes Ms Aries's as refusing to accept her apology and gave evidence (paragraph 13 of her statement) that the (now) chairman "claimed that mistakes like this were a common occurrence on my part". The claimant said, and I accept, that she formed the view that the way in which Ms Aries was addressing her (which she describes as aggressive) meant that "it was apparent she was going to resume her victimisation of me now that the one person who could stop it was no longer with us." In cross-examination, the claimant said that Ms Aries definitely raised her voice and denied that she mistook the manner of someone who speaks English as a foreign language for aggression. My conclusion is that Ms Aries probably spoke at some length and with some heat about the claimant's mistake. Her evidence about her management style was "If there is a problem and [CW] is not taking action I will take action instead of the hands off approach [taken by Mr Aries] when he was chairman". Her speaking style is somewhat abrupt and she has shown herself in the past as likely to jump to conclusions and not to respect the claimant's privacy in labour relations matters. However, I do not think that Ms Aries was aggressive although she may well, as she did on previous occasions, have included comments about earlier perceived mistakes regardless about whether her criticism was justified. There is no doubt, however, that the mistaken disclosure of sensitive information was a serious mistake; fortunately the consequences of it were limited.

51. No action was taken against the claimant for her mistake on 14 October 2019, either formal or informal and there was no further mention of the incident (her paragraph 14). However, it is clear that the claimant believed that, with Mr Aries gone, she was vulnerable.

52. On 16 October 2019 (rather than on the 15 October - as the claimant accepted in cross-examination), Mrs McAllister was working on a document and found herself unable to save it: an error message informed her that she didn't have authority to access any of the files on the Accounts Folder. She went upstairs to ask Ms Aries whether she knew anything about it (see Claimant's paragraph 14). In her witness statement she explains that she was assured by CW that it had not had anything to do with the claimant's error and that there had been an error on the part of the IT Support Company who had restricted access to the Accounts Folder to himself, Ms Aries and the claimant but they had restricted her access in error. CW contacted the support company who instantly reinstated her access. In cross-examination the claimant accepted that, given that it happened soon after her mistaken disclosure of information, she thought that the restriction of her access might have had something to do with her error. She insisted that when she went to Ms Aries she had simply asked why it had happened.

53. Ms Aries's account was that the claimant had interrupted a meeting with the brand manager and accused her of blocking her IT access. She described the claimant's tone as "aggressive and accusing and totally unnecessary". She told CW that since it was not the first time that she considered the claimant to have displayed a "rude, aggressive and disrespectful attitude" she wanted a formal procedure to be followed. According to the email apparently sent from CW (from whom I have not heard), the request for a formal process happened on 18 October 2019 (see page 110). It appears that both Ms Aries and the other witness told CW that they considered the claimant's behaviour to be unacceptable.

54. The claimant disputed that there was a meeting going on: her evidence was that Ms Aries and JP were in their own office at their own desks and had not moved into the adjacent meeting room. She denied that she had been angry when she was locked out of the accounts and did not believe that she had been disrespectful. It was suggested to her that she had acted disrespectfully since she was of the view that as the ex-wife of Mr Aries, Ms Aries had not got her place on merit. The claimant's answer was that that had never entered her head and was a completely false accusation.

55. My conclusion in relation to the 16 October 2019 is that the claimant entered the upstairs office without regard to whether or not Ms Aries or JP were occupied. If they were having a meeting, it was not a formal meeting. They were co-workers engaged in their normal work which would sometimes involve working collaboratively. That does not mean that they were not interrupted by the claimant. Ms Aries gave clear evidence that the claimant accused her of blocking her access to the Accounts Folders. I find that this evidence to be credible and I accept it. First, the claimant accepts that this was her suspicion. Secondly, the claimant had jumped to the conclusion two days previously that Ms Aries would start to victimise her. There had been a period of relatively

good relations between them since early May 2019. The claimant had made an error of a magnitude which meant that Ms Aries's unhappiness with her actions was justified. It seems to me to be very likely that, having reached that conclusion and suspecting as she did that Ms Aries had caused her access to be blocked, the claimant didn't ask Ms Aries whether she knew why her access had been blocked so much as accuse her of blocking it. Given that she made that accusation in the belief that Ms Aries was about to start a campaign of victimisation I find that the claimant's tone was probably accusatory and disrespectful; not what one might reasonably expect her way of speaking to her employer to be.

56. On 29 October 2019, twelve days after the incident, CW invited the claimant to a meeting to discuss her conduct on 16 October "as the tone and attitude of your behaviour was interpreted as harassing or bullying behaviour" (page 107 is the invitation dated 28 October 2019). It was clear that this was a formal meeting because the claimant was referred to the disciplinary procedure and advised that she could bring a companion. CW referred to it as a disciplinary hearing (see page 110 and the heading of the letter at page 107) but the letter of invitation only refers to a "meeting in order to discuss this further" and there is no warning of the level of disciplinary sanction which might be imposed.

57. The disciplinary procedure is at section 10.2 of the company handbook (see page 54 and following). Clause 10 of the contract of employment states that it can be used whenever the employee acts in a manner that is contrary to normal acceptable standards of conduct (see page 72). It was suggested to the claimant that when 2 members of staff reported unacceptable behaviour the employee ought to be invited to a meeting to discuss it and she responded by questioning the length of time taken for the invitation to be sent. It is true that the ACAS Code of Practice recommends that investigations are carried out without unreasonable delay.

58. The claimant had been on holiday on 25 and 28 October 2019. This does not completely explain why no steps appear to have been taken by CW to investigate the matter between 18 and 24 October 2020. Emails were apparently sent by Ms Aries and the witness, JP on 30 October 2020.

59. The claimant resigned orally within a short time of CW handing her the invitation. She did not disagree with the suggestion that it was about 10 minutes later. It was suggested to her that she resigned because she had been invited to the disciplinary meeting and her answer was, "In essence, yes. But it wasn't just because of that. The absurdity of the claim led me to think that Ms Aries would not stop and her previous action and the effect on me – I couldn't face more victimisation by her". She accepted that, in that sense, she pre-empted what she saw to be an intention to resume victimisation of her. That answer leads me to conclude that Ms Aries's behaviour prior to the claimant's first resignation, the disciplinary invitation and the belief that she would be subject to further action which she expected to amount to victimisation were part of the reason why the claimant resigned.

60. The claimant agreed with the suggestion that the decision was not a calm and considered one and said that because the previous behaviour had

overwhelmed her, she acted hastily. She agreed with the suggestion that her action was pre-emptive as she believed that Ms Aries was going to resume victimisation of her. However, there is no doubt that the claimant did communicate a clear intention to resign. That was her evidence and CW's email by which he sought advice (page 110) shows that he put that construction upon her words.

61. This was notified to the staff members on 29 October and she felt that this gave her no opportunity to cool down and reconsider her decision (see her paragraph 17). CW wrote to the claimant on 31 October 2019 because she had not attended for work since the morning of 29 October to ask whether she had intended to resign without working her notice. She replied on 1 November in which she said that the announcement of her resignation had been made before she had an opportunity to calm down and reconsider and therefore returning to work was "impossible without feeling humiliated" (page 114). She stated that the reasons why she considered her position to be no longer tenable were the previous actions of Ms Aries (which led to her previous resignation) and the notification of the disciplinary hearing for an incident which, on her account "in no way could be construed as either bullying or harassing" which caused her to conclude that Ms Aries was going to resume her harassment of her. She confirmed that she had decided to resign without notice rather than to fight "the absurd allegations of bullying and harassment".

62. The claimant accepted that, had she not received the invitation to the disciplinary hearing, she would not have resigned and that that had been the trigger.

Conclusions

63. I now set out my conclusion on the issues, applying the law as set out above to the facts which I have found. I do not repeat all of the facts here since that would add unnecessarily to the length of the judgment, but I have them all in mind in reaching those conclusions.

64. My conclusion about the events of 20 November 2018 are that the claimant's version of events is, in its essentials, credible. She received a public dressing down for an error and that was not reasonable or acceptable behaviour. It was not behaviour which was justified by the actions of the claimant which provoked it. Some reprimand would have been justified. What was unacceptable about it, was that Ms Aries accused the claimant of making frequent mistakes (when the only previous mistake relating to sending parcels of which I have been told was apparently due to the error of somebody else) and did so in public. My findings are that the claimant's request to Ms Aries to go away was not shouted or aggressive.

65. By emailing all of the staff information which should have been a complaint limited to the managing director, Ms Aries caused the claimant to be humiliated. Again, she made public that which should not have been.

66. The only particular behaviour of which the claimant complains concerning her hours and timekeeping was of publicly criticising her lateness and causing the

managing director to ask her to change her hours from a 4.00 pm finish to a 4.30 pm finish two days per week. Ms Aries mistakenly believed that the claimant was finishing earlier than her agreed time and I accept that she probably made clear her displeasure with the claimant's timekeeping which came across to the latter as hostility. I do not understand why the managing director did not clear up this misunderstanding, but I have not heard evidence from him as he was made redundant in January 2020.

67. My findings about the email of 1 April 2019 are that the implication that the claimant had falsely claimed to be unfit to attend work was not justified by the information which Ms Aries had and was not supported by the managing director's stance since he accepted the claimant's stated reasons for absence. Ms Aries clearly suggested that someone should attend work even when they were sick and that appears to be her belief, unless that sickness absence were covered by a GP note. This is contrary to the respondent's policy. On this occasion, Ms Aries denied intentionally circulating her mail to all staff. Even if that were true, she expresses herself in immoderate terms and it is extremely careless not to ensure that a confidential communication urging the managing director to improve the sickness absence record of an individual member of staff because of the suspicion (to put it mildly) that they are malingering is only sent to the intended recipient.

68. So far as Ms Aries's behaviour on 14 October 2019 is concerned, it is common ground that this was a potentially serious mistake by the claimant which could have had financial consequences for the company. My conclusion is that Ms Aries probably spoke at length and with some heat and may well have included comments about earlier perceived mistakes regardless about whether her criticism was justified but was not aggressive. The claimant did specifically refer to Ms Aries's behaviour on 14 October 2019 when explaining the reason why she resigned but relies upon it within the issues for me to decide.

69. I am satisfied that Ms Aries had nothing to do with the claimant being denied access to particular files on 16 October 2019 which was an innocent mistake by the IT Support Company. This was the claimant's own understanding. The statement in the grounds of response paragraph 9 that the claimant had been blocked because of the email error was not adequately explained but does not affect my conclusion since the claimant's account of her conversation with CW is broadly similar to his note of what happened in the email of 30 October 2019 at page 110.

70. The claimant was called to disciplinary action by a letter dated 28 October 2019. The claimant was of the view that she was facing false accusations by Ms Aries. The invitation from CW states that the claimant "aggressively challenged" Ms Aries which leaves him open to the accusation that he had already reached that conclusion. There is no indication about how CW was going to investigate the allegation and then who was going to make a decision about any disciplinary action, given the small numbers of senior staff with the respondent company and that the complaint was made by the chairman herself. CW's actions on the claimant's grievance suggest that he would understand when it was necessary to seek outside, independent support. I am also of the view that it is noteworthy that the claimant's mistake in disclosing sensitive

information was not the subject of disciplinary action when some employers might have considered taking action for carelessness of that sort.

71. Mr McAllister skilfully drew attention to the timing of Ms Aries email statement (page 108 timed at 10.02 copied to JP) and that of JP (page 109 timed at 10.10). It is clear that JP had sight of Ms Aries account of the 16 October 2019 incident before writing his account. The sending of Ms Aries's email statement to JP before he had written his own, suggests that the investigation had not got off to the kind of start which ensures the expected standards that different witness accounts should not influence each other but should be independent to ensure fairness. However, this was not known to the claimant when she resigned.

72. The claimant is clearly of the view that the respondent's actions following her resignation made it impossible for her to reconsider. However, those actions were not a cause of her resignation.

73. Following the guidance in Kaur, I need to decide what was the last act in time which caused the claimant to resign. I find that it was the sending of the invitation to a disciplinary meeting. This was an action which the claimant could reasonably regard as detrimental in itself. The claimant clearly regarded it as unjustified and that the delay in sending it led to that conclusion. I disagree. What the conclusion after a fair investigation would have been and, had misconduct been proved what a justifiable sanction would have been in all the circumstances is now speculation. There may have been justifiable criticism of the procedure to be followed in the fullness of time, but the claimant resigned simply in response to the invitation to a disciplinary hearing. In the circumstances where the complainant (Ms Aries) and the witness (JP) both told the managing director that the claimant's behaviour was unacceptable, it does not seem to be to be reasonable to criticise CW for deciding to start formal disciplinary proceedings. To the extent that Ms Aries's reaction to the claimant's mistake of 14 October was part of the reason for her resignation, I find it hard to criticise Ms Aries for being, as she put it, "not happy" and for expressing herself forcefully and with some heat in the circumstances of what had happened.

74. The claimant resigned within minutes of receiving the invitation and therefore it is not argued that she affirmed the contract since that invitation. However, my view is that that invitation was not a repudiatory breach of the implied term of mutual trust and confidence in itself. As I say above, merely inviting the claimant to a disciplinary hearing in the circumstances of this case was within the scope of the respondent's disciplinary policy and a reasonable response to the complaints received.

75. Was the decision to invite the claimant to a disciplinary hearing part of a course of conduct which viewed cumulatively, amounted to a repudiatory breach of contract? It is necessary to consider what the final act adds to any earlier breach and it must contribute something to the breach. I remind myself of the words of Dyson LJ in Omilaju paragraph 20 where he said,

"It may be true that an act which is the last in a series of acts which, taken together, amounts to a breach of the implied term of trust and confidence will usually be unreasonable and, perhaps, even blameworthy. But, viewed in isolation, the final straw may not always be unreasonable, still less blameworthy. Nor do I see any reason why it should be. The only question is whether the final straw is the last in a series of acts or incidents which cumulatively amount to a repudiation of the contract by the employer."

76. Had the claimant not withdrawn her May 2019 resignation, she could have claimed that the acts which I have found Ms Aries to be responsible for and which were the reasons for that resignation were a repudiatory breach of the implied term of mutual trust and confidence. However, it is clear that by withdrawing that resignation and working for more than 6 months, the claimant affirmed the contract after any such breach.

77. In the present case the claimant argues that there was a breach of the implied term which binds the employer not, without reasonable or proper cause, to act in a way which is calculated or likely to destroy or seriously damage the relationship of trust and confidence between employer and employee.

78. I accept the respondent's submission that the claimant was premature in resigning in response to the invitation to the disciplinary hearing. That, in itself, was not something which was capable of contributing to the repudiatory breach. Neither, on balance, was Ms Aries's reaction to the claimant's mistaken disclosure of information on 14 October. The claimant clearly anticipated unfair treatment in relation to disciplinary but there were two versions of events about the 16 October 2020. The claimant had jumped to the conclusion that Ms Aries had blocked her access to necessary files – she presumed that she would be targeted but hadn't been.

79. It seems to me that Ms Aries's actions in copying her statement of events to JP before he gave his own statement would have been likely to have undermined the fairness of the investigation by CW but that was not known to the claimant at the time of her resignation. It is not known how CW would have reacted to that realisation, had the investigation continued. The decision about the next steps in the action was to be that of CW and there was no reason available to the claimant to conclude that his approach would have been unfair.

80. I am of the view that the elements of Ms Aries actions to which I refer in paragraph 76 above mean that there was a repudiatory breach of the implied term of mutual trust and confidence in response to which the claimant resigned orally at the end of April and that was confirmed in writing on 1 May 2019. The claimant did affirm the contract of employment by withdrawing the resignation on 2 May 2019 and continuing to work for the respondent from then until 29 October 2019.

81. The claimant resigned on 29 October 2019 in response to the respondent's conduct but the act which was the proximate trigger for the resignation was the disciplinary letter. That disciplinary letter did not contribute to the repudiatory breach of contract in the sense explained in Omilaju and neither did Ms Aries's actions on 14 October. I have therefore concluded that the last straw doctrine does not apply to in the present case and that the claimant was not dismissed.

82. I do not therefore need to go on to consider whether any dismissal was fair or unfair.

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Employment Judge George

Date: …27 October 2020 …………..

Sent to the parties on: .

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For the Tribunal Office