EMPLOYMENT TRIBUNALS

Claimant: Mrs C Taylor
Respondent: Phoenix Healthcare Distribution Ltd

HELD AT: Liverpool **ON:** 27, 28 & 29 October 2020

BEFORE: Employment Judge Shotter

REPRESENTATION:

Claimant: Mr G Taylor, husband
Respondent: Mrs Fernandez Mahoney, solicitor

JUDGMENT having been sent to the parties on 20 November 2020 and written reasons have been requested in accordance with Rule 62(3) of the Employment Tribunal Rules of Procedure 2013, the following reasons are provided:

REASONS

Preamble

The claim

1. In a claim form received on 12 February 2019 following ACAS Early Conciliation between 13 December and 13 January 2019, the claimant brings a complaint of constructive unfair dismissal under s.95(1)(c) Employment Rights Act 1996.

Agreed issues

2. The parties agreed the issues for the Tribunal to determine as follows:

2.1 Did the Respondent act in such a way as to be in fundamental breach of the Claimant's contract of employment? Was there a breach of the implied term of trust and confidence?

2.2 If the answer to point 2.1 above is yes, did the Claimant resign in respect of the alleged fundamental breach and for no other reason?

2.3 If the answer to point 2.2 above is yes, did the Claimant delay in resigning in response to the alleged fundamental breach, such that the Claimant can be regarded as having waived the Respondent's breach?

2.4 Was the Claimant dismissed by means of the Respondent's conduct?

2.5 If the Claimant was dismissed, what was the reason for the dismissal?

2.6 If the Claimant was dismissed, was the dismissal fair in all the circumstances?

2.7 If successful, what compensation should the Tribunal award to the Claimant?

2.8 If it is found that the Claimant is entitled to compensation, should such compensation be reduced by reason of:

2.8.1 any salary earned by the Claimant following the termination of her employment;

2.8.2 any benefits or other sums received by the Claimant due to the termination of her employment;

2.8.3 any failure to take reasonable steps to mitigate her loss on the Claimant's part;

2.8.4 contributory fault;

2.8.5 whether the Claimant would have been dismissed in any event;

2.8.6 that the Tribunal considers it would be just and equitable to do so.

Evidence and the bundle

7 There was an issue between the parties as to whether the bundle was agreed as the claimant had received a hard copy the day before the hearing and had not checked to make sure that the bundle had not been changed in any way. The bundle was also sent to the claimant by email. It was agreed the Tribunal would adjourn to enable the claimant to check the bundle before the hearing started, and after the adjournment the claimant agreed it was basically the same and the list of issues were also agreed.

8 The Tribunal heard evidence from the claimant on her own account, and on behalf of the respondent it heard from Joanne Blythe, purchasing administrator and the claimant's supervisor, Neil Storey, customer service quality systems and development, Katrina Wilcox, customer service supervisor, and Nicola Williams, customer service supervisor. It is notable that the claimant made a number of concessions under cross-examination including that it was reasonable for the respondent to investigate the allegation of her swearing and there was "some stuff I can't remember" during the relevant period as a result of taking anti-depressants which raised an issue over the claimant's ability to reflect what happened before she resigned as opposed to what she believed had happened, a belief formulated over a period of time as this litigation progressed.

9 All the witnesses produced a written statement consisting of their evidence in chief, and on the second day of the liability hearing an application was made on behalf of the respondent for leave to be granted in order that Katrina Wilcox could submit a second supplemental statement to deal with union recognition within the respondent and the email she sent to the claimant concerning the request made by the claimant to be accompanied by a union representative, information which she had omitted to include in her original statement for no good reason and the respondent can be criticised for this. However, it was in the interests of justice for this evidence to be given, and it was preferable that Ms Wilcox provided a supplemental statement in order the claimant, who is a litigant in person, has an opportunity to consider the evidence and prepare for cross-examination. It became apparent after hearing oral evidence from the witnesses on the first day of the final hearing that union recognition and the status of a union representative at the claimant's place of work was a key issue in the claimant's claim that she had been subjected to a breach of contract described by her to be a "last straw" incident. A discussion took place with the parties about the importance of this evidence and the best way of dealing with it, balancing the interests of both and ensuring that the case was dealt with justly in accordance with the overriding objective. An agreement was reached to the effect that leave would be granted to Katrina Wilcox to prepare a supplemental witness statement limited to the discrete issues of union recognition and representation at hearings. The claimant was then given as much time as she needed to consider the statement and prepare cross-examination before the liability hearing was reconvened.

10 There were a number of conflicts between the evidence given by the claimant, and that given by the respondent's witnesses which the Tribunal resolved as set out below. There is a key conflict in the evidence between the claimant and Katrina Wilcox concerning what was said after the claimant sent the emails on 24 June 2019 referred to below in the finding of facts. It is not disputed the claimant sat near to Katrina Wilcox that day, whether it was in front or behind her, and it is feasible that a conversation about the emails the claimant had just sent concerning union recognition had taken place. It is undisputed the claimant (a) was a member of the union and paid her union fees, (b) she was aware from the respondent's Disciplinary Procedure what a union representative could say and do at a disciplinary hearing and (c) the hearing had been adjourned earlier for the claimant to contact her union and arrange union representation. It was available for the claimant to check with her union and/or representative how he or she could assist her at the disciplinary hearing, and for her to be accompanied by the union representative at it. Instead, the claimant chose to

bring a work colleague, which was entirely a matter for her. The claimant's evidence made no sense given the adjournment she had sought and the reason for it, which was she was arranging union representation and I found, on the balance of probabilities, that Katrina Wilcox had explained orally to the claimant whilst they were sitting near each other the claimant could bring her union representative to represent her to the hearing.

11 At this liability hearing the claimant's evidence as to union recognition was incorrect as there was a suggestion the Wellfield site, where the claimant was based, did not recognise USDAW. The claimant gave oral evidence under cross-examination that raised a question mark over her credibility, for example, she stated that there was no recognised union representative for customer services at the Wellfield site, which was incorrect and the claimant would have known this to have been the case.

12 The claimant's ET1 claim form also pleads "I requested that my union representative be present. It was then I was told that "USDAW union is not recognised on Wellfield site and should not be allowed to intervene in any part of the hearing but could accompany me, but only as an observer." The claim form is an important document, it sets out the claimant's case and it is incorrect that USDAW was not recognised on the Wellfield site, a fact the claimant was aware of given her union membership and stated intention to the respondent that she would be represented by an USDAW union representative.

13 The Tribunal considered the contemporaneous documentation noting that the claimant's statement/letter was not responded to by Katrina Wilcox or anyone else from the respondent. Ms Wilcox in oral evidence explained that the claimant left the disciplinary hearing and did not given her an opportunity to discuss what had been written, following which she was absent from work, the disciplinary process could not continue and following a request made by the claimant HR was to deal with her. The contemporaneous documents support Katrina Wilcox's version of events, and no adverse inference can be made by the respondent's failure to respond to the claimant's statement/letter.

14 Drawing all of the threads of the evidence together, on the balance of probabilities the Tribunal preferred Katrina Wilcox's version of what was said on the 24 June 2014 when she informed the claimant that her union representative could speak on her behalf, but cannot answer questions. It is unfortunate that the email was not clearer, however, the incorrect information was put right during the conversation with the claimant. It would have been preferable had the position then been confirmed again in writing, it was not, but the failure to do so cannot amount to a breach of contract, let alone a fundamental breach, especially given the fact the claimant had neither arranged union representation or brought a union representative with her at the hearing.

15 The Tribunal was referred to an agreed bundle, which it has taken into account. It has heard oral submissions made on behalf of both parties, which the Tribunal does not intend to repeat, it has attempted to incorporate the points made by the parties within the body of this judgment with reasons and has made the following findings of the relevant facts.

Facts

16 The respondent is in the business of pharmaceutical trading and distribution of healthcare products and medication. It has 13 depot sites and 3 office based sites. The respondent employs a customer services team which incorporates a speciality team who specialise in customers ordering specialist drugs such as Venclyxto which was in limited supply. Katrina Wilcox was responsible for the administrative function of the specialist team.

17 The claimant commenced her employment based at the respondent's office based Wellfield site in Runcorn as a customer service advisor who worked in the call centre. At no stage during her employment with the respondent did the claimant's duties include dealing with specialist drugs such as Venclyxto, and she was not part of the speciality team referred to above. The claimant and all other customer service advisors who were not part of the specialist team received training and updates which included instructions that they were not to deal with customers ordering speciality drugs. During the relevant period only two speciality drugs were distributed including Venclyxto according to the evidence before the Tribunal, in direct contrast to Mr Taylor's oral submissions when he referred to nine hundred drugs underlining the confusion he had over the issue and how many drugs the respondent dealt with.

18 USDAW is recognised by the respondent, and the union representatives are based at the depot sites and not the office sites. Union representation at disciplinary hearings can be requested on all sites providing the employee makes the necessary arrangements. The claimant was a member of the union and she was aware that she could arrange union representation if she so wished, in direct contrast to the evidence she gave in response to questions put to her by the Tribunal that USDAW was not recognised on the Wellfield site which brought into question the credibility of her evidence.

The employment contract.

19 The claimant was issued with a Contract of Employment effective from 3 July 2017 and unsigned. The relevant clauses are as follows;

> Clause 11 Disciplinary and Grievance Procedures referred to a "more detailed explanation of the full disciplinary and appeals procedure can be found on the company intranet…"
>
> Clause 28 referred to the "terms and condition of employment are governed by (and may be changed by) a collective agreement between the company and USDAW. The relevant information can be obtained from your HR representative."

Code of Conduct

20 The respondent had issued a "Code of Conduct" which proves "all employees are expected to carry out their responsibilities in a professional manner that protects the image and reputation of Phoenix. They should treat customers, suppliers and

fellow employees with respect…Activities that might…harm the reputation of Phoenix…must be avoided."

21 The Code of Conduct included rules about "Behaviour in the Workplace" and at paragraph 4.3 headed "Zero tolerance of harassment or violence" employees were "expected to treat one another with respect. Any form of harassment, such as offensive remarks…that creates an intimidating, hostile or offensive working environment, is unacceptable…Fellow employees, customers…and any other individual associated with the company should at all times be treated with dignity and respect. Verbal or physical violence will not be tolerated."

The Disciplinary Policy (non-contractual)

22 The disciplinary policy was expressly stated to be non-contractual in effect. A non-exhaustive list of gross-misconduct examples were set out that included "bringing the company into serious disrepute…making negative or disparaging comments on social media…"

23 It provided that employees had a right to be accompanied at a disciplinary hearing by "a work colleague or accredited trade union representative. If you wish to be accompanied you must notify the supervisor/manager who is conducting the disciplinary hearing…the role of a companion is to expedite an acceptable outcome during the hearing and as such they may act as follows:

- **They may address the hearing to put forward and/or summarise your case**

- They may respond on your behalf to any views expressed during the hearing.

- They may confer with you during the hearing.

- They do not have the right to answer questions on your behalf.

- They do not have the right to prevent anyone present at the hearing explaining their case" [the Tribunal's emphasis].

Social Media Guidance (private use) dated 1 December 2015

24 The Social Media Guidance ran to a number of pages which covered matters such as posting comments on social networking sites such as Facebook. Paragraph 3 provided "You must restrict any public comments relating to the Company to be factual and non-confidential, such as your role etc…you must not pass personal comments on your opinion of the Company…employees or business activities which may be classed as defamatory, offensive or bullying…Whatever you post, you are personally responsible for. You must also be aware that your comments are exposed to the public and competitors over a long period." At paragraph 5 penalties such as disciplinary action up to and including dismissal were referenced for failing to comply with the Guidance.

25 The claimant was aware of the respondent's policies and procedures, which she could access on the Intranet. She successfully passed her probation and undertook training which included the fact that the speciality team who specialise in drugs exclusively dealt with Venclyxto and the claimant was not to deal with it. The Tribunal concluded, after hearing oral evidence, that the claimant could not have misunderstood the position with regard to the sale of Venclyxto. In oral evidence the claimant indicated she could not remember being informed she was not to deal with specialist drug sales.

26 The claimant struggled at times with her performance and this was initially dealt with on an informal basis, and she confirmed that she had been on a personal improvement plan ("PIP"). Leading to the claimant's resignation performance management of the claimant continued as she was still underperforming.

First disciplinary hearing January 2018.

27 On the 24 January 2018 Nicola Williams carried out an informal discussion with the claimant recorded on a Preliminary Inquiry Form which had the name of the person conducting the inquiry as Alison Walker. Mr Taylor has made much of this, suggesting the respondent was telling lies and there was a nefarious reason for the part played by Nicola Williams hidden behind the name of Alison Walker. The Tribunal accepted the explanation given by Nicola Williams that Alison Walker, as the claimant's line manager at the time, was originally going to take the meeting, but unable to do and Nicola Williams had accidentally missed the fact that the names were unchanged on the record. It is not disputed evidence that the claimant attended the informal discussion with Nicola Williams and knew very well it was not Alison Walker who had taken it.

28 The background to the informal discussion was a report from an unknown source that the claimant had referred to a colleague stating; "she's a cheeky bitch" when other customer service advisors were talking to customers on the phone working the early shift. In oral evidence the claimant conceded that it was not a breach of contract for the respondent to carry out an investigation, and the Tribunal found this to be the case taking into account the Code of Conduct and Bullying and Harassment Policy referred to above. In short, there could have been a case for the claimant to answer as she admitted using the swear words, and a colleague provided a witness statement confirming she had, but they were said in response to an eBay purchase and not aimed at any of the respondent's employees.

29 After the informal discussion the complaint that the claimant had aimed the words "she's a cheeky bitch" at a fellow colleague was dropped on an unknown date that cannot be recalled. The claimant was invited to a disciplinary hearing and the ACAS Code was complied with throughout the process. Joanne Blythe heard the disciplinary on the 9 February 2018 and the notes reflect she informed the claimant at the outset that there was no evidence of bullying and harassment and that allegation was dropped. Other allegations remained to be answered and the claimant was given a full opportunity to put forward her version of events. The claimant admitted swearing the morning of 14 January 2018. The claimant did not wish to be accompanied having been advised of her right in the invite letter.

First disciplinary hearing outcome letter

30 Joanne Blythe set out the disciplinary outcome in a letter dated 16 February 2018 which confirmed "I have found no evidence to support any breach of the bullying and Harassment Policy….and therefore the breach was withdrawn at the disciplinary hearing. In relation to the Code of Conduct my findings were "you admitted to using inappropriate language in the main customer service office whilst colleagues were working and taking calls. You agreed this should not have occurred as customers may have overheard this and as such could potentially bring the company into disrepute. I therefore believe that there is sufficient evidence to support the allegation that you are in breach of the Code of conduct, namely section 4.3' to treat one another with respect, using offensive remarks, verbal conduct, at all times treating customers with dignity and respect."

31 The claimant was issued with a verbal warning placed on her personnel file for 6-months after which it would be disregarded. The claimant was advised of her right to appeal, and she accepted the decision at the time choosing not to appeal.

32 Mr Taylor has made much of the fact that the claimant was not told the name of the employee who had originally raised the complaint that she had called them a "cheeky bitch" and this was a breach of contract. Mr Taylor asked for that person's name at this liability hearing which was refused on the basis it was not relevant either in 2018 or now 2020 given the fact that the disciplinary allegation was withdrawn and the claimant informed at the disciplinary hearing.

33 The claimant's performance continued to deteriorate and it was informally managed by supervisors, including Joanne Blythe.

The second disciplinary hearing

34 On 8 August 2018 Joanne Blythe came across a number of Facebook entries exchanged between the claimant and two of her colleagues concerning the respondent and raised a complaint as she as upset and "disgusted" that such comments could be made against managers, albeit they were not named.

35 The Tribunal was not provided with all of the Facebook posts, and disclosure was limited to the exchange with the claimant. The entries should be interpreted in context and given their ordinary common sense meaning taking into account the credible evidence given by Nicola Williams who conducted disciplinary hearings in relation to all three employees, that the posts clearly were aimed at the respondent and Wellfield managers. The three employees involved were disciplined for the posts, the main culprit who had made multiple comments was issued with a 12- month final written warning with the claimant and her colleague a 6-month oral warning.

36 It is undisputed the claimant responded to the Facebook posts referencing the following; "customers having unnecessary problems and we get all of the flack…It's my view this change was badly timed, especially with the volumes of calls and not enough manpower in depots." The reference to depots was to the respondent. In a

separate entry she wrote “Targets are all well and good but being presented with a heap load of invoices all with missing lines is a disgrace. Then having to do collection notes for a heap load of excess stock is bad too. Never done so many picking errors as I have last week this week. So forgive me like [name blanked out] had mentioned the sun, and they can stick their targets where the sun don’t shine.” In oral evidence the claimant confirmed the name of the manger, who was one of the witnesses in this case.

37 Mr Taylor in re-examination and cross -examination attempted to argue that the posts could not have fallen foul of the respondent’s Social Media Guidance as the claimant had not named the respondent or any managers. The Tribunal did not agree, the posts clearly referred to the work the claimant was carrying out for the respondent and managers, and Mr Taylor’s interpretation has no basis in fact giving the words their common sense meaning and context. The Tribunal finds it was reasonable for the respondent to conclude the claimant was referencing the company and managers it employed in derogatory terms within the body of her Facebook posts.

38 The claimant was invited to a disciplinary hearing in a letter dated 14 August 2018 allegedly in breach of the respondent’s Social Media Policy, Disciplinary Policy, contract of employment and the implied term of “trust and confidence.” Reference was made to the live verbal warning on the claimant’s file. Nicola Williams conducted the hearing and a written record of interview was produced which confirmed the claimant’s behaviour amounted to misconduct and a 6-month verbal warning was issued.

39 Mr Taylor has attempted to argue that the respondent was “pushing” the claimant out of the business through these disciplinary hearings and that its actions constituted a fundamental breach of the implied term of trust and confidence. The Tribunal finds as a matter of fact that this was not the case. It was open to Nicola Williams to issue the claimant with a first written warning given the fact she had a live warning on her personnel file when the second offence was committed. The claimant did not have two-years continuity of employment and could have been dismissed without the respondent facing a complaint of unfair dismissal.

40 The outcome was confirmed in a letter dated 28 August 2018. Reference was made to the live warning as follows “I also considered previous disciplinary action that had been taken against you on the 9th and that fact that there was only one day left on this.” The claimant was informed of her right to appeal. The claimant did not appeal and accepted the 6-month oral warning. In oral evidence the claimant on cross-examination conceded that she thought it was a positive outcome at the time, her mitigation was taken into account and therefore she did not appeal.

<u>The third disciplinary investigation and invite to a hearing</u>

41 On the 4 June 2019 the claimant was on a long telephone conversation with a customer and in danger of missing her bus home, she left mid-call and her colleague took over the claimant’s phone. It is undisputed (a) customer service advisors had their own confidential log in detail for the computer and phone which they were required to exclusively use, (b) they were required to log out to ensure confidentiality at the end of the shift, (c) calls could be transferred to other customer service advisor’s

telephones with the agreement of the supervisor and (d) all calls were recorded. Mr Taylor made much of the respondent's evidence dealing with the recording of calls suggesting Nicola Williams could have overheard the call taken by the claimant and then her colleague on the claimant's phone. Mr Taylor submitted Joanne Blythe knew what was going on at the time without any factual basis for coming to such a conclusion, and the Tribunal preferred the more credible evidence of Nicola Williams that she could listen to a recording once the live call had finished, and she was unaware the claimant's colleague had taken over the call at the time.

42 Nicola Williams produced a witness statement dated 10 June 2019 taken during the disciplinary investigation that confirmed the claimant was still logged in to the system after she had been seen leaving her shift and "thought it was strange as I had not been asked for advice or help with this call…"

43 In a letter dated 13 June 2019 Joanne Blythe invited the claimant to a disciplinary hearing to be held on 19 June 2019 referencing the Code of Conduct and alleging the claimant "may be in breach of the following – carry out responsibilities in a professional manner, image and reputation of the company, computer security…conduct of this type will often be deemed serious misconduct…the outcome could be up to and including dismissal…without notice. A number of policies and procedures were attached including the Code of Conduct Policy and Disciplinary Policy as referenced above. The claimant was advised she had the right to be accompanied by either a work colleague or accredited trade union official and it was for her to arrange their attendance. The claimant was aware at this stage that a trade union official could take part in the hearing as provided in the disciplinary policy above.

44 The claimant did not dispute a colleague had taken over her call on her phone and computer, and that he had offered to do so (as admitted in a statement from the colleague taken on the 4 June 2019 during the investigation) when the claimant had pointed at her watch whilst she was on the call. The upshot was that the claimant left work without logging off her computer and phone and she did not inform her supervisor of this.

<u>Fourth disciplinary investigation 4 June 2019</u>

45 During the period when the claimant was facing disciplinary investigation new allegations came to light that the claimant had placed a large order of the Venclyxto product on the 4 June 2019.

46 On the 13 June 2019 Katrina Wilcox carried out an informal preliminary inquiry at which the claimant responded that she could not recall and questioned whether the system allowed her to place the drugs order. Katrina Wilcox invited the claimant to an investigation meeting on 26 June 2019 into an alleged failure to adhere to company procedure. The claimant was advised of her right to be accompanied by a work colleague or accredited trade union official.

47 In or around the 24 June 2019 the claimant had a conversation with Joanne Blythe about representation at the disciplinary hearing to be conducted by Katrina Wilcox and it is undisputed the original date of 19 June 2019 was rescheduled to 25

June 2019 in order that the claimant could contact her union representative, a period of 6-days.

48 There is a dispute as to what the claimant was told by Joanne Blythe. The claimant maintains Joanne Blythe informed her the union representative would not be allowed to "represent" her at the hearing. Joanne Blyth maintains she advised the claimant that she had the right to be accompanied by either a colleague or trade union official in line with the respondent's policies and procedures. On the balance of probabilities, the Tribunal preferred the evidence of Joanne Blythe, who was managing the claimant's underperformance at the time and directly supervised the claimant as Alison Walker, the previous supervisor had left. The Tribunal concluded the claimant was informed she had the right to be accompanied by a colleague or trade union official in line with the respondent's policies and procedures. The claimant's evidence and memory was unreliable on a number of matters, for example, the documents to which the Tribunal was taken to relating to the claimant's reviews reflect she was underperforming but the claimant was in denial stating: "although I have not met the target overall I feel my figures are many steps in the right direction."

49 The claimant's performance continued to deteriorate and she was informed by Joanne Blythe that despite the support (which included sitting near a supervisor) it had still not improved and formal performance management would take place under the respondent's procedure. The Tribunal concluded on the balance of probabilities that the claimant's underperformance and difficulties she had carrying out a role for which she may not have been suited as she clearly struggled with it, was a factor in the claimant's decision to resign.

50 At 9.54 on the 24 June 2019 the claimant emailed Katrina Wilcox as follows "I am advised by Jo [Joanne Blythe] that my union rep can accompany me at my hearing she cannot represent me or intervene in the meeting. I will therefore be accompanied by Debra Porter." At no stage did the claimant indicate to the respondent that she had secured union representation, and there was no contact between any union representative acting on the claimant's behalf and the respondent.

51 At 9.54 on 24 June 2019 Katrina Wilcox responded "That is correct. Although you can bring a union rep, they cannot speak on your behalf and would just be a companion."

52 On the 24 June 2019 the claimant sat near Katrina Wilcox and after she had received the email Katrina Wilcox explained orally whilst they were sitting near each other the claimant could bring her union representative to represent her at the hearing in accordance with procedure. The claimant was therefore aware from her discussion with Katrina Wilcox and from her copy of the respondent's disciplinary procedure she had a right to be accompanied at a disciplinary hearing by "a work colleague or accredited trade union representative who "may address the hearing to put forward and/or summarise your case…respond on your behalf to any views expressed during the hearing…confer with you during the hearing…do not have the right to answer questions on your behalf and do not have the right to prevent anyone present at the hearing explaining their case". Had the claimant obtained union representation prior

to the reconvened disciplinary hearing as planned, the right of representation would undoubtedly have been made clear to her by the union.

Disciplinary hearing 25 June 2019.

53 The claimant attended the disciplinary hearing on the 25 June 2019. Katrina Wilcox was supported by a notetaker, the claimant her colleague. The claimant had prepared a "Letter" which she handed to Katrina Wilcox at the outset. Katrina Wilcox and her colleague read the letter. The document was lengthy, it referred to the previous disciplinary hearings and the allegations regarding computer security due to be heard by Katrina Wilcox that day. The claimant wrote in respect of the 25 June 2019 disciplinary hearing "I am denied the right of my trade union representative as a companion to speak for me as outlined by ACAS enclosed." Katrina Wilcox's first response was that the claimant was raising historical matters; however, before she had time to discuss the letter with the claimant it is undisputed that the claimant left the meeting and went home. She remained absent from work until resignation and when Katrina Wilcox attempted to arrange a meeting to discuss the absence "and anything I or the company can do to help you in your return to work" the claimant refused to take part and in response sent an email dated 15 July 2019 referencing the stress at work sick notes and that she would prefer to deal with the human resources department direct ("HR").

54 At the hearing dated 25 June 2019 the respondent did not breach its disciplinary procedures and there was no anticipated breach either which could have given rise to a possible breach of contract.

Claimant's sickness absence

55 In a letter dated 11 July 2019 to HR the claimant raised a number of issues with historical documents relating to the January 2018 disciplinary hearing and alleged bullying of a colleague, questioning why she was disciplined in the first place, maintaining the "current allegation" of computer security is "a nonsense" and "I would also like a full and frank reason why my basis rights are being withheld at any disciplinary hearing these people decide to initiate against me." The claimant made no mention of union representation or recognition until the 14 August 2018 recorded delivery letter referred to below, which the respondent did not respond to.

56 As a result of the claimant's sickness absence and request that she deal exclusively with HR no further steps were taken with regard to the disciplinary hearing or investigation. Neil Storey had interviewed the claimant and offered her the job with whom the claimant got on well, he had numerous dealing with her during the probation period and performance management, comforting her when she was upset. It was decided that Neil Storey would be the claimant's point of contact during her sickness absence and they discussed her overall health including the difficulties she had meeting targets at work and the stress this put her under. The claimant agreed to take part in future calls, however these did not take place as a result of her resignation on the 15 August 2019. During the claimant's sickness absence, she was in receipt of statutory sick pay and undertook a welfare meeting with HR.

Claimant's letter dated 14 August 2019

57 In a recorded delivery letter dated 14 August 2019 the claimant raised a number of allegations including "since joining your company I have experienced appalling treatment from your junior management" and their "constant nit picking." Reference was made to the respondent "repeatedly ignoring my request for the name of my accuser," the 25 June 2019 disciplinary hearing and being told that "USDAW union is not recognised on the Wellfield site, and would not be allowed to intervene in any part of the hearing but can accompany you... I refused to take part in that disciplinary hearing until my full rights to meaningful representation were implemented and to date no such assurance has been given. I therefore feel the company has made it impossible for my continued employment."

58 The effective date of termination was agreed between the parties as 15 August 2019.

Constructive unfair dismissal

59 Section 95(1)(c) of the Employment Rights Act 1996, as amended ("the ERA") states that there is a dismissal when an employee terminated his or her contract, with or without notice, in circumstances that he or she is entitled to terminate it without notice by reason of the employer's conduct.

60 The Tribunal's starting point was the test laid down by the Court of Appeal in Western Excavating (ECC) Ltd –v- Sharp [1978] ICR 221 whether the employer was guilty of conduct which is a repudiatory/significant breach going to the root of the contract. The issues to be decided upon in this respect were: Was there a fundamental breach on the part of the employer? Did the claimant terminate the contract by resigning? Did the claimant prove that the effective cause of her resignation was the respondent's fundamental breach of contract? In other words, what was the effective cause of the employee's resignation? Did the claimant delay and therefore act in such a way that is inconsistent with an intention to treat the contract as an end? The Court of Appeal "*made it clear that questions of constructive dismissal should be determined according to the terms of the contractual relationship and not in accordance with a test of 'reasonable conduct by the employer."*

The implied term of trust and confidence

61 There is an implied term in every contract of employment to the effect that the employer will not without reasonable and proper cause, conduct itself in a manner likely to destroy, or seriously damage the relationship of confidence and trust between employer and employee. In order to constitute a breach of the implied term it is not necessary for the employee to show that the employer intended any repudiation of the contract: the Tribunal's function is to look at the employer's conduct as a whole and determine whether it is such that its effect, judged reasonably and sensibly, is such that the employee cannot be expected to put up with it; or put another way, the vital question is whether the impact of the employer's conduct on the employee was such that, viewed objectively, the employee could properly conclude that the employers were repudiating the contract. The correct test of repudiatory conduct by an employer

is set out in the Court of Appeal judgment in the case of Paul Buckland V Bournemouth University Higher Education Corporation [2010] EWCA Civ 121, and this is an objective test.

62 The House of Lords in Malik v Bank of Credit; Mahmud v Bank of Credit [1997] UKHL 23, held that the breach occurs when the proscribed conduct takes place. In Mr Masuri's case the proscribed conduct took place on the 12 August 2018 and yet the claimant remained in employment for a month until he resigned on 14 September 2018. The employee may take the conduct as a repudiatory breach, entitling him to leave without notice. If the employee stays, the extent to which staying would be a waiver of the breach depends on the circumstances. Lord Steyn referred to the implied obligation covering a diversity of situations in which "a balance has to be stuck between an employer's interests in managing his business as he sees fit, and the employee's interest in not being unfairly and improperly exploited," and to the impact of the employer's conduct being objectively assessed to ascertain whether objectively considered, it is likely to destroy or cause serious damage to the relationship between employer and employee. If it is found to be so, then a breach of the implied obligation may arise.

Last straw

63 A course of conduct can cumulatively amount to a fundamental breach of contract entitling the employee to resign and claim constructive dismissal following a "last straw" incident. The last straw itself does not need to amount to a breach – Lewis v Motorworld Garages Limited [1986] ICR 157 CA. Glidewell LJ said at para 169F "The breach of this implied obligation of trust and confidence may consist of a series of actions on the part of the employer which cumulatively amount to a breach of the term, although each individual incident may not do so. In particular, in such a case the last action of the employer which leads to the employee leaving need not itself be a breach of contract; the question is, does the cumulative series of acts taken e together amount to a breach of the implied term?"

64 In Omilaju v Waltham Forest London Borough Council [2005] ICR 481 the Court of Appeal held that the act constituting the last straw need not be the same character as the earlier acts, nor must it constitute unreasonable or blameworthy conduct, although in most cases it will do so. The last straw must contribute, however slightly, to the breach of the implied term of trust and confidence. An entirely innocuous act on the part of the employer cannot be a final last straw, even if the employee genuinely but mistakenly interprets the act as hurtful and destructive on his or her own trust and confidence in the employer.

Employee must resign in response to repudiatory breach

65 Walker v. Josiah Wedgwood & Sons Ltd [1978] ICR 744, IRLR 105, EAT "… it is at least requisite that the employee should leave because of the breach of the employer's relevant duty to him, and that this should demonstrably be the case. It is not sufficient, we think, if he merely leaves … **And secondly, we think, it is not sufficient if he leaves in circumstances which indicate some ground for his**

leaving other than the breach of the employer's obligation to him" (per Arnold J) [the Tribunal's emphasis as this point is relevant to Mrs Taylor's case].

Waiver of breach

66 Weston Excavating cited above; The employee "*must make up his mind soon after the conduct of which he complains; for if he continues for any length of time without leaving, he will lose his right to treat himself as discharged*".

67 In W.E. Cox Toner (International) Ltd v. Crook [1981] ICR 823 IRLR 443, EAT Employee censured by employer in July 1980 for taking leave without previously advising the employer. He demanded the withdrawal of the censure letter. He was informed on 6 February 1981 that the letter would not be withdrawn. He left four weeks later. The EAT held that he was precluded from claiming for unfair dismissal because he had remained for four weeks after it had become clear that his grievance would not be remedied and consequently must be taken to have affirmed the contract.

Conclusion – applying the law to the facts

68 With reference to the first issue, namely, did the respondent act in a way as to be in fundamental breach of the claimant's contract of employment, the Tribunal found that it had not for the reasons set out above. There was no fundamental breach of the implied term of trust and confidence. The respondent had 'reasonable and proper cause' for the disciplinary investigations, hearings and outcomes as set out above. There was no cumulative breach of the implied term of trust and confidence and the claimant, who does not have two years continuity of employment, has failed to discharge the burden upon her.

69 The relationship of employer and employee is regarded as one based on a mutual trust and confidence between the parties. In Courtaulds Northern Textiles Ltd v Andrew [1979] IRLR 84, EAT, the EAT held that it was a fundamental breach of contract for the employer, without reasonable and proper cause, to conduct itself in a manner 'calculated or likely to destroy or seriously damage the relationship of confidence and trust between the parties'. In Woods v WM Car Services (Peterborough) Ltd [1981] ICR 666, EAT. Mr Justice Browne-Wilkinson stated: 'To constitute a breach of this implied term it is not necessary to show that the employer intended any repudiation of the contract: the tribunal's function is to look at the employer's conduct as a whole and determine whether it is such that its effect, judged reasonably and sensibly, is such that the employee cannot be expected to put up with it…any breach of that implied term is a fundamental breach amounting to a repudiation since it necessarily goes to the root of the contract'. The Tribunal had this test in mind when it considered the claimant's case.

70 Turning to the "last straw incident" and issue concerning union representation, I did not accept the oral submissions made by Ms Fernandez Mahoney to the effect that refusing an employee union representation as provided within the respondent's Disciplinary Procedure could not amount to a fundamental breach of the implied term of trust and confidence. If an employee were to attend a disciplinary hearing in

accordance with a disciplinary procedure that expressly provided their representative may address the hearing to put forward and/or summarise their case, and the union representative was prevented from carrying out this function, it is conceivable in certain circumstances, depending on the individual facts of the case, that a fundamental breach of the implied term of trust and confidence could have taken place.

71 Had the 24 June 2019 email and initial conversation with Joanne Blythe been the only communication to the claimant concerning union representation, the claimant's case may have been stronger on this point had she taken part in the disciplinary hearing with a union representative who was not allowed to carry out his or her duties. The claimant did not take an active part of in the disciplinary hearing, she handed in a letter and left. The content of the email dated 24 June 2019 is unfortunate, however the misunderstanding was put right in the conversation that followed between Katrina Wilcox and the claimant. In the alternative, even if the 24 June 2019 email was sent to the claimant without reasonable and proper cause it could not be described objectively as conduct 'calculated or likely to destroy or seriously damage trust and confidence' taking into account the context in which they were written and factual matrix set out above including adjournment of the disciplinary hearing and the claimant had been told by other managers she could be accompanied by a union representative in accordance with the Disciplinary Procedure which clearly set out what a union representative could and could not do. The claimant had a copy of the procedure and an adjournment had been granted to her in order that she could arrange union representation. A considerable amount of time has been spent by the Tribunal considering this issue, balancing the evidence and credibility of the parties.

72 Individual actions by an employer that do not in themselves constitute fundamental breaches of any contractual term may have the cumulative effect. A course of conduct can cumulatively amount to a fundamental breach of contract entitling the employee to resign and claim constructive dismissal following a "last straw" incident. The last straw itself does not need to amount to a breach – Lewis v Motorworld Garages Limited cited above. Glidewell LJ said at para 169F "The breach of this implied obligation of trust and confidence may consist of a series of actions on the part of the employer which cumulatively amount to a breach of the term, although each individual incident may not do so. In such a case the last action of the employer which leads to the employee leaving need not itself be a breach of contract; the question is, does the cumulative series of acts taken together amount to a breach of the implied term?" In Omilaju cited above the Court of Appeal held the last straw must contribute, however slightly, to the breach of the implied term of trust and confidence. An entirely innocuous act on the part of the employer cannot be a final last straw, even if the employee genuinely but mistakenly interprets the act as hurtful and destructive on his or her own trust and confidence in the employer. In the case of Mrs Taylor, I took the view that the email sent by Katrina Wilcox on 24 June 2019 was not an innocuous act, and but for the subsequent conversation when the claimant was put right, it could have contributed to the breach of the implied term of trust and confidence but as there was no cumulative breach this does not take the claimant's case any further.

73 The claimant's case is that the respondent's cumulative actions from the first warning through to the third disciplinary hearing and the refusal to allow her union

representative to take an active part in the hearing, undermined the trust and confidence inherent in her contract of employment. The Tribunal concluded, taking into account all of the evidence, that there was no cumulative effect leading to a "last straw" incident. On the balance of probabilities, the Tribunal found the respondent had not refused to allow the claimant's union representative to take an active part in the hearing. The claimant had decided, having initially intended to be represented by her union and agreed an adjournment with the respondent of the disciplinary hearing to this end, to call a work colleague instead and that work colleague accompanied her to the disciplinary hearing which the claimant walked out before Katrina Wilcox had an opportunity to explore the issues with her.

74 If the Tribunal is incorrect in its evaluation of the 24 June 2019 email, and it did amount to a breach of contract notwithstanding the subsequent discussion between the claimant and Katrina Wilcox, the test of whether there was a repudiatory breach of contract is an objective one and the concept of "reasonableness" plays no part in the test. In Buckland cited above, the question of whether the employer's conduct fell within the range of reasonable responses was not relevant when determining whether there has been a constructive dismissal. Objectively assessed I found that there was no actual or anticipatory repudiatory breach looking at the respondent's conduct as a whole. It cannot be said, viewed objectively, the claimant could properly conclude that the respondent were repudiating the contract and its actions were likely to destroy or cause serious damage to the relationship between employer and employee.

75 In order for the claimant to be able to claim constructive dismissal, four conditions must be met:(1) There must be a breach of contract by the employer. This may be either an actual breach or an anticipatory breach and the claimant has not discharged the burden on her in this regard. (2) That breach must be sufficiently important to justify the employee resigning, or else it must be the last in a series of incidents which justify her leaving, which was not the case. (3) The claimant must leave in response to the breach and not for some other, unconnected reason. (4) She must not delay too long in terminating the contract in response to the employer's breach, otherwise she may be deemed to have waived the breach and agreed to vary the contract."

76 With reference to the fourth condition, on the balance of probabilities, the Tribunal concluded the claimant resigned because she had been issued with two oral warnings and was facing further serious disciplinary allegations against a backdrop of the claimant's continual underperformance and prospect of her been subject to formal performance management. As evidenced in her communications and at this liability hearing, she was upset and angry because she did not believe the oral warnings were justified (despite choosing not to appeal them) and became preoccupied with the name of the person who had made the allegation of bullying and harassment that led to the first disciplinary hearing, despite the fact that it was dropped and the person's name irrelevant. The claimant was facing serious disciplinary allegations, which in the letter of invite, could result in her dismissal and another investigation into another serious matter concerning medication sales beyond her remit. All of these events place behind a backdrop of the claimant underperforming, and as reflected in her Facebook entries, she was unhappy with the managers and work, felt under stress, was required to sit near a supervisor who could provide assistance and facing formal performance

management under the respondent's policy. The claimant could foresee the inevitability of her dismissal, and these are the reasons for the claimant's resignation. The Tribunal's conclusion in this regard is supported by the claim form. The claimant pleads that the last straw came on the 25th June 2019 when I was summonsed to another hearing regarding 'computer security,' a hearing which the respondent was justified in having, bearing in mind the fact that the claimant had a case to answer, with or without union representation which was down to the claimant's own choice. In a separate paragraph, not described as a "last straw" the claimant pleads that "I requested that my union representative be present. It was then I was told that 'USDAW union is not recognised on Wellfield site and will not be allowed to intervene in any part of the hearing but could accompany me, but only as an observer'" when the claimant was told no such thing.

77 In conclusion, the respondent was not in breach of contract and the claimant was not unfairly dismissed; her claim for constructive dismissal is not well founded and is dismissed.

9.12.2020

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Employment Judge Shotter

JUDGMENT AND REASONS SENT TO THE PARTIES ON

28 January 2021

FOR THE SECRETARY OF THE TRIBUNALS