EMPLOYMENT TRIBUNALS

Claimant: Miss J Quayle

Respondent: Scott Robert LLP

Heard at: Liverpool **On:** 7 December 2020

Before: Employment Judge Horne

Representatives
For the claimant: in person
For the respondent: Mr T Fuller, consultant

Judgment was announced to the parties at a hearing on 7 December 2020. Written reasons were requested by the respondent in accordance with rule 62 of the Employment Tribunal Rules of Procedure 2013. Accordingly the following reasons are provided.

REASONS

Preliminary

1. The heading to these reasons is marked with the hearing code "V". This code indicates that the hearing took place on a remote video platform. Neither party objected to the format of the hearing.

Complaints and issues

2. By a claim form presented on 10 January 2020, the claimant raised the following complaints:

   2.1. unfair constructive dismissal, within the meaning of sections 95(1)(c) and 98 of the Employment Rights Act 1996 ("ERA"), in contravention of section 94 of ERA; and

   2.2. unlawful deduction from wages, contrary to section 13 of ERA.

3. A subsequent case management order indicated that the claimant was also alleging that the respondent had failed to provide a statutory statement of employment particulars, contrary to section 1 of ERA. Looking at the parties' list

of issues and the claimant's schedule of loss, it is clear that the purpose of this allegation was to enhance the claimant's remedy if one of the above complaints was successful. At the remedy stage, the claimant would seek an additional award under section 38 of the Employment Act 2002. There was no suggestion that the claimant was bringing a reference to the tribunal under section 11 of ERA to determine what particulars should have been included in the statutory statement.

4. The parties' list of issues formed a useful starting point for our discussion of the issues at the start of the hearing. Following that discussion, and the parties' closing arguments, the issues for me to decide were substantially refined. I have accordingly recast the list of issues to reflect the issues I actually had to decide at the hearing.

Unlawful deduction from wages

5. The complaint of unlawful deduction from wages initially had a number of different strands, each based on a different kind of payment to which the claimant was allegedly entitled. By the time the hearing started, all but one of these strands had fallen away. The residue of the wages claim consisted of an allegation that the respondent was liable for unlawful deductions made by its predecessor company from the claimant's wages between January and June 2019, in that it had made deductions for employee pension contributions and had failed to pay those contributions into a pension fund. The respondent's case was that it had belatedly paid the full amount of the contributions into the relevant pension scheme in September 2020. If that was correct, the respondent would argue that the most the claimant could possibly achieve by pursuing her complaint of unlawful deduction from wages would be a declaration without any consequential order for payment. By the time of the hearing, the claimant had received a screenshot from the respondent purporting to show the making of the pension payment, but had not received any independent confirmation from the Pensions Regulator. She was not prepared to take the respondent's word at face value.

6. We agreed on a way forward. The wages complaint is stayed. During the period of the stay, the claimant has opportunity to verify that all her deducted wages had been paid into the pension scheme. If it turns out that they have been paid, the claimant's content for this part of her claim to be dismissed on withdrawal. If, on the other hand, she discovers that they have not been paid, she will notify the tribunal accordingly and the stay can be lifted. By agreement, the default position is that this part of the claim will be dismissed unless the claimant positively indicates that it is to be pursued.

Unfair constructive dismissal

7. The complaint of unfair dismissal stands or falls with the question of whether or not the claimant was constructively dismissed. If she was, the dismissal was unfair. At the start of the hearing, the respondent's representative indicated that he would not seek to advance a potentially fair reason for dismissal.

8. It is the claimant's case that the respondent breached one term of the contract, which is commonly referred to as "the implied term of trust and confidence". Box 8.2 of the claim form succinctly summarised the conduct that was alleged to have damaged the trust and confidence relationship. This is what it said:

> "My employer failed to auto enrol me into a pension scheme yet took sums from my wages each month. They failed to dispose them into any segregated account or into any form of pension scheme. Over four grievances were lodged in relation [to] this gets to no avail were any payments or back payments made despite the firm setting up the pension in July 2019. I took it upon myself to actively decline from internal processes however continued my professional duties and fulfilled my role until such grievances had been progressed correctly through the firm's grievance process. This never materialised under such defiance of the firm's internal record-keeping resulted in me receiving a performance improvement plan. I then decided to leave the company as I felt I was being silenced by way of disciplinary actions and felt I had no other option but to resign before I was pushed out."

9. What I have to decide is:

   9.1. Did the respondent (or its predecessor company) conduct itself in that way?

   9.2. Was there reasonable and proper cause for that conduct?

   9.3. Was the conduct calculated or likely to destroy or seriously damage the relationship of trust and confidence?

   9.4. Did the claimant resign in response to the breach?

   9.5. Did the claimant affirm the contract before resigning?

Evidence

10. I considered documents in an electronic bundle notionally ending at page 153, although the true number of pages was significantly greater.

11. The claimant gave oral evidence on her own behalf. Mr Good was the sole witness for the respondent. Both of them confirmed the truth of their written statements and answered questions.

Facts

12. The respondent has been in business since 1 June 2019. One of its partners is Mr Tim Good. The business provides regulatory and compliance consultancy services to clients who are regulated by the Financial Conduct Authority.

13. Prior to June 2019, essentially the same business was carried on by Compliance Consult and Advisory Limited ("CCA"). Mr Good was a director of that company. On 24 January 2018, CCA was made the subject of a corporate voluntary arrangement (CVA) with its creditors. The CVA remained in place until 21 May 2019 when its creditors issued a petition for compulsory winding up. In July 2019, the winding up order was granted. By that time, of course, its business had transferred to the respondent.

14. The claimant began her employment with CCA on 26 May 2016 as a regulatory advisor. Her employment transferred to the respondent on 1 June 2019. The respondent continued to employ her until 7 February 2020, the expiry date of a period of notice given by her.

15. At the heart of this case is a dispute about workplace pensions. In order to understand the issues in this case, it may assist the reader to know a little about

how workplace pensions operate. This summary is intended to be brief, even if it runs the risk of some minor inaccuracies in the detail of the scheme.

16. Since 1 February 2018, it has been mandatory for employers to "auto enrol" their employees into a workplace pension. Auto enrolment means placing the employee automatically into the scheme and placing the onus on the employee to opt out. Once an employee is enrolled, the employer must make regular payments into a pension fund on the employee's behalf. There are two elements to these payments. One of these is the employee contribution. The amount of the employee contribution is deducted from the employee's pay and in turn paid into the fund. The second element is the employer contribution. This is paid from the employer's own resources directly into the fund. Workplace pensions are administered by the National Employment Savings Trust (NEST). One of the functions of NEST is to keep track of the payments made by the employer into the workplace pension scheme. NEST has an online portal onto which employers can register their pension payments. If NEST detects a failure to comply with the requirements of the scheme, it can refer the employer to the Pensions Regulator.

17. On 1 February 2018, the compulsory auto enrolment date, the claimant's employer was one week into its CVA. It did not enrol the claimant or her colleagues into a workplace pension. The weeks and months came and went without any sign of a pension, causing the claimant and her colleagues to become increasingly concerned and increasingly vocal. On 7 September 2018, in response to one such expression of concern, Mr Good sent an email to affected employees in which he recognised that the delay was "unacceptable" and that he was still trying to set up the scheme. In the meantime, he continued to pay the claimant and her colleagues in full, without any deduction for employee contributions.

18. The claimant was eventually enrolled into a workplace pension in December 2018. From January 2019, CCA made regular deductions from the claimant's pay. The deductions were equal to the amount of her employee contribution into the workplace pension. The claimant was aware of the deductions, as they appeared on her monthly pay slips. What she did not know until much later was that, instead of paying her contributions into the pension fund, CCA was actually keeping the money in its own bank account. This was the same bank account that CCA used for its general business transactions.

19. Meanwhile, in January 2019, Mr Good attempted to register pension payments with NEST. He encountered a technical difficulty. Because CCA was so late in enrolling the claimant into a workplace pension, the NEST portal would not register new pension payments until CCA had first cleared its arrears. That is to say, the portal automatically recorded any new payments as being contributions in respect of the period from February to December 2018. Mr Good did not want to pay arrears of contributions into the scheme. Making back payments would, for a short time at least, mean that the claimant and her colleagues would be overpaid, because CCA had not made any deductions from the previous 10 months' pay in respect of the employee contributions. He did not explain this difficulty to the claimant or any other employees. CCA carried on making the deductions from their pay and keeping the money in its general bank account.

20. As previously mentioned, on 1 June 2019, under the supervision of an insolvency practitioner, the staff and assets of CCA transferred to the respondent. Mr Good auto enrolled the claimant and her colleagues in the respondent's workplace pension. The CCA workplace pension scheme remained in existence. The employee contributions to that scheme remained in CCA's bank account which, by then, was in the hands of the insolvency practitioner.

21. From June 2019 onwards, the respondent not only deducted employee contributions from the claimant's pay, but actually paid them into the respondent's workplace pension scheme.

22. On 21 June 2019, the claimant was informed by NEST that CCA had failed to pay her employee contributions into the CCA workplace pension scheme and was accordingly being referred to the Pensions Regulator. The claimant was dismayed at the news. She thought that she would lose her money. She immediately approached Mr Good and asked him what had happened to her pension contributions. Mr Good sought to reassure the claimant that any backdated contributions would be paid. It is not clear to me exactly what the claimant and Mr Good said to each other in this conversation. The parties were able to recall their impressions better than the actual words that were spoken. The claimant did not say in terms that she was raising a grievance. Mr Good did not think that the claimant regarded the state of her pension as an issue over which she would resign. What both parties believed by the time the conversation had finished, however, was that the claimant clearly regarded the issue as being unresolved. In Mr Good's words, she "wanted the issue sorted". For her part, the claimant believed that there would be no satisfactory resolution to this dispute unless Mr Good did two things. First, he would need to provide some evidence to her of where her money was and demonstrate that it was safe. Second, she required from Mr Good a convincing explanation of why he had delayed auto-enrolling her into the CCA pension in the first place.

23. At some point over the summer of 2019, the claimant had a one-to-one meeting with her line manager, Mr Roy Williams. At this meeting, the claimant told Mr Williams that she was still awaiting resolution of the pension issue. Apart from this one meeting, the claimant did not raise her concerns over her pension issue directly with Mr Good or any other manager until September 2019. Instead, she decided on an informal kind of industrial action. In order to understand what she did, some knowledge is required of the respondent' work monitoring system known as CLIO.

24. The CLIO system was introduced by CCA during the summer of 2018. It was broadly similar to the time recording systems commonly used by solicitors' firms. Each regulatory adviser had his or her own user account. Under their own username, the adviser would record details of what work they had done on a particular client file and how long they had spent working on it. The system depended on regular and timely updates. If necessary, an administrator could gain access to and adviser's user account and make updates on their behalf.

25. Although it was relatively uncommon for clients to be billed at an hourly rate, CLIO was nevertheless regarded by Mr Good as an important management tool. This was for a number of reasons:

    25.1. it enabled fixed-fee work to be priced on a more informed basis, having regard to how much time similar tasks had actually taken to complete;

25.2. where clients paid a fixed monthly fee in return for a contracted number of hours' work, CLIO enabled the clients to know how much work had been done in any given month and hence how much value for money they were getting; and

25.3. it enabled managers to forecast workload and tailor marketing activities accordingly.

26. The introduction of CLIO had not been without its teething problems. In the early weeks of the new system, Mr Williams frequently emailed the claimant and colleagues, pointing out errors and encouraging them to complete their updates correctly. These emails were generally terse and to the point, omitting pleasantries and rudeness alike.

27. Following her conversation with Mr Good on 21 June 2019, the claimant was so disillusioned that she decided to stop using the CLIO system properly. She did not abandon CLIO altogether, still less did she neglect her professional services to the respondent's clients, but she consciously omitted to make many updates onto CLIO and chose to leave out details which she knew the respondent regarded as important. In her mind, this was a form of protest over the unresolved situation over her pension.

28. By September 2019, Mr Williams had become aware that the claimant was not properly updating CLIO. He raised the issue with her at a meeting. The claimant's response was quite candid. She told him that she was deliberately withholding information from CLIO in protest over the unresolved pension issue.

29. From that time onwards, the claimant continued to defy the respondent openly in relation to her use of CLIO. Mr Williams tried to take remedial action. He used his administrator access to input various updates on the claimant's behalf. He also continues to point out deficiencies in the claimant's recording. The claimant was not unique in this respect: other advisers were still failing to operate the system correctly. What made the claimant's case different from theirs was that she was the only person who was openly refusing to try to get it right.

30. In October 2019, the claimant took a short period of annual leave, from which she was expected to return on 15 October 2019. On her last day's holiday, 14 October 2019, Mr Williams sent an email to her work email address. The email pointed out a number of shortcomings in her recent updates on CLIO. In its tone, the email was similar to another CLIO-related email which Mr Williams sent to another colleague on the same day. The tone was also similar to those matter-of-fact emails which Mr Williams had sent in 2018. Mr Williams' intention was for the claimant to read the email when she returned to work following day.

31. In fact, the claimant read the email on the day it was sent. She had set up an alert on her private mobile phone, so that incoming work emails would come more quickly to her attention. She did not disable the alert on her days off. When the claimant read the email, she was incensed. This was the moment, she told me, when she finally thought her employment was "untenable". From that time onwards, she was looking to leave.

32. The claimant sent two emails in response. One of them engaged with the detail of Mr Williams' criticisms of her CLIO updates. The other email was expressed in more general and emotive terms and challenged what she perceived to be the

inappropriate tone of Mr Williams' e-mail. She carried on deliberately under-using CLIO as before.

33. In the absence of any improvement, a decision was taken to place the claimant onto a formal performance improvement plan (PIP). She was informed of the decision at a meeting on 7 November 2019. The written PIP was provided to her the following day.

34. On 11 November 2019, the claimant gave Mr Good a letter of resignation. Relevantly, the letter stated:

> "
>
> …
>
> Please accept this as my formal letter of resignation and termination of our contract. I feel under the continued circumstances and in light of recent events, I have no other choice but to resign. I feel the relationship breakdown between myself and the firm has become fractured beyond repair.
>
> Your continued defiance to assist me with my continued grievances concerning the whereabouts of my pension and associated monies, is not only an express breach of contract, but moreover, a breach of trust and confidence. Rather than provide a valid response to each of my grievances you merely pacified me and took my silence as confirmation that I was happy with the information you have given me. Yet my silence was not an indication of this and has been further supported by further information requests and changes in my behaviour, which you again failed to try and reconcile and instead insisted on blaming my behaviour and attitude for the issue. As a result, my actions led you to furnish me with a performance improvement plan by way of remedy my behaviour. Yet the fundamentals of the matter, relates solely to your breach of contract, leaving me to feel pressured, disheartened and vulnerable.
>
> As detailed, I consider the above to be a fundamental and unreasonable breach of contract on your part, as failure to assist your employees not only to the whereabouts of their monies but in respect of repeated grievances pertaining to the matter and then to treat them unfairly as a result is unacceptable and nothing more than an attempted silencing measure.
>
> Due to the seriousness of the breach, I am entitled by law… to walk away from my position with immediate effect, however, I am committed to ensuring a smooth transition upon my departure and [am] therefore open to discussing my required notice period further.
>
> …"

35. At the time she wrote this letter, the claimant knew she was pregnant. She had not told anybody at the respondent and did not want them to know. As can be seen, her letter, whilst purporting to reserve the right to consider herself constructively dismissed, also invited the respondent to agree on a period of notice. Although she dressed up that invitation as an appeal to the respondent's own interests, her real motivation was to secure a stable income for a little longer, knowing that she would soon be unable to work.

36. I am now in a position to record my findings about the reasons why the claimant resigned. I list the reasons in reverse chronological order. Before doing so, I should mention one thing that did not cause her to resign. The claimant did not resign because of being placed on the PIP. She had already decided to leave by then. Mentioning the PIP in her resignation letter was merely an afterthought. Her actual reasons for resigning were:

    36.1. She took offence at Mr Williams' email of 14 October 2019. There were three things she found objectionable about the e-mail. First, the timing. Second, the tone. Third, the fact that Mr Williams was criticising her entries on CLIO, rather than addressing her underlying motivation, which was to protest over the pension issue.

    36.2. She believed that Mr Good had not adequately resolved the pension issue. In her mind, he had not demonstrated that her money was safe and had not provided her with a satisfactory explanation for having delayed her auto-enrolment between February and December 2018.

    36.3. She was strongly motivated by CCA having taken her employee pension contributions and kept them in its own account rather than putting them in a pension.

    36.4. She also resigned in response to the delay in enrolling her in the first place.

37. In September 2020 the respondent made a substantial payment into the CCA pension scheme in respect of employee pension contributions. I did not make any finding as to whether or not this payment fully matched the employee contributions that had been deducted from the claimant's pay between January to June 2019. If necessary I can make such a finding if the stay on the wages complaint is lifted.

Relevant law

38. Section 95 of the Employment Rights Act 1996 ("ERA") relevantly provides:

> 95 Circumstances in which an employee is dismissed
>
> (1) For the purposes of this Part an employee is dismissed by his employer if (and… only if)—
>
> … (c) 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. …

39. An employee seeking to establish that he has been constructively dismissed must prove:

    39.1. that the employer fundamentally breached the contract of employment; and

    39.2. that he resigned in response to the breach.

    (*Western Excavating (ECC) Ltd v. Sharp* [1978] IRLR 27).

40. It is an implied term of the contract of employment that the employer will not, without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between employer and employee: *Malik v. BCCI plc* [1997] IRLR 462, as clarified in *Baldwin v Brighton & Hove CC* [2007] IRLR 232.

41. The serious nature of the conduct required before a repudiatory breach of contract can exist has been addressed by the EAT (Langstaff J) in *Pearce-v-Receptek* [2013] ALL ER (D) 364.

> “12. ...It has always to be borne in mind that such a breach [of the implied term] is necessarily repudiatory, and it ought to be borne in mind that for conduct to be repudiatory, it has to be truly serious. The modern test in respect of constructive dismissal or repudiatory conduct is that stated by the Court of Appeal, not in an employment context, in the case of *Eminence Property Developments Limited v Heaney* [2010] EWCA Civ 1168:
>
> > "So far as concerns of repudiatory conduct, the legal test is simply stated ... It is whether, looking at all the circumstances objectively, that is, from the perspective of a reasonable person in a position of the innocent party, the contract breaker has clearly shown an intention to abandon and altogether refuse to perform the contract."
>
> 13. That has been followed since in Cooper v Oates [2010] EWCA Civ 1346, but is not just a test of commercial application. In the employment case of *Tullet Prebon Plc v BGC Brokers LP* [2011] EWCA Civ 131, Aikens LJ took the same approach and adopted the expression, "Abandon and altogether refuse to perform the contract". In evaluating whether the implied term of trust and confidence has been broken, a court will wish to have regard to the fact that, since it is repudiatory, it must in essence be such a breach as to indicate an intention to abandon and altogether refuse to perform the contract.”

42. Where a fundamental breach of contract has played a part in the decision to resign, the claim of constructive dismissal will not be defeated merely because the employee also had other reasons for resigning: *Wright v. North Ayrshire Council* [2014] IRLR 4 at paragraph 16. See also *Abbey Cars (West Horndon) Ltd v. Ford* UKEAT 0472/07 at paragraph 34 and 35.

43. An employee may lose the right to treat himself as constructively dismissed if he affirms the contract before resigning.

44. An employee is entitled to a reasonable period of time in which to resign before being taken to have affirmed the contract: *Air Canada v. Lee* [1978] ICR 1202, EAT. The length of that period is not fixed. Relevant factors include the consequences to the employee of losing their job and their prospects of finding alternative work: *Chindove v. William Morrison Supermarkets* EAT/0201/13.

45. A fundamental breach of contract cannot be “cured”, but if an employer takes corrective action, the employer may prevent conduct from developing into a breach of the implied term of trust and confidence: *Assamoi-v-Spirit Pub Co Ltd* [2012] ALL ER (D) 17.

46. Where a fundamental breach of contract has played a part in the decision to resign, the claim of constructive dismissal will not be defeated merely because the employee also had other reasons for resigning: *Wright-v-North Ayrshire Council* [2014] IRLR 4 at paragraph 16. See also *Abbey Cars (West Horndon) Ltd v Ford* UKEAT 0472/07 at paragraph 34 and 35.

47. An employee who remains in employment whilst attempting to persuade the employer to remedy the breach of contract will not necessarily be taken to have affirmed the contract. All depends on the circumstances of the particular case: *W E Cox Toner (International) Ltd v Crook* [1981] IRLR 443,

48. Where an employer has made amends for the breach, and the employee has not not made their position clear, the employee may be allowed only a very limited time to remain in employment before losing the right to be treated as constructively dismissed: *Buckland v. Bournemouth University Higher Education Corporation* [2010] EWCA Civ 121.

49. It is not uncommon for an employee to resign in response to a "final straw". In *Omilaju v. Waltham Forest London Borough Council* [2005] EWCA Civ 1493*,* [2005] IRLR 35*,* CA the Court of Appeal held that where the alleged breach of the implied term of trust and confidence constituted a series of acts the essential ingredient of the final act was that it was an act in a series the cumulative effect of which was to amount to the breach. It followed that although the final act may not be blameworthy or unreasonable it had to contribute something to the breach even if relatively insignificant.

50. A failure of the alleged final straw to meet this test is not necessarily fatal to a constructive dismissal. Where the act which finally tips the employee into resigning is incapable of being a "final straw", in the sense that it could not contribute to a breach of the trust and confidence term, the employee may still be able to argue that he also resigned in response to an earlier breach of contract: *Williams v. The Governing Boy of Alderman Davies Church in Wales Primary School* UKEAT 0108/19.

51. Where the employer fundamentally breaches the contract, and the employee does not resign, the employee will usually continue to be bound by the contract's terms. If the employee does not abide by the terms, the employer, though in breach of contract himself, will usually be entitled to take disciplinary action, including dismissal, against the contract-breaking employee. There may be an exception where the term breached by the employer and the term breached by the employee are related in such a way that the parties can be said to have intended that breach of one term releases the other party from the other term. Whether or not that exception applies is a question of fact: *Macari v. Celtic Football and Athletic Co Ltd* CSIH 0309/6/98.

Conclusions

Breach of contract

Conduct of respondent and CCA

52. I start by examining the allegations of the employer's conduct that is said to have undermined the relationship of trust and confidence.

53. It is not in dispute that the conduct of CCA was conduct of the employer. It falls to be taken into account along with the conduct of the respondent.

The PIP

54. Strictly speaking I do not need to decide whether the PIP contributed to a breach of the trust and confidence term or not. This is because the claimant did not resign even partly in response to the PIP. My finding was that she had already made up her mind to resign by the time the PIP was issued to her.

55. In case I am wrong about that, I would still find that the PIP could not have contributed to a breach of contract. The PIP was issued with reasonable and proper cause. CLIO was an important management tool and it was reasonable of the respondent to require the claimant to use it properly. The claimant was deliberately flouting that requirement, despite having been given an opportunity to improve. Her disobedience was motivated by a sense of unfairness over the pension issue, but that does not mean that the respondent did not have reasonable and proper cause for issuing the PIP. The claimant's refusal to do an important part of her job was an unreasonable form of protest, especially when she had not yet tried raising a formal grievance. A PIP was an objectively reasonable and proportionate response.

The e-mail of 14 October 2019

56. In my view, Mr Williams' 14 October e-mail was innocuous. It was incapable of adding to a cumulative breach of the trust and confidence term. Before coming to this view, I examined the claimant's three criticisms of the e-mail and concluded as follows:

    56.1. There was nothing wrong with the timing. It was sent to the claimant's work e-mail address the day before she was due back in work.

    56.2. There was nothing about the tone of the email to which the claimant could reasonably take objection. It was matter-of-fact, just as similar emails to the claimant and others had been previously.

    56.3. Mr Williams was entitled to challenge the claimant's failure to use CLIO properly. The claimant could have no reasonable expectation that Mr Williams would hold back from pointing her failures out. Nor did she have any legitimate basis for thinking that her non-compliance would be overlooked pending resolution of her pension issues.

57. The 14 October 2019 e-mail cannot therefore have been a "final straw" and could not affect the claimant's entitlement to resign. Applying *Williams,* it is still open to me to find that the claimant resigned in response to a breach of contract based on the respondent's conduct prior to 14 October 2019. I must, however, be careful to take into account everything that happened from the date of the earlier conduct when deciding whether or not the claimant affirmed the contract.

Delay in auto-enrolment

58. CCA delayed auto-enrolment into a workplace pension by some 10 months. In Mr Good's own words, the delay was "unacceptable". There was no reasonable and proper cause for it. A delay of that magnitude was likely to cause significant damage to the trust and confidence relationship.

The claimant's pension contributions

59. Between January and June 2019, CCA deducted employee pension contributions from the claimant's pay and, instead of paying those contributions into a workplace pension, kept the money in its own general bank account where it was no doubt pooled with funds that would be needed to pay creditors. CCA did not tell the claimant what it was doing, with the result that she only discovered what had happened when she was informed by NEST. All this occurred whilst CCA was operating on the brink of insolvency.

60. Conduct such as this was highly likely to cause serious damage to the relationship of trust and confidence. In coming to the view that the likely damage was serious, I have taken two important considerations into account.

    60.1. I have reminded myself of the high threshold of seriousness that is required before a tribunal can find that there was fundamental breach of contract. The seriousness of this conduct was, in my view, on a par with that of an employer who demonstrates an intention to abandon and altogether refuse to perform the contract.

    60.2. I have also borne in mind the respondent's argument that the effect of the conduct was relatively minor. I had better explain the respondent's argument as I understand it. The respondent contends that little harm was done by a delay in paying the claimant's contributions into a pension fund. This is because the claimant would not be eligible to draw her pension for some years, so, even if payment of her contributions into the fund was delayed by a few months, there would still be plenty of time left for the pension investment to grow. I disagree for two reasons. First, the size of the claimant's pension pot would be optimised by earlier investment. Second, and more fundamentally, the claimant was not just worried that her pension contributions would not have sufficient time to grow. Her main concern was that she was going to lose her money altogether. Her ability to trust CCA's liquidators as a safe custodian of her pension contributions would no doubt have been damaged by the fact that CCA did not even tell her that it was keeping her money until the claimant received the news from NEST.

61. In my opinion, CCA did not have reasonable and proper cause for its conduct. CCA did encounter a technical difficulty with the NEST portal. But that was a problem of CCA's own making. It was caused by CCA delaying auto enrolment until 10 months after the compulsory deadline. Even if one disregards the cause of the NEST portal problem, it did not give CCA a good reason to do what it did. CCA had alternative options. It could have made backdated employee contribution payments into the workplace pension and then sought to recover those contributions from the claimant. Alternatively, CCA could have transferred the employee contributions into a separate bank account so that the money was safer from creditors. At the very least, Mr Good could have told the claimant what was going on.

Failure to resolve the pension issue

62. Further damage was done to the relationship of trust and confidence by Mr Good's failure to resolve the pension issue following his conversation with the claimant on 21 June 2019. It will be remembered that there were two steps that the claimant wanted Mr Good to take. These were, first, to demonstrate that her money was safe and, second, to provide a satisfactory explanation for the original delay in auto enrolment.

63. I can deal with the latter point relatively quickly. By the summer of 2019 it had been over six months since the claimant had been auto-enrolled into the CCA workplace pension. Whatever harm had been done by the original delay was already long in the past. Going back over the reasons for that delay would have done little to repair the relationship of trust and confidence. Conversely, Mr Good's failure to provide a historic explanation would not significantly damage

the relationship. Much more important was the question of what was to be done to address the consequences of the delay.

64. By contrast, it was imperative that Mr Good took active steps to demonstrate to the claimant that her employee pension contributions were safe. Mr Good knew that the claimant regarded that issue as being unresolved. Although I was not able to make a precise finding as to what was said in that conversation, it must have been reasonably clear to Mr Good that the claimant was looking to him to demonstrate to her that her money was safe. This was at a time when the claimant's pension contributions were still in the bank account of a company that was about to be placed compulsory liquidation and (from July 2019) had been ordered to be wound up.

65. The respondents did not have reasonable and proper cause for failing to resolve the issue over the summer of 2019. I reach this conclusion despite the fact that the claimant did not personally chase Mr Good during this period. She made it clear at her one-to-one meeting with Mr Williams that the pension issue was still outstanding. Even if she had not mentioned it to Mr Williams, the onus was on Mr Good to take active steps to reassure the claimant, knowing as he did that she regarded the matter as unresolved. One step that the respondent could have taken was to use its own funds to make a back-dated payment of employee pension contributions into the CCA pension scheme. That is what the respondent eventually did in September 2020. The respondent could then attempt to recover the equivalent amount from CCA in the liquidation. If the pension contributions were as safe in the liquidator's hands as Mr Good claimed them to be, this would have been a relatively risk-free step for the respondent to take.

66. In my view, the additional damage to the trust and confidence relationship that was caused by the respondent's failure to resolve the pension issue would have been apparent to the claimant and the respondent by the beginning of September 2019. By then, a reasonable period of time had expired for Mr Good to resolve the issue.

Breach of contract - conclusion

67. It follows from my assessment of the specific allegations of conduct that the respondent fundamentally breached the implied term of trust and confidence.

<u>Resignation in response to the breach</u>

68. It follows from my findings at paragraph 36 that the claimant resigned at least partly in response to the breach of contract. In particular, the claimant resigned in response to the breach of the trust and confidence term caused by the respondent's conduct set out at paragraphs 36.2 to 36.4.

69. I have also found the claimant resigned partly for reasons that did not amount to any breach of contract by the respondent. These reasons included the 14 October 2019 email and Mr Good's continued failure to provide a historic explanation for delayed auto enrolment. The fact that these reasons contributed to the decision cannot affect my conclusion that the claimant resigned in response to a fundamental breach of contract.

<u>Affirmation</u>

70. The effect of my conclusions at paragraphs 54, 55, 56 and 66 is that the final occasion on which the respondent breached the contract was the beginning of September 2019. When deciding whether or not the claimant affirmed the contract, I must take into account everything that happened from that time onwards.

71. In my view, the claimant did not affirm the contract by continuing to work in September, October and early November 2019. Although the claimant had not raised a written grievance, or stated in terms that she would resign over the pension issue, it must have been reasonably apparent to the respondent that the claimant's willingness to remain an employee was conditional upon the respondent putting right its breach of contract. From September 2019 until she resigned, the claimant clearly indicated that she would stop doing her job properly in protest over the pension issue. That stance was misguided. It justified the respondent in taking corrective action. But it also indicated to the respondent that the claimant regarded the unresolved pension issue as a serious matter affecting the future of her employment.

72. I do not regard this as being a case where the employer had made amends for the breach, so as to require the claimant to resign immediately or lose the right to resign. By the time the claimant's employment ended, the respondent still had not demonstrated that the claimant's employee pension contributions from January to June 2019 were safe. Nor had the respondent invested those contributions into a pension fund.

73. The claimant did not affirm the contract by giving and working a period of notice. Her resignation letter made it very clear that she was reserving her right to resign with immediate effect. It would have been apparent to any reasonable reader of the letter that the claimant was seeking a limited continuation of employment for the parties' mutual benefit, but without detracting from her entitlement to accept a repudiatory breach.

Constructive unfair dismissal

74. It follows that the claimant was constructively dismissed. No potentially fair reason for dismissal having been advanced, I must find that the dismissal was unfair.

Remedy

75. If the parties cannot now agree on the claimant's remedy, there will need to be a hearing at which the claimant's remedy can be determined.

76. When making its request for written reasons, the respondent asked for my reasons to address the question of whether or not the claimant was provided with a statutory statement of employment particulars. In my view it would be wrong for these reasons to express a finding either way. My oral judgement and reasons were confined to determining whether or not the claim was well-founded. I was able to conclude that the claimant had been unfairly constructively dismissed regardless of whether or not a statutory statement had been given.

77. If it becomes necessary for me to revisit the dispute over whether or not statutory particulars were provided, I will do so at a remedy hearing. I would encourage the parties to consider carefully whether or not they require a finding on this issue before the claimant's remedy can be agreed. The maximum amount of an award

under section 38 of the Employment Act 2002 is four weeks' pay. It would almost always be disproportionate to hold a remedy hearing for the sake of such an amount.

Employment Judge Horne

8 January 2021

SENT TO THE PARTIES ON

29 January 2021

FOR THE TRIBUNAL OFFICE