EMPLOYMENT TRIBUNALS

Claimant: **Ms K Page**

Respondent: **Landsker Child Care Limited**

Heard at: **Cardiff** **On: 13 November 2020 and 20 November 2020**

Before: **Employment Judge R Harfield**
Members **Ms H Mason**
Mr W Horne

Representation:
Claimant: In person
Respondent: Mr McNerney (Counsel)

RESERVED JUDGMENT

It is the unanimous decision of the Tribunal that the claimant's complaints of constructive unfair dismissal, direct sex discrimination and harassment related to sex do not succeed and are dismissed.

REASONS

Background and Introduction

1. The claimant worked for the respondent as a Senior Residential Childcare Worker until her resignation on 5 March 2019. Acas conciliation took place between 8 May 2019 and 23 May 2019. By way of a claim form presented on 3 June 2019 the claimant brought complaints of constructive unfair dismissal, sex discrimination, a claim for a redundancy payment and for "other payments." The respondent filed an ET3 response form denying the claims. A case management preliminary hearing took place before Employment Judge Ward on 29 August 2019. The claimant clarified that she was not pursuing her complaints for redundancy pay and "other

payments" and a dismissal judgment was issued for those specific complaints.

2. Employment Judge Ward defined the issues to be decided as:

"*Constructive unfair dismissal*

(a) Was the claimant constructively dismissed?

(i) 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 damage the relationship of trust and confidence between it and the claimant?

(ii) If so, did the claimant "affirm" the contract of employment before resigning? (To "affirm" means to act in a manner that indicates the claimant remains bound by the terms of the contract.)

(iii) If not, did the claimant resign in response to the breach of contract (was the breach a reason for the claimant's resignation – it need not be the only reason for the resignation)?

(b) The conduct the claimant relies on as breaching trust and confidence is:

(i) Her suspension;

(ii) The disciplinary investigation;

(iii) The threat of a potential disciplinary hearing together with the procedure followed.

(c) 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 ("ERA"); and, if so, was the dismissal fair or unfair in accordance with Section 98(4) ERA and, in particular, did the respondent in all respects act within the "band of reasonable responses"?

(d) If the claimant was unfairly dismissed and the remedy is compensation:

(i) If the dismissal was procedurally unfair, what adjustment, if any, should be made to any compensatory award to reflect the possibility that the claimant would have been dismissed had a fair and reasonable procedure been followed? [See: Polkey v AE

Dayton Services Ltd [1987] UKHL 8; paragraph 54 of Software 2000 Ltd v Andrews [2007] ICR 825; W Devis & Sons Ltd v Atkins [1977] 3 All ER 40; Credit Agricole Corporate and Investment Bank v Wardle [2011] IRLR 604];

(ii) Would it be just and equitable to reduce the amount of the claimant's basic award because of any blameworthy or culpable conduct before the dismissal, pursuant to Section 122(2) ERA; and if so to what extent?

(iii) Did the claimant, by blameworthy or culpable actions, cause or contribute to the dismissal to any extent; and if so, by what proportion, if at all, would it be just and equitable to reduce the amount of any compensatory award, pursuant to Section 123(6) ERA?

Equality Act, section 13: direct discrimination because of sex

(e) Has the respondent treated the claimant as follows:

(i) In the way Mr D Pryke spoke to the claimant and dealt with the initial investigation meeting on 18 February;

(ii) Not providing her a pay slip on 19 February 2019; and

(iii) Mr D Pryke patronising the claimant in a telephone call on 20 February when calling about the payslip saying that the claimant was "a very clever girl".

(f) Was that treatment "less favourable treatment", i.e. did the respondent treat the claimant les favourably than it treated or would have treated others ("comparators") in not materially different circumstances?

(g) The claimant relies on hypothetical male comparators.

(h) If so, was this because of the claimant's sex and/or because of the protected characteristic of sex more generally?

Equality Act, section 26: harassment related to sex

(i) Did the respondent engage in conduct as follows:

(i) In the way Mr D Pryke spoke to the claimant and dealt with her at the initial investigation meeting on 18 February;

(ii) Not providing her a pay slip on 19 February 2019;

(iii) Mr D Pryke patronising the claimant in a telephone call on 20 February when calling about the payslip saying that the claimant was "a very clever girl"; and

(iv) In advising the claimant that the invitation to a disciplinary hearing "the pack" would be sent out at 3pm if she did not resign.

(i) If so, was the conduct unwanted?

(k) If so, did it relate to the protected characteristic of sex?

(l) Did the conduct have the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

(m) Did the conduct have the effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating, or offensive environment for the claimant? (Whether conduct has this effect involves taking into account the claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.)

3. The case was listed for hearing in January 2020 and then February 2020 but was postponed due to the non availability of one of the respondent's witnesses. Unfortunately the hearing relisted for 1 and 2 April 2020 was then postponed due to the temporary suspension of in person hearings caused by the Covid 19 pandemic. A telephone case management preliminary hearing was conducted instead. The case was relisted for a full hearing on 12 and 13 November 2020. A further case management preliminary hearing took place before Employment Judge Moore on 12 October 2020 to make final arrangements for the hearing in light of ongoing restrictions due to the ongoing pandemic. Regrettably it then transpired there were no Employment Judges available on 12 November. With the co-operation of the parties the case was relisted to be heard instead over the two days of 13 and 20 November.

4. The first day of the hearing proceeded by way of a hybrid hearing with everyone in attendance (with social distancing measures in place) with the exception of the non legal members who attended by video. There were intermittent audio difficulties. Day two of the hearing ultimately proceeded by way of the claimant attending the Tribunal in person with a clerk also in attendance and everyone else joining by video using the CVP platform. This resolved the audio problems. The Tribunal is grateful for the flexibility and goodwill shown by everyone in assisting the Tribunal in finding a way to get the case fairly heard.

5. We received a hearing bundle extending to 87 pages. We received written witness statements from the claimant who was her only witness and from Mr Pryke and Ms Davies for the respondent. We heard oral evidence from those witnesses. We received oral closing comments from both parties. We have not fully set out the parties' submissions in this Judgment but we have taken them fully into account. The panel were able to complete their deliberations on the afternoon of day 2 but there was insufficient time to deliver an oral judgment. It was therefore reserved. At the start of the hearing the Tribunal made an anonymity order anonymising the identity of two young people involved in the background to this dispute. Their identities are not relevant to what the Tribunal has to decide. Refences in brackets in this decision refer to the page number in the bundle.

Relevant legal principles

Direct Sex Discrimination

6. In the Equality Act 2010 direct discrimination is defined in Section 13(1) as:

   (1) A person (A) discriminates against another person (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

7. Sex is a protected characteristic. The concept of treating someone "less favourably" inherently requires some form of comparison. Section 23 provides that when comparing cases for the purpose of Section 13 "*there must be no material difference between the circumstances related to each case."*

8. It is well established that where the treatment of which the claimant complains is not overtly because of sex, the key question is the "reason why" the decision or action of the respondent was taken. This involves consideration of the mental processes, conscious or subconscious, of the individual(s) responsible; see the decision of the Employment Appeal Tribunal in Amnesty International v Ahmed [2009] IRLR 884 and the authorities discussed at paragraphs 31- 37. The protected characteristic must have had at least a material influence on the decision in question. Unfair treatment by itself is not discriminatory; what needs to be shown in a direct discrimination claim is that there is worse treatment than that given to an appropriate comparator; Bahl v Law Society 2004 IRLR 799.

Harassment related to sex

9. Section 26 of the Equality Act defines harassment under the Act as follows:

(1) A person (A) harasses another (B) if –

(a) A engages in unwanted conduct related to a relevant protected characteristic [which includes the protected characteristic of sex], and

(b) the conduct has the purpose or effect of –

(i) violating B's dignity, or

(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B…

(4) In deciding whether conduct has the effect referred to in subsection 1(b), each of the following must be taken into account –

(a) the perception of B;

(b) the circumstances of the case;

(c) whether it is reasonable for the conduct to have that effect.

10. In Richmond Pharmacology v Dhaliwal [2009] IRLR 336 the Employment Appeal Tribunal set out a three step test for establishing whether harassment has occurred:

(i) was there unwanted conduct;
(ii) did it have the purpose or effect of violating a person's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for them; and
(iii) was it related to a protected characteristic.

11. It was also said that the Tribunal must consider both whether the complainant considers themselves to have suffered the effect in question (the subjective question) and whether it was reasonable for the conduct to be regarded as having that effect (the objective question). The Tribunal must also take into account all the other circumstances. The relevance of the subjective question is that if the claimant does not perceive their dignity to have been violated, or an adverse environment created, then the conduct should not be found to have that effect. The relevance of the objective question is that if it was not reasonable for the conduct to be

regarded as violating the claimant's dignity or creating an adverse environment for her, then it should not be found to have done so.

12. In Grant v HM Land Registry 2011 IRLR 748 the Court of Appeal reiterated that when assessing the effect of a remark, the context in which it is given is highly material. An Employment Tribunal should not cheapen the significance of the words "intimidating, hostile, degrading, humiliating or offensive" as they are an important control to prevent trivial acts causing minor upset being caught up in the concept of harassment.

13. The phrase "related to" a protected characteristic encompasses conduct associated with sex even if not caused by it; Equal Opportunities Commission v Secretary of State for Trade and Industry [2007] ICR 1234.

Equality Act - Burden of Proof

14. Section 136 of the Equality Act provides that:

> *(2) If there are facts from which the court (which includes a Tribunal) could decide, in the absence of any other explanation, that a person (A) contravenes the provision concerned, the court must hold that the contravention occurred.*
>
> *(3) But subsection (2) does not apply if A shows that A did not contravene the provisions.*

15. Guidance as to the application of the burden of proof was given by the Court of Appeal in Igen v Wong 2005 IRLR 258 as refined in Madarassy v Nomura International Plc [2007] ICR 867. The Court of Appeal emphasised that there must be something more than simply a difference in protected characteristic and a difference in treatment for the burden of proof to shift to the respondent. They are not, without more, sufficient material from which a Tribunal could properly conclude that, on the balance of probabilities, the respondent had committed an act of discrimination. The guidance to be derived from these decisions was approved by the Supreme Court in Hewage v Grampian Health Board [2012] UKSC 37. In some cases, however, it is appropriate for the tribunal to dispense with the two stage analysis if it is able to make a positive finding about the reason for the treatment in question.

Constructive Unfair Dismissal

16. Unfair dismissal claims are brought under Part X of the Employment Rights Act 1996. An unfair dismissal claim can be pursued only if the employee has been dismissed, and the circumstances in which an employee is dismissed are defined by Section 95 of that Act. The relevant

part of Section 95 is Section 95(1)(c) which provides that an employee is dismissed by his employer if:

> *"the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct."*

It is usually known as a "constructive dismissal".

17. Case law has established the following principles:

(1) The employer must have committed a repudiatory breach of contract. A repudiatory breach is a significant breach going to the root of the contract. This is the abiding principle set out in Western Excavating v Sharp [1978] ICR 221.

(2) A repudiatory breach can be a breach of the implied term that is within every contract of employment that the employer shall not without reasonable and proper cause conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between employer and employee (Woods v WM Car Services (Peterborough) Ltd [1981] IRLR 347.)

(3) Whether an employer has committed a breach of that implied term must be judged objectively. It is not enough to show merely that an employer has behaved unreasonably. The line between serious unreasonableness and a breach is a fine one. A repudiatory breach does not occur simply because an employee feels they have been unreasonably treated nor does it occur when an employee believes it has.

(4) The employee must leave, in part at least, because of the breach. However, the breach does not have to be the sole cause, there can be a combination of causes provided an effective cause for the resignation is the breach; the breach must have played a part (see Nottingham County Council v Meikle [2005] ICR 1 and Wright v North Ayrshire Council UKEAT/0017/13).

(5) The employee must not waive the breach or affirm the contract by delaying resignation too long.

(6) There can be a breach of the implied term of trust and confidence where the components relied upon are not individually repudiatory but which cumulatively consist of a breach of that implied term.

(7) In appropriate cases, a "last straw" doctrine can apply. This states that if the employer's act which was the proximate cause of an employee's

resignation was not by itself a fundamental breach of contract the employee can rely upon the employer's course of conduct considered as whole in establishing that he or she was constructively dismissed. However, London Borough of Waltham Forest v Omilaju [2005] IRLR 35 tells us that the "last straw" must contribute, however slightly, to the breach of trust and confidence. The last straw cannot be an entirely innocuous act or be something which is utterly trivial.

(8) In Kaur v Leeds Teaching Hospitals NHS Trust [2018] EWCA Civ 978 the Court of Appeal set out the questions that the tribunal must ask itself in a "last straw" case. These are:

(a) 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?

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

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

(d) 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.

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

18. If it is established that the resignation meets the definition of a dismissal under section 95(1)(c), the employer has the burden of showing a potentially fair reason for dismissal before the general question of fairness arises under section 98(4).

Findings of fact

19. As against those issues to be decided and the relevant legal principles the Tribunal, applying the balance of probabilities, makes the following findings of fact.

20. On 15 February 2019 the claimant was on duty in the respondent's residential care home, Greenmeadows. There was an incident involving Child A following the claimant finding a letter written by Child A containing references to suicide. The claimant's incident report is at [59 – 62]. In short form, the claimant sought telephone advice from Ms Davies (Senior Residential Care Worker) and Mr Lee Ronan (Manager of the home). She spoke with Child A and later telephoned 111 for professional medical

advice. The claimant and Child A spoke with a call handler and then a nurse and later a doctor. A hospital appointment was made for the following morning.

21. Another Residential Care Worker, BA, was on duty at the same time as the claimant. On 16 February 2019, after the claimant had finished her shift, BA spoke with Ms Davies. Ms Davies' file note is at [65] In short form, BA alleged the claimant had handled the situation badly, and had spoken to Child A in an aggressive manner and had goaded Child A which meant Child A had responded by shouting.

22. BA then prepared a file note detailing her concerns. The file note is at [64]. In short form, BA alleged that when she was upstairs settling another child she heard "screaming and shouting." She alleged that the claimant had been unprofessional in the handling of Child A's letter, that the claimant had asked Child A questions about the letter in an antagonising way, that when Child A was speaking to the doctor and explaining how she felt the claimant had asked for the phone back, and when the claimant was talking to the doctor the doctor could not "get a word in." BA said that the child's letter was read out multiple times by the claimant even though Child A was telling her not to. She alleged the claimant's demeanour towards Child A was very confrontational and that it had fuelled Child A's anger. To be clear the claimant firmly denies any inappropriate conduct. What actually in fact happened is *not* something about which the Tribunal has to make findings of fact in order to decide this case. We therefore do not do so.

23. On the evening of 16 February 2019 Child A emailed Mr Thomas, a director of the respondent company. Her email is at [68A to 68B]. In her email Child A complained about the claimant's treatment of her. However these were generalised concerns as opposed to being a specific complaint about the events of 15 February 2019.

24. At the time the claimant was unaware about BA's complaint. She was next due in work on 18 February 2019 and started work in her usual manner at 8am, including spending time alone with Child A. During the course of that morning Mr Ronan spoke with Mr Pryke (Development Manager) and told Mr Pryke about the allegations. Mr Pryke told Mr Ronan to suspend the claimant whilst an investigation took place. Mr Pryke says in his witness statement this was because the claimant was due to work in the home that evening and he wanted to ensure the safety of Child A and the claimant as it would allow there to be an investigation without any interference in the process. In fact the claimant was already in work.

25. Mr Pryke's witness statement says that he had also received an email from Mr Thomas, a director of the respondent, forwarding on an email from Child A [68A] complaining about the claimant's conduct on 16 February 2019. Mr Pryke says in his written witness statement that this email, together with the conversation with Mr Ronan, led him to make the decision to suspend. In fact this is incorrect because, as already stated, Child A's email, whilst complaining about the claimant, was not directed to the events of 15 February 2019. Moreover, Mr Pryke did not himself receive the email from Mr Thomas until later that afternoon by which time the claimant had already been suspended. At best at the point in time Mr Pryke told Mr Ronan to suspend the claimant he could only have known that Child A had emailed Mr Thomas making a complaint on the evening of 16 February 2019.

26. At about 10:30 am Mr Ronan spoke to the claimant privately and told her she was suspended pending an investigation. The claimant was asked to leave the home. She was not told at that time why she was suspended. She was told that Mr Pryke was on his way and she would be contacted to arrange a meeting later that day. Another worker present on the evening in question, YR, was also suspended.

27. The claimant was called to an investigative meeting with Mr Pryke and Mr Ronan at 1pm that day in a private room in a pub. Despite being an investigation meeting, the respondent failed to either make or keep or disclose any records of that meeting. From the witness evidence the Tribunal is however to find the following. The claimant was given the opportunity to tell her version of events of 15 February. The claimant was also told much of the detail of what BA's complaint was and she was shown a copy of BA's file note. The claimant said that she had done nothing wrong and that she had acted professionally throughout. The claimant became distressed during the meeting.

28. The claimant alleges that Mr Pryke spoke to her in a manner that made her breakdown, that she felt intimidated and bullied and she was continuously made to feel like a liar. The claimant said to the Tribunal that she felt bullied by Mr Pryke's tone of voice and that she felt words were being put into her mouth. However, the claimant was unable to give the Tribunal any particular examples or specific allegations as to how it is said Mr Pryke was behaving in such a way other than saying she was answering as honestly as she could and she felt as if her answers were not good enough.

29. The Tribunal accepts that the claimant found the process of attending the meeting, being asked about her actions, and being told of BA's accusations distressing. They are, however, steps that have to happen at a fact finding meeting. Looking at it objectively the Tribunal does not find

that Mr Pryke behaved in an intimidating or bullying manner towards the claimant.

30. Mr Ronan was appointed as the claimant's point of contact. The claimant was told that Mr Pryke would conduct an investigation. During the course of the meeting Mr Pryke also said that Mr Thomas had received a complaint from Child A and that he was waiting to receive it. After the meeting the claimant contacted Ms Davies and attempted to contact BA.

31. Later that afternoon Mr Ronan spoke with Child A. The file note is at [68]. Child A alleged that the claimant had repeatedly read the letter out despite being asked not to. She complained that the claimant could have dealt with a search of Child A's bedroom in a nicer way and that the claimant had interrupted Child A's call with the doctor by taking the phone off her. She said that she did not want the call with the doctor to be on loudspeaker and also alleged that the claimant had argued with the doctor on the phone.

32. The claimant continued to be acutely distressed and on the morning of 19 February 2019 she messaged Mr Ronan [69 – 71] saying she had been up all night and was waiting for the GP to call her about hopefully being seen that day in relation to her mental health. She said "*yesterday every came to head and the stress even depression I've not spoken about and kept to myself over the last 6 months bottling up has come.*" Mr Ronan responded to say he was sorry to hear about the claimant's health and enquired whether the claimant was well enough to speak. The claimant told him that the GP had told her she needed to be seen and she was going in for an appointment the following morning. The claimant said "*I cant hold a conversation without crying I appreciate your help but I think its best if I'm left today alone by everyone I'm afraid."* Mr Ronan responded to say that was not a problem.

33. The respondent sends out payslips in advance of the payroll run. On the afternoon of 19 February 2019 the claimant checked her email and she had not received a payslip. She emailed the administrator, Jane, asking for her payslip [72]. She did not receive a response. She emailed again the following morning and again did not receive a response.

34. The claimant attended her GP appointment on 20 February 2019 and was diagnosed with work related stress. The GP offered the claimant a 3 week sick note which the claimant declined as she was suspended on full pay. She was aware that if she was signed off sick she would be paid at a lower sick pay rate. The GP told the claimant the sick note would be on her file so that she could call on it at a later date if needed. The claimant updated Mr Ronan about this.

35. On the afternoon of 20 February 2019 the claimant spoke with Mr Pryke by telephone. She asked about her payslip. Mr Pryke says in his witness statement that the claimant said she was going to her doctors to get a sick note. The witness statement says that as the respondent pays in advance if the claimant had generated a sick note she could have ended up overpaid. That part of his witness statement is incorrect. The claimant had not specifically told Mr Ronan she was going to get a sick note. As at the 19 February when the claimant's payslip was halted she had told Mr Ronan she had a GP appointment the next day. That said, the Tribunal accepts and finds that Mr Pryke did think, given what he had been told by Mr Ronan about the claimant's state of health and that she was due to visit her GP, that there was real chance the claimant could end up signed off work sick.

36. The respondent pays basic pay in advance. However enhancements for work such as being on call, sleep ins and overtime are paid in arrears once the work has been undertaken and it is known what additional pay is due. The Tribunal accepts and finds that the reason why Mr Pryke put a hold on the claimant's payroll run and payslip was because he thought she may be signed off sick and could potentially end up overpaid. In order to try to avoid that happening he asked for a temporary hold on the claimant's pay run until it was known whether or not the claimant was going to be signed off sick. The claimant argues that Mr Pryke would have known that she would have sufficient arrears of enhancements due to her to cover any shortfall in basic pay at the sick pay rate. She points out that he would explain such arrangements at, for example, the induction of new staff. The Tribunal accepts, however, that Mr Pryke would not have known the granular detail of the exact payments the claimant would have been due that month. He made the decision to place the temporary halt on the pay run based on his general concern about the risk of overpayment and to buy time in which to see where the land lay by the time pay was actually due. The claimant was ultimately not disadvantaged as she was paid what she was due by BACS on her normal pay date of 21 February. The Tribunal accepts, however, that subjectively the claimant would have been unsettled by not receiving her payslip on its usual due date as set against the background of having been suspended.

37. During their telephone conversation on 20 February 2020 Mr Pryke told the claimant that he had authorised her payslip to be withheld because the claimant was potentially going to go on to sick leave. The claimant told Mr Pryke she had not gone on sick leave, and that even if she had, she had already worked enough on calls and sleep ins to cover any sickness period. The claimant alleges that Mr Pryke then called her a "clever girl" and that she felt discriminated against during the phone call for being a female as the manner in which Mr Pryke spoke was patronising and

belittling. Mr Pryke denies this. He says that as he did not know the specifics of the payroll procedures he had said in response "it sounds like you are cleverer than me, you'd better talk to Jane." He denies speaking to the claimant in a patronising or belittling way or in a way that was because of the claimant's sex.

38. The Tribunal notes that the claimant did not make this particular allegation in her ET1 claim form as originally lodged. The allegation appears to have come to light at the case management hearing conducted by Employment Judge Ward when Judge Ward was clarifying the claimant's complaints with her. In her oral evidence the claimant maintained the comment had been said and that she found it belittling but it was not one of the reasons why she resigned. Given the conflicting evidence, and the absence of the specific allegation in the claimant's ET1 claim form, the Tribunal does not find it established on the balance of probabilities that Mr Pryke used the specific expression "clever girl." We do accept that he made some reference to the claimant being clever, which was said in the context of the claimant's comment that any sleep ins, on call and overtime she had worked would offset against any shortfall in basic pay.

39. On 22 February 2019 the claimant was called by Mr Ronan and asked to meet with Mr Pryke again on 25 February. The claimant says that she told Mr Ronan she did not want to meet with Mr Pryke alone and that it would be too little notice for someone from Unison to attend with her. The claimant says Mr Ronan told her that he could not attend as he was on annual leave but that a member of staff from head office would be present. She says that she therefore attended on that basis. She says that on attending and meeting Mr Pryke in the carpark she asked him who was accompanying him and he said that it was only him. The claimant's evidence was that she was too polite to say she did not want to go into a room with Mr Pryke on her own so she went ahead with it. Mr Pryke denied that it was ever intended that someone from head office would be there as there are no staff employed there that would attend this kind of meeting.

40. The Tribunal's view is that there was no benefit to Mr Pryke in him deliberately engineering a meeting alone with the claimant. For one, he would, on the face of it, end up responsible for taking the notes. It was not a meeting in respect of which in either her ET1 claim form, her written witness statement or the minutes the claimant prepared after the meeting, the claimant was alleging that Mr Pryke had imposed improper pressure in some way. She says in her written statement that the meeting was a short one. The Tribunal did not have the benefit of any evidence from Mr Ronan. On the evidence available, and applying the balance of probabilities, the Tribunal finds it is likely that Mr Ronan did tell the claimant that someone else would be present with Mr Pryke. But likewise

finds there was not some deliberate strategy on the part of the respondent to countermand that commitment. The Tribunal considers it more likely Mr Pryke did not appreciate the importance to the claimant of having someone else there. When he found out that Mr Ronan could not attend, and given what he was intending to talk about, he decided to just go ahead by himself. The claimant, as we have said, herself decided to press ahead with the meeting on the day.

41. Despite being a second fact finding investigation meeting Mr Pryke did not prepare any minutes of other written record of the meeting. The claimant later emailed Mr Pryke her own record [75]. Mr Pryke said in evidence that the claimant's notes were a fair record of their discussions. We therefore accept that they are summary of what was discussed.

42. It is evident from the claimant's note at [75] that there was a fairly detailed discussion of BA's allegations. The claimant put across how and why she disputed BA's account and the content of BA's file note. The Tribunal accepts that the claimant had a fair understanding of what BA was accusing her of.

43. There was also some discussion as to what was to happen next as the claimant refers in her emailed minutes to a disciplinary pack and asking that her email be placed within it. She also writes "*you mentioned that in your summary of this investigation you would be stating the past complaints and a recommendation of disciplinary procedure.*"

44. The Tribunal therefore finds that on 25 February 2019 Mr Pryke told the claimant he would be preparing a summary investigation report which would recommend formal disciplinary proceedings. He also told her that the allegations against her and the evidence relied upon would all be sent out to her in a disciplinary pack. Mr Pryke also referred to previous complaints that Child A had made about the claimant and that these would be referred to and relied upon in his investigation report and the anticipated disciplinary proceedings. He also told her that he would not be conducting the actual disciplinary hearing itself as he had undertaken the investigation.

45. The claimant also told Mr Pryke that she had raised in previous supervision meetings concerns about Child A and that she felt targeted by Child A but that she did not feel support had not been put in place to address this which had left her open to allegations and complaints. The claimant was also given the opportunity add anything else she wished to her account, and she told Mr Pryke she had been transparent and had nothing further to add.

46. The claimant alleges that Mr Pryke told her "things were not looking good" in relation to her future employment with the respondent. Mr Pryke denies saying this or threatening the claimant with disciplinary proceedings but that he was upfront with the claimant that the disciplinary proceedings would include the previous complaint about the claimant's use of language and her tone. Mr Pryke said the claimant had been given extra training on communication skills and had previously been placed on a capability procedure which the claimant had recently completed which related to a complaint about the claimant's language towards a child. The Tribunal does not find it established on the balance of probabilities that Mr Pryke said the particular phrase "things are not looking good". He ultimately was not going to conduct the disciplinary hearing. However, the Tribunal accepts that subjectively, given what Mr Pryke had said, particularly about including previous complaints, the claimant was upset and concerned about what was going to be levelled against her and where her future lay.

47. On 27 February the claimant emailed Mr Pryke with her minutes from their meeting on 25 February and asked for them to be included in the disciplinary pack. Mr Pryke did not respond. Her email also said that she had spoken with her union, Unison, and they had advised that past complaints should not be brought into the investigation. That same day Mr Ronan met again with BA where, in effect, she maintained her allegations against the claimant [74].

48. The claimant states that about 4pm on 4 March 2019 Mr Pryke telephoned her saying she was facing disciplinary proceedings at Head Office in Narberth on Friday 8th March at 2pm and that he would be sending the disciplinary pack the next day. The claimant says this would not have left her with reasonable time in which to prepare and arrange representation. This heightened her upset. Mr Pryke denied making any such phone call. He also denied that any disciplinary hearing was ever scheduled. The Tribunal accepts the evidence of the claimant and finds that the call was made and that the claimant was told this. The subsequent events of 5 March (which the respondent cannot dispute having called no evidence on the point) do not make sense without that telephone call having occurred.

49. On 5 March the claimant had a series of phone calls with Mr Ronan and then met with him when she ultimately handed in her notice. For reasons never explained the respondent did not call Mr Ronan as a witness. They adduced no evidence to dispute the claimant's version of events, other than Mr Pryke denying that in fact Mr Ronan had spoken to him. The Tribunal therefore accepts the claimant's account of events as set out in her witness statement.

50. The claimant telephoned Mr Ronan and told him that she would be activating her 3 week sick note as her mental health had deteriorated. Mr

Ronan told her he would call Mr Pryke and call her back. The claimant's expectation was that if she did this the disciplinary hearing would not go ahead as anticipated and the disciplinary pack would not be sent out to her.

51. Mr Ronan then returned the claimant's call stating that Mr Pryke had advised the claimant could activate her sick note. The claimant's witness statement continues "*However, the pack would be sent at 3pm that afternoon and I would still face disciplinary on the expiry of my paper and the only way that this would not be sent is if I handed in my notice at 3pm that day. I advised that as per ACAS rules if an employee is on the sick the employer cannot send out anything, Lee Ronan advised me that he would check this with Danny Pryke."*

52. In the meantime the claimant spoke with her union representative who told her that if the claimant activated her sick note then no communication could be received from the respondent.

53. The claimant spoke again with Mr Ronan. He told her that he had spoken with Mr Thomas who had agreed that if the claimant handed in her notice by 3pm that day she could remain on the sick for as long as she needed as he appreciated she needed some form of income. He said that the disciplinary pack would go away. The claimant arranged to meet with Mr Ronan in Wetherspoons so that she could hand over her sick note.

54. The claimant considered her position and discussed it with Unison and her family. She decided that she would resign. She said in evidence that it had all got too much and she could not cope with it anymore.

55. At 1:30pm that afternoon the claimant met with Mr Ronan. During their meeting she typed up her resignation and emailed it over at 1:52pm [78]. She said "*Dear Lee/Paul As of today 05.03.19 I wish to advise that I will be handing in my notice of resignation. I would like to take this opportunity to thank you all for my time with you. Many thanks".* The claimant said in evidence that the reference to "all" was not intended to include Mr Pryke.

56. The respondent's ET3 in this case says:

> "*20. The Claimant told the Respondent's Danny Dyke that she was considering resigning rather than having to be interviewed as part of the investigatory process. The Claimant stated she felt unable to face a potential disciplinary. Her main concern was if she was dismissed as a result of a disciplinary hearing it would consequently mean the Respondent had a duty to inform Social Care Wales, which could have resulted in the Claimant being struck off the register. With this in mind, coupled with the Claimant raising issues*

that she felt mentally unwell, the Respondent commented to the Claimant that if she did resign then the investigation/disciplinary process would cease, meaning that there would be no need to continue with investigation process. This was offered purely to try to assist the Claimant in light of her disclosure of mental health issues. The Claimant had not previously raised any issues in relation to her own mental health to the Respondent.

21. The Claimant remained undecided as to whether or not she was going to resign. Consequently the Respondent did not know whether to issue the disciplinary pack to the Claimant or not. The Respondent discussed this with the Claimant and to provide itself with a timeframe, stated to the Claimant if it had not received her resignation by 3pm it would go ahead and issue the disciplinary pack to her."

57. The difficulty is that this account in the ET3 is unsupported by any written evidence put forward by the respondent. Mr Pryke does not say this in his witness statement. He does not refer at all to any discussions with the claimant about the potential to resign. His statement jumps from the meeting on 26 February to the respondent receiving the claimant's resignation email on 5 March 2019.

58 In answer to questions from the Tribunal Mr Pryke said that the ET3 response form would have been approved by him. He was unable to account for the reference to the Claimant being told that if she did not resign by 3pm the respondent would go ahead and issue the disciplinary pack. He did make reference to an alleged discussion with the claimant that there would be a break for a time so that the claimant could decide what she wanted to do next. He said it was for the claimant to consider whether she wanted to go down the disciplinary route, or hand in her sick note and continue with the disciplinary after that, or hand in her notice if she felt she could not cope any more. However, that alleged discussion is not referenced at all in his written witness statement or in any documents and was denied by the claimant.

59. Moreover, Mr Pryke was unable to account for the reference in the ET3 to a 3pm deadline or what day that related to. He denied all knowledge of the claimant's discussions with Mr Ronan and tentatively suggested, whilst also saying that he could not really answer the Tribunal's questions, that he may have told the claimant to have a week and let him know what she had decided but he still could not explain what day the 3pm deadline related to in an ET3 response form that had been approved by him. On these particular issues the Tribunal found Mr Pryke's evidence to be unreliable and evasive and we reject his account of these events. We

accept the claimant's version of events as to what happened between 26 February and her resignation on 5 March 2019.

Discussion and Conclusions

60. Applying our findings of fact to the law and the issues to be decided, as identified by Employment Judge Ward, our conclusions are as follows.

Direct sex discrimination and harassment related to sex

In the way Mr D Pryke spoke to the claimant and dealt with her at the initial investigation meeting on 18 February 2019

61. We have already made a finding of fact that Mr Pryke did not speak to the claimant inappropriately or act inappropriately in the investigation meeting with the claimant on 18 February 2019. It follows, there was no detrimental conduct which could as a matter of fact be considered to amount to less favourable treatment. Moreover, the claimant was not, because of sex, treated less favourably that the respondent treated or would treat others in not materially different circumstances. Mr Pryke would have behaved the same way in that meeting if the claimant were a man. This complaint of direct sex discrimination fails and is dismissed.

62. For the same reason Mr Pryke did not engage in unwanted conduct which either had the purpose or effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant. Given our findings of fact it was not objectively reasonable for the claimant to have perceived such a purpose or effect. Moreover, the conduct of the meeting and what Mr Pryke said at the meeting was not related to the claimant's protected characteristic of sex. This complaint of harassment related to sex fails and is dismissed.

Not providing a payslip on 19 February 2019

63. We have made a finding of fact that Mr Pryke put a temporary halt on the claimant's payslip because he was concerned about the risk of the claimant going overpaid. This is a non discriminatory reason for why Mr Pryke did what he did. The respondent did not, because of sex, treat the claimant less favourably than the respondent treated or would treat others in not material different circumstances. Mr Pryke would have done the same if the claimant were a man. This complaint of direct sex discrimination fails and is dismissed.

64. Likewise Mr Pryke put a halt on the payslip because he was concerned about the risk of overpayment and in doing so did not engage in unwanted conduct which either had the purpose or effect of violating the claimant's

dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant. It was not objectively reasonable for the claimant to have perceived such a purpose or effect. It is conduct that would not meet the threshold identified in Grant v HM Land Registry and is also conduct that is not related to the claimant's sex. This complaint of harassment related to sex fails and is dismissed.

Mr D Pryke patronising the claimant in a telephone call on 20 February when calling about the payslip saying that the claimant was a "very clever girl."

65. The Tribunal has not found it established on the balance of probabilities that Mr Pryke used the specific words "clever girl." As such the complaints of direct sex discrimination and harassment related to sex fail at the first hurdle as the comment said to amount to the less favourable treatment or unwanted conduct has not been established as a matter of fact.

66. The Tribunal would add that even if it had been satisfied that Mr Pryke had used the expression "clever girl" we would not have found that amounted to direct sex discrimination or harassment related to sex. The context of the comment is highly relevant as it was made in response to the claimant having said that even if she did go on sick leave she would not end up overpaid because any overpayment of base pay would be offset against the amounts she was owed in arrears for enhancements such as sleep ins and overtime. The Tribunal is satisfied that in not materially different circumstances involving a man, Mr Pryke would have referred to such a comparator as a "clever boy". In context, it is also not an expression that the Tribunal would find it objectively reasonable for the claimant to consider it had the purpose or effect of violating her dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for her. It is also not conduct that would not meet the threshold identified in Grant v HM Land Registry. These complaints of harassment related to sex and direct sex discrimination fail and are dismissed.

In advising the claimant that the invitation to a disciplinary hearing "the pack" would be sent out at 3pm if she did not resign

67. The claimant says this constituted harassment related to sex. The Tribunal has found that what Mr Ronan said, after the claimant had said she was going to activate her 3 week sick note, was that the disciplinary pack would be sent out at 3pm that day and the claimant would face a disciplinary hearing when her sick note came to an end. She was told to avoid the disciplinary pack being sent out she would have to hand in any resignation by 3pm.

68. This was unwanted conduct in the sense that the claimant did not want the disciplinary pack sent out to her. However, the Tribunal is not satisfied that it was objectively reasonable for the claimant to view it as having the purpose or effect of violating her dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for her. The context here is important. There was nothing inherently wrong in telling the claimant that she would face disciplinary proceedings when she was well enough when her sickness certificate came to an end. There was nothing inherently wrong in sending the claimant out a disciplinary pack with the evidence in it to be used at a future date. This is evidence the claimant had been asking for and in respect of which she had said she needed time to prepare and seek help from her Union.

69. By itself sending out a disciplinary pack of evidence, looked at objectively, did not prejudice the claimant. The deadline of 3pm may have made the claimant feel pressurised. However, again that has to be viewed in context. All the handing in of the resignation that day would achieve was avoiding the disciplinary pack being sent out. If the claimant did not agree she still retained all of the same options. The disciplinary proceedings would still have remained on hold at least for the currency of her sick note. That Mr Pryke did not in fact have the disciplinary pack "ready to go" does not change that analysis. Moreover, the Tribunal could see no evidence that this conducted was related to the protected characteristic of sex. This complaint of harassment related to success therefore fails and is dismissed.

70. The Tribunal did not consider, in respect of any of the complaints of direct sex discrimination or harassment related to sex, that the claimant had established facts from which the Tribunal could decide, in the absence of any other explanation, that the respondent had committed direct sex discrimination or harassment related to sex, such as to shift the burden of proof to the respondent.

Constructive Unfair Dismissal

71. The Tribunal carefully considered the criticisms that the claimant makes about the respondent in support of her claim she was entitled to resign and consider herself constructively unfairly dismissed. The Tribunal does not consider that any of the acts relied upon by the claimant individually constitute a repudiatory breach of contract or more specifically a breach of the implied term of trust and confidence. Nor does the Tribunal consider that cumulatively those acts complained about form a course of conduct comprising several acts or omissions which cumulatively amount to a repudiatory breach or a breach of the implied term of trust and confidence.

72. We will briefly summarise why we reached that conclusion taking the claimant's criticism in turn.

Suspension

73. The Tribunal considers that the respondent had reasonable cause to suspend the claimant. The respondent had the complaint from BA. The Tribunal is satisfied that given the nature of the complaint and the fact it related to a vulnerable young person in the care of the claimant and the respondent that the respondent had to take it seriously. It gave the respondent sufficient grounds on which to suspend the claimant whilst the allegation was investigated. The Tribunal is satisfied that the claimant's suspension was reasonably necessary to protect those involved (including the claimant) and to protect the integrity of the investigation itself. The claimant herself in evidence accepted that she was not disputing the fact of her suspension but more that if it was going to happen it should have happened earlier that day.

74. The Tribunal accepts that the claimant's initial suspension was clumsily handled and she could have been told more about the circumstances initially. However, that was remedied shortly thereafter once Mr Pryke met with the claimant. The actual decision to suspend was, however, made with reasonable cause.

The disciplinary investigation and the threat of a potential disciplinary hearing together with the procedure followed

75. The Tribunal does not consider the respondent acted unreasonably in its conduct of the disciplinary investigation. Even if the claimant was not given a copy of BA's complaint, she understood the gist of what was being alleged and she was able to respond to it. Other potential witnesses, including Child A and YR were spoken to. A second fact finding meeting was held with the claimant where she was given the opportunity to add anything else that she wanted to.

76. The Tribunal has found that Mr Ronan told the claimant that someone else would be in attendance to take notes at the meeting on the 25 February 2019 and that indication was not honoured. It would have been good practice to honour such a commitment. However, objectively we have also found that this was not a deliberate strategy designed to prejudice the claimant in some way and that Mr Pryke had not understood the importance to the claimant. The claimant herself agreed to proceed to meet with Mr Pryke alone and does not allege anything inappropriate then happened in the meeting.

77. The claimant complains that Mr Pryke told her that he was going to recommend that she be taken to a disciplinary hearing and he was going to bring previous complaints into the disciplinary case. The Tribunal was not given any documents relating to that prior history and neither the claimant nor Mr Pryke gave the Tribunal much information about it in their witness evidence. It did not, however, appear to be in dispute that the claimant had completed a capability process relating to communication skills following an earlier complaint. The extent to which that history was relevant or was appropriate to be taken into account in the anticipated disciplinary proceedings is difficult to assess without the detail of the previous events and without the detail of the future anticipated disciplinary case. As the claimant resigned the latter was never produced. However, the Tribunal does not find that it would never be potentially appropriate for a previous capability process or a previous complaint to form part of a disciplinary case in some way. It would very much depend upon the particular facts and circumstances. Sometimes a pattern of conduct can be a relevant consideration. The Tribunal cannot therefore conclude that Mr Pryke's indication to the claimant was inherently unreasonable or improper. Moreover, if the claimant had grounds on which to dispute the relevance of the previous events then she would have, with the assistance of her Union, been able to do so in the disciplinary process and at the disciplinary hearing.

78. The Tribunal also does not find it was unreasonable for Mr Pryke to decide that there was sufficient evidence to justify taking the claimant to a disciplinary hearing. Mr Pryke had the complaint of BA supported in part by Child A. The Tribunal accepts that provided a basis on which to decide to proceed. The actual outcome would lie in the hands of the hearing officer. It is important to remember that the disciplinary proceedings were at a relatively early stage at the time the claimant resigned. She had not been to a disciplinary hearing and the formal pack of papers had not been served on her. There was a process still to come in which the Tribunal considers it likely that the claimant would have had the opportunity to submit her own evidence or dispute that of the respondent with the assistance of her Union. She herself accepted that Mr Pryke told her another manager would be conducting the disciplinary hearing as he had conducted the investigation. The Tribunal did not consider it had evidence before it to show that the eventual hearing officer had pre-judged the outcome in some way. Further, the Tribunal does not find that on 25 February, Mr Pryke "threatened" the claimant with a disciplinary hearing. He was telling her, as the investigating officer, what the next step would be.

79. The Tribunal has found that on 4 March 2019 Mr Pryke did tell the claimant that she would be facing a disciplinary hearing on 8 March 2019 with the pack being sent out the next day. Whilst there was nothing

inherently wrong in the respondent seeking to progress the disciplinary proceedings, the Tribunal accepts and agrees with the claimant that on the face of it, it would not have given her reasonable time to prepare bearing in mind she was likely to want to take Union advice once she had the evidential pack. She would have received the pack at the earliest on the 6 March, two days before the hearing. These purported arrangements were unreasonable. However, this does have to be set within the context of the fact that Mr Pryke's indication then did not happen. There would have been opportunities for the claimant or her union representative to have objected to the lack of notice (or indeed for her union representative to seek an adjournment if they were not available). However, in fact the route the claimant took was to tell Mr Ronan, the next day, that she was activating her sick note. He then told her that this meant the disciplinary hearing would *not* take place at that stage but instead at a future date when the claimant's sickness certificate was at an end. The pressure of an anticipated disciplinary hearing on 8 March 2019 was therefore removed by the 5 March 2019 and had been removed by the time the claimant decided to resign. There was nothing improper in telling the claimant that the disciplinary hearing would be on hold until she was well enough to attend.

80. The claimant also complains that Mr Ronan told her that even though she was activating her sick note that the disciplinary pack would still be sent out to her and that the only way to avoid that would be to hand in her resignation by 3pm. The Tribunal here repeats its findings made above in relation to the harassment claim. There was nothing inherently wrong in sending the claimant out a disciplinary pack with the evidence in it to be used at a future date. This is evidence the claimant had been asking for and in respect of which she had said she needed time to prepare and seek help from her Union. Whilst the claimant may have understood the contrary, there is nothing, whether within the Acas Code of Practice, or elsewhere, that inherently prohibits an employer sending a disciplinary pack out to an employee who is on sick leave or otherwise communicating with that employee.

81. As also already stated above, the Tribunal accepts that the deadline of 3pm may have made the claimant subjectively feel pressurised. However, objectively that has to be set within the context that all the handing in of the resignation that day would achieve was avoiding the disciplinary pack being sent out. If the claimant did not agree she still retained all of the same options. The disciplinary proceedings would still have remained on hold whilst she was signed off sick, so there was no immediate pressure. She would still have available the full range of options including resigning at a future date, or attending the disciplinary hearing once she was well enough to do so. Indeed, in one sense she would have had the benefit of the disciplinary pack in terms of being able to take advice from her Union

and consider her options with the protection of at least a 3 week period in which she knew there would be no disciplinary hearing. That Mr Pryke did not in fact have the disciplinary pack "ready to go" does not change the Tribunal's analysis.

Summary

82. We have often used the word "reasonable" when evaluating the criticisms the claimant makes of the respondent. It is, however, not the ultimate legal test but was said in Buckland to be a helpful tool in the Tribunal's factual analysis kit for deciding whether there has been a fundamental breach.

83. Some of the claimant's criticisms we have found to have some degree of validity and some we have not. We took a step back and looked at those we found to have some validity. Overall the Tribunal did not consider, applying an objective analysis and set within context, that any individual criticism demonstrated that the respondent acted without reasonable and proper cause in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between employer and employee. Nor did it otherwise amount to a repudiatory breach of contract. Furthermore, when assessed cumulatively there was no course of conduct by the respondent where cumulatively the respondent without reasonable and proper cause conducted itself in a manner calculated or likely to destroy or seriously damage mutual trust and confidence. Nor was there cumulatively any other repudiatory breach of contract. It is important to remember that the threshold here is a relatively high one; not all unreasonable behaviour amounts to a breach nor does an employee's sense that she has been treated unreasonably.

84. Moreover, the Tribunal does not consider that the claimant resigned in response to any claimed breach. The Tribunal considers that the claimant decided to resign because she could not face the prospect of having to attend the disciplinary hearing and its potential implications for her. She said herself in evidence that she could not cope anymore and she had discussed her decision through with her family and her Union before she met up with Mr Ronan at Wetherspoons. She wrote on her ET1 claim form "*This was my only option to remain on the Social care Wales register or face disciplinary and the prospect if found guilty I would be dismissed and struck off unable to work in the sector."* It is understandable that the claimant found the anticipated disciplinary process acutely distressing and understandable why she would wish to avoid the potential consequences that the risk of dismissal would bring. However, resigning for that reason was not a resignation that was in response to any repudiatory breach of contract by the respondent. It was a decision made by the claimant of her own choice and volition. The Tribunal would add that it was conscious in

this case as to the absence of Mr Ronan's evidence and the observations it has made above about, at times, the unreliability of Mr Pryke as a witness. However, ultimately the claimant could only have resigned in response to conduct on the part of the respondent that she actually knew about. The Tribunal has in large part accepted the claimant's version of events, particularly in relation to the run up to her resignation. But on that version of events the claimant has not established that she did resign in response to such a repudiatory breach.

85. It follows that the claimant resigned and was not dismissed. The constructive unfair dismissal claim cannot succeed and is dismissed.

Conclusions

86. The claimant's complaints of constructive unfair dismissal, sex discrimination and harassment related to sex are not successful and are dismissed.

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Employment Judge R Harfield
Dated: 18 December 2020

JUDGMENT SENT TO THE PARTIES ON 21 December 2020

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FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS