



EMPLOYMENT TRIBUNALS

Claimant: Ms Fredericka (Vann) Durham

Respondent: The members of the Management Committee of the Retreat Animal Rescue, being Neil Richard Davies, Ian Henry Thompson, Dr Cara Robinson, Alexandra Elliott, Mandy Pierce, Lisa Yvonne Thompson, and Kathleen Vegan Marie Foster

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

Heard at: London South Employment Tribunal (by CVP)

On: 3, 4, 21 and 22 December 2020 and in chambers on 8 January 2021

Before: Employment Judge Kelly (sitting alone)

Appearances

For the claimant: In person

For the respondent: Ms Hausdorff of counsel

JUDGMENT

The Judgment of the Tribunal is that:

The claimant's claim for unfair dismissal is dismissed.

The claimant's claim for deduction from wages is dismissed on withdrawal by the claimant.

The respondent breached the claimant's contract of employment. The respondent is ordered to pay to the claimant the sum of £906.24.

REASONS

1. By a claim presented on 10 Dec 2018, after a period of early conciliation from 21 Nov 2018 to 27 Nov 2018, the claimant claimed constructive unfair dismissal, unlawful deduction from wages, breach of contract and disability discrimination. The disability discrimination claim was dismissed on 4 Feb 2020. The claimant's employment ended on 1 November 2018.
2. This has been a remote hearing by CVP, and partially by telephone conference as referred to below. A face to face hearing was not held because it was not practicable and no-one requested it.
3. At the start of the hearing, it was noted that the ACAS early conciliation number stated on the claim form did not correspond to that cited in the certificate in the bundle. It was then established that the number quoted on the claim form was a multiple EC number rather than the specific number allocated to the claimant. This multiple number was shown on the EC certificate. The respondent stated, at the start of the second day of the hearing, that it would not contend that the EC certificate number quoted was wrong.
4. During the course of the hearing, we noted that the judgment was likely to make references to the claimant's mental health and explored with the parties whether it would be appropriate to make an order which prevented the claimant's identity from being known to protect her human rights. We noted that, given the small nature of the respondent, it would be necessary to anonymise the identity of both parties if the claimant's identity were not to be discernible. The claimant did not wish the respondent's identity to be anonymised and submitted that no orders for anonymisation should be made, on which basis, we made none.
5. At the start of the hearing, we were referred to a bundle of 168 pages. A supplementary bundle of 63 pages was supplied for the start of day 3 of the hearing. The respondent further supplied a set of payslips during the course of day 3 of the hearing. The respondent supplied further payslips after the end of the hearing and both parties sent in written submissions in relation to them.
6. For the claimant, we heard from the claimant, and Jill Barringer, a former volunteer at the respondent, who could only connect by phone and, therefore, that part of the hearing was conducted by telephone conference call. For the respondent, we heard from Ian Thompson, a founder of the respondent, chair of its trustees and its Project Director, Neil Davies, a founder of and trustee of the respondent and husband of Mr Thompson, Susan Swinney, a volunteer for the respondent (who connected to CVP by audio only) and, Susan Bauer, a supporter of the respondent. The claimant also presented unsigned statements from two witnesses who did not give oral evidence, Carrie May and Susy Fiveash-Davies.
7. Due to the provision of further evidence, it was necessary, in the interests of justice for the claimant and Mr Davies to give evidence twice.
8. The hearing was interrupted by the respondent's complaint that the claimant's daughter, who was present in the hearing, was, in the hearing, communicating with third parties about events in the hearing. However, having considered the matter further, the respondent did not pursue this.
9. References below to page numbers are to pages of the bundle.
10. The respondent presented written closing submissions which referred to various cases, and the claimant oral ones.

11. At the start of the hearing, we clarified the issues, as this had not taken place during any previous hearing. The claimant withdrew her claim for unlawful deduction from wages and relied instead on a breach of contract claim. The reason for this was that, on the face of it, the unlawful deduction claim was out of time. The remaining issues were identified as follows:

Constructive unfair dismissal

11.1. Was the claimant dismissed, i.e. (a) Did the respondent breach the so-called 'trust and confidence term', i.e. did it, without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously to damage the relationship of trust and confidence between it and the claimant? (b) if so, did the claimant affirm the contract of employment before resigning? (c) if not, did the claimant resign in response to the respondent's conduct (to put it another way, was it a reason for the claimant's resignation – it need not be the reason for the resignation)?

11.2. The conduct the claimant relied on as breaching the trust and confidence term was:

11.2.1. At a meeting with Mr Thompson on 10 Aug 2018, Mr Thompson verbally abused the claimant, screaming and shouting at her, telling her she was ungrateful to him for what he had done for her and attacking her character;

11.2.2. Messages of 4 Sep 2018 sent by Ian Thompson to the claimant's daughter (p126 – 130);

11.2.3. The following social media posts making comments about the claimant: Mr Thompson made a comment about the claimant on social media on 18 Sep (p141) and 1 Oct 2018 (p136). Cathy Foster, a trustee, made a comment about the claimant on social media on 18 Sep 2018 on Mr Thompson's social media post. Angela Farr, a volunteer, made a comment on 1 Oct 2018. Vicky O'Dell, an employee, and Alex Elliott, a volunteer, made posts on 18 Sep 2018 (p141-142).

We encouraged the claimant to think carefully about what acts she wished to rely on as breaching trust and confidence and there was an extended discussion on this issue. We encouraged the claimant to consider the issues set down in relevant documents, but she clearly confirmed that the above issues were the only ones which she wished to rely on.

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

Remedy for unfair dismissal

11.4. If the claimant was unfairly dismissed and the remedy is compensation:

11.4.1. if the dismissal was procedurally unfair, what adjustment, if any, should be made to any compensatory award to reflect the possibility that the claimant would still have been dismissed had a fair and reasonable procedure been followed / have been dismissed in time anyway]? See: Polkey v AE Dayton Services Ltd [1987] UKHL 8; paragraph 54 of Software 2000 Ltd v Andrews [2007] ICR 825; [W Devis

& Sons Ltd v Atkins [1977] 3 All ER 40; Crédit Agricole Corporate and Investment Bank v Wardle [2011] IRLR 604;

- 11.4.2. would it be just and equitable to reduce the amount of the claimant's basic award because of any blameworthy or culpable conduct before the dismissal, pursuant to ERA section 122(2); and if so to what extent?
- 11.4.3. did the claimant, by blameworthy or culpable actions, cause or contribute to dismissal to any extent; and if so, by what proportion, if at all, would it be just and equitable to reduce the amount of any compensatory award, pursuant to ERA section 123(6)?
- 11.4.4. The claimant was seeking compensation only and did not wish to be re-instated.
- 11.4.5. The respondent said that any compensation should be reduced by 25% because of the claimant's failure to raise a grievance prior to resignation.
- 11.4.6. During the course of the hearing, it was also identified that the claimant's resignation letter may potentially amount to a grievance and that this could result in an issue that the compensation should be increased by 25% for the respondent's failure to deal with a grievance.

Breach of contract claim

- 11.5. The claimant's inability to cogently articulate her breach of contract claim presented ongoing difficulties during the hearing.
- 11.6. The issue as initially identified remained constant as: Did the respondent pay to the claimant for the period 2 Jun 2016 to 5 May 2017 monthly pay less than her contractual entitlement? (The claimant said that her contractual entitlement was to £657 gross.) However, the basis on which the claimant argued deductions had been made changed as evidence merged and the matter was discussed. Initially, it did not appear that the claimant had a good case because she was paid £1248 gross from which rent for accommodation of £582 was deducted. On the face of it, therefore, it appeared that the claimant was paid more than her contractual entitlement. However, the claimant stated she wished to continue with this claim as she considered that the net payment she received was too low.
- 11.7. The claimant was asked further about her pay claim when giving evidence. She said that she worked for longer hours than she had been paid for but that she could not quantify the claim. She then said that she had, when living in the respondent's accommodation, always worked an extra day at the weekend which she understood to be in lieu of rent. As the respondent had deducted rent from her pay, she should have been paid for the extra day.
- 11.8. On the third day of the hearing, the claimant changed her argument to be that rent was deducted from her wages for a period when she was not in fact being accommodated by the respondents, and therefore, the deduction should not have been made.
- 11.9. Also, on the third day of the hearing, the respondent for the first time produced its records of the claimant's payslips ('Electronic Payslips'), which were different from the payslips in the bundle which the respondent said had been issued to the claimant during her employment. The respondent's Electronic Payslips showed no deduction for rent and a higher net payment to the claimant than those on the payslips

apparently issued to the claimant. On the fourth day of the hearing, the claimant agreed that her claim could be quantified as a claim for the difference between the pay payable to her on the payslips in the bundle and the pay payable to her as per the Electronic Payslips.

11.10. At the end of the fourth day of the hearing, the respondent had not yet provided all the Electronic Payslips. Further payslips, plus parties' submissions on them, were received by the tribunal for consideration after the hearing.

11.11. The respondent said that the claimant's breach of contract claim was out of time.

11.12. The respondent said that if any award were made, there should be a reduction for the claimant's failure to present a grievance in relation to it. The claimant said she did not raise a grievance because she did not see the payslips until her adviser asked for them after the end of her employment by which time the claimant had involved ACAS and that had become the mechanism for trying to resolve the dispute.

What happened

12. We find the following as the primary facts in this case.

13. The claimant initially had support with her claim to the tribunal from a business which she understood to be solicitors. However, in April 2020, she discovered they had no qualifications at all. She said she did not receive support from them after April 2020. Witness statements in the case were exchanged on 17 Sep 2020.

14. The respondent is an animal rescue farm sanctuary and café, registered as a charity and known as the Retreat.

15. The respondent engaged a consultant to provide it with HR and payroll support. Dr Bauer, a supporter of the respondent, who was an HR Manager for a large local business, also provided informal HR support.

16. The claimant began working at the respondent in November 2014, initially as a volunteer. She initially worked in the cattery and then with the horses, and was given the Horse Team leader role in September 2016. She was a designated tractor driver and worked around animals. Her contract of employment of 1 June 2016 describes her as Animal Care Assistant. The claimant had mental health issues when she started at the respondent and the state of her condition was subject to fluctuation throughout the period she was there.

17. It was the claimant's case that she was employed from December 2014, and was paid cash until her first on the books payment on 2 June 2016. The respondent said that the claimant's employment began on 1 June 2016. Under cross examination, the respondent accepted that the claimant's employment began at the start of May 2016, as shown by a wages payment to her at the start of June, but it would not accept that the claimant was paid any wages or was an employee prior to that date.

18. Two payments were made into the claimant's bank account by the respondent, each of £500, on 1 March 2016 and on 30 March 2016. No payslips were issued for these sums. As they are round figures of £500, we conclude that no tax was deducted. The respondent's evidence was that these were goodwill payments to the claimant made by Mr Thompson and Mr Davies because the claimant had looked after their dogs. Mr Thompson said that these dogs were not their personal pets but were the respondent's dogs. However, Mr Davies said that the claimant looked after 'our animals, ... our pets in our home'. We

conclude that these payments were made to the claimant from the respondent for services provided by the claimant to Mr Thompson and Mr Davies in their personal capacity and not for service to the Respondent.

19. Given our finding on the unfair dismissal claim, it is not necessary for us to make a finding of fact as to when the claimant's employment in fact started.
20. In evidence, the claimant accepted that Mr Thompson did not have the power to dismiss her and that a due disciplinary process should be followed.
21. During the period she worked for the respondent, the claimant developed a very friendly relationship with Mr Thompson and Mr Davies. She and her children moved into their home at the Retreat in 2015 when she was pregnant. Mr Thompson was her birthing partner when she had a baby. In 2017, Mr Thompson and Mr Davies lent the claimant money for a deposit on a rental property for her to move into and found for the claimant a friend of theirs to guarantee her rent payments. They also assisted her financially in other ways. The claimant moved out of their home in about March 2017.
22. Mr Thompson's evidence was that, after she moved out, the claimant worked an extra day a week for the respondent to repay the personal loan made to her by Mr Thompson and Mr Davies when she went into rented accommodation.
23. The respondent's evidence raised various allegations against the claimant's misconduct while working at the Retreat. This evidence took up a disproportionate amount of the hearing. None of these alleged misconducts was ever the subject of any disciplinary action by the respondent. This evidence would have been relevant to the question of remedy for unfair dismissal, but in view of our decision that there was no unfair dismissal, it is not in fact necessary for inclusion in this judgment.
24. We limit our findings of fact on this point to say that we found the allegations of misconduct made against the claimant to be exaggerated and embellished. For example, in oral evidence, Dr Bauer embellished her written evidence that the claimant had damaged a tractor part while driving it while on her mobile phone and smoking to add that the claimant was drunk at the time. If that had been true, we would have expected to see such a serious allegation in Dr Bauer's written statement.
25. Most significantly, none of the allegations resulted in any disciplinary action being taken against the claimant. We do not find it credible that the claimant would not have been subject to disciplinary action if, as alleged by the respondent, she had really been drunk when driving the tractor or if she had frequently smoked next to inflammable materials or if she had assaulted colleagues or if she had stolen money collected for the charity.
26. The claimant said, and complained to the respondent that, the respondent was managed in an unprofessional way. She said that confidentiality of staff information was not respected, staff were bullied and there was a toxic atmosphere.
27. Ms Swinney was a volunteer at the respondent from 2016 and worked Saturdays with the Horse Team, run by the claimant. She was then paid by the respondent to work on its Horse Team on Mondays. In the spring of 2018, she was appointed 'Sanctuary Manager' to focus on HR issues because there was a lot of friction between staff. However, this was a volunteer position. Therefore, Ms Swinney did not have any executive authority, although she was referred to as the claimant's line manager.
28. Ms Swinney's written statement was moderate in tone. In contrast to Dr Bauer's statement, it did not list out misconduct of the claimant, referring only to the claimant not pulling her

weight, being aggressive and argumentative and having a poor work relationship with other members of staff, but not other more serious misconduct issues alleged by Dr Bauer or other witness statements. Ms Swinney described matters about the respondent which she said the claimant complain to her about. It presented a reasonably balanced tone.

29. On 27 May 2018 (p107), Ms Swinney sent a sympathetic text to the claimant. Regarding the volunteers, she wrote to the claimant, that there should be a united stance about the volunteers, 'if they are not happy with the work asked of them then perhaps this is no longer the place for them to volunteer – I have worked in officers where 'bitching' is a given fact because everyone wants to climb the corporate ladder but at the retreat we are all working/volunteering for one reason. We should all be on the same page. It is not always obvious what you do, I know, but they are unaware of the time you put in elsewhere like worming travellers horses etc... Put forward a policy where to take concerns to and how they will be dealt with in a professional manner in a bid to stop this awful bitching.'

Meeting of 20 July 2018

30. On 20 July 2018, there was a meeting of the Horse Team attended by Ms Swinney, Mr Thompson, and volunteers and employees of the Horse Team, including the claimant. This meeting was suggested by Ms Swinney because the claimant had complained to her that she was not appreciated by other members of staff and the respondent.
31. Mr Thompson drew up an agenda (p113) for the meeting listing issues to be discussed such as introduction of daily work plans showing who would be doing what jobs, team bonding, recruiting and retaining volunteers, re-homing plan, fund raising, publicity and thanking contributors to the team.
32. The meeting did not resolve the issues. The claimant's perception was that she was criticised and humiliated in front of the volunteers. After the meeting, the claimant again complained to Ms Swinney about the Horse Team not appreciating her and about Mr Thompson bullying staff and spreading staff confidential information around to other staff and more publicly. She complained about not having had a pay increase. Ms Swinney took some or all of these concerns to Mr Thompson who told her that the next step was to hold a 'meeting of concern'.

Meeting of 10 Aug 2018

33. The claimant was therefore invited to a meeting which took place on 10 Aug 2018 with Ian Thompson, and Ms Swinney. Mr Thompson used the meeting to try to address pent up grievances he had with the claimant.
34. In advance of the meeting, Mr Thompson typed up a note of the points which came into his mind in relation to the claimant (p119). He noted that:
- 34.1. The Horse Team was disillusioned with the claimant as team leader and there had been months of complaints about her.
- 34.2. The claimant should be concentrating on her role looking after the charity's horses and ensuring they had proper nutritional and medical care, rehoming horses and recruiting volunteers, and not outreach, which was not part of her role.
- 34.3. The claimant should not be controlling a respondent social media page.
- 34.4. The claimant was not actioning tasks such as installing an electric paddock.

- 34.5. It was not true that the claimant had not had a pay rise because the national minimum wage rose every year. Mr Thompson then noted financial support given to the claimant. He noted in capitals, which we take to indicate the emotional force behind the point, 'YOUR HOME HOW MUCH DID THAT COST ME. YOUR GUARANTOR'. The notes also mention payments to the claimant of a bonus, adoption fees, payment for Thursdays in cash, the offer of a car, 'thousands of pounds that are tax free' and that, in return, the claimant only worked 9.30 to 2.00.
35. We were referred to page 123 which the respondent said was an agenda for this meeting. The claimant was not shown the agenda at the time.
- 35.1. It stated that the meeting was arranged following the outcome of the horse team meeting on 20 Jul 2018 'on the back of months of complaints from other members of staff/volunteers' about the claimant.
- 35.2. It stated that the claimant's complaints would be discussed, IE, being paid the national minimum wage, a lack of respect for her role from management to volunteers as horse team manager, a lack of professionalism from management, and if these issues were not rectified, she would give up her role as team leader and be a horse care worker.
- 35.3. The claimant should share the respondent social media function with other members of the Horse Team.
- 35.4. Outstanding internal concerns leading to disciplinary action: the condition of horses returned after loan, damage to a tractor scoop and harrow, driving equipment while using her mobile phone and walking across the yard with an open bottle of vodka, countless cigarette breaks and over long lunch breaks resulting in little work being done.
- 35.5. Outstanding external concerns potentially leading to disciplinary action: Mary Green's visit, Investigation into missing monies raised at a garden centre.
- 35.6. To arrange a follow up meeting leading to potential disciplinary action.
36. The only matters from the agenda which they managed to get through in the meeting before the claimant left the meeting were as listed to para 35.3 above.
37. In her claim form, the claimant said that she was shouted at and reduced to tears in the meeting. She also mentioned it in her witness statement saying that Mr Thompson was clearly angry at her for raising things with Ms Swinney and he became very intimidating shouting and swearing at her and telling her she should be grateful for what he had done for the claimant and her family. She mentioned it in her resignation letter saying the meeting consisted of being shouted at for 40 Minutes and she was reduced to tears; there was no professionalism shown or any concern for her well being.
38. The claimant gave oral evidence that Mr Thompson treated her in a humiliating and intimidating manner in the meeting. She said he shouted at her aggressively. He said that she should be grateful to him for supporting her through mental health issues. He said how dare she question anything after everything he had done for her. He shouted and his speech was littered with swear words such as 'fucking'. He ranted and raved at her. The claimant said that she was crying and left the room. Ms Swinney came out and said she should return. The claimant said she was too scared, but Ms Swinney said that it would be worse if she did not return. The claimant did return but left again shortly afterwards.

39. According to Mr Thompson, the claimant became upset and aggressive in the meeting, and then accused them of being unprofessional and said she would give up her role as team leader. He said she became very defensive when they started discussing the social media page and left the meeting permanently.
40. According to Ms Swinney, the claimant became emotional and aggressive, and Mr Thompson was not shouting at the claimant or giving her any cause to be upset. The claimant got angry and left when they started discussing the social media issue.
41. We were referred to page 124 which the respondent said were minutes of the meeting. The claimant said that she had not seen them at the time and they were untrue and inaccurate. According to these notes, there was a discussion of the issues on the agenda to the point of the social media issue at which point the claimant left the meeting.
42. Neither Ms Barringer nor Dr Bauer were not present in the meeting. Ms Barringer's evidence was that Mr Thompson commonly swore and shouted on a daily basis and would inappropriately and aggressively raise issues with staff in front of their colleagues. Dr Bauer's evidence was that the claimant became aggressive and sometimes even violent when drunk, that it was not Mr Thompson's ethos to swear and rant and rave and that she had never seen Mr Thompson being anything but supportive and kind to everyone.
43. We reach a conclusion on this issue below.

Follow on from 10 Aug 2018 meeting

44. After the meeting, the claimant messaged Ms Swinney to ask her if she should return to work as it was unclear what position she was in and Ms Swinney confirmed that she should.
45. The claimant went into work on 11 Aug 2018 and continued working. On 27 Aug 2018, the claimant was informed that she would have to attend a 'follow on interview' in 7 days' time. She suffered anxiety particularly in light of what happened at the previous meeting on 10 August and went sick. She was signed off by her GP with depression on 30 Aug 2018 from 27 Aug 2018. She did not return to work prior to the end of her employment.
46. Dr Bauer's evidence was that the claimant was aware that she would face a formal disciplinary investigation before she went sick on 27 Aug 2018, and this was the respondent's case. The claimant denied this. Dr Bauer was not involved in the meetings of 20 July or 10 August. She said her evidence was based on conversations with Ms Swinney, Mr Thompson and Mr Davies. However, she was unable to say whether she gave Mr Thompson any advice on the alleged disciplinary matters. None of the witness statements of Ms Swinney, Mr Thompson and Mr Davies stated that the claimant had been made aware she would face disciplinary proceedings. The claimant was not shown the agenda for the meeting on 10 Aug 2018 which referred to potential disciplinary action. We conclude that the claimant was not aware that the respondent had it in mind to begin disciplinary action against her. She only knew that there was to be a follow up meeting from the meeting on 10 August and she feared she would be upset by it.
47. Further, if the respondent had decided to instigate disciplinary proceedings against the claimant, it had a window between the claimant's return to work on 11 Aug 2018 and her going sick on 27 Aug 2018, in which to instigate disciplinary proceedings or at least indicate formally to the claimant that it was going to do so. However, it failed to do so.

Texts with the claimant's daughter

48. On 4 Sep 2018 (p126), the claimant's daughter texted Mr Thompson to ask what was going on at work for her mother. Mr Thompson's reply included that 'Your mum and The Retreat have come to the end of their journey together.... 'it's time to finish the links with her and The Retreat'. 'I've been unhappy with her professional (sic) for some time and this time off was the fine (sic) straw when she knows how I'm feeling too. I've been really ill with stress most of it caused by [the claimant]. I had to have a serious meeting with her recently and she was coming back for the follow on meeting which if I'm honest she wasn't going to survive. I've stuck by her thick and thin and at no stage has she done the same. There's so much that's gone over the last few months and you will have no idea... I'll be dealing with [the claimant] when she returns but sadly the outcome will not be good.' 'Sadly it's just the job and her don't mix'.
49. The claimant's daughter showed these to the claimant on receipt. When she saw the texts, the claimant felt that she was not welcome back to work at the respondent. She felt that she would be dismissed with no procedure being followed and she was scared. She also considered that it was completely inappropriate for Mr Thompson to have put this kind of information about herself in an email to her daughter.

Social media posts

50. The claimant referred us to social media posts from Facebook including:
- 50.1. A post by Mr Thompson of 1 Oct at 19:41 (page 136) saying 'Scum bags never win because the unicorns are on our side not theirs'.
- 50.2. A post by Mr Thompson of 6 Nov saying 'When not even your mum likes you, you must be a cunt'.
51. The claimant thought that these posts were about her, but Mr Thompson said they were about his family. We accept Mr Thompson's evidence that they were not about the claimant.

Resignation

52. The claimant resigned by letter of 1 Oct 2018 at 00:27 lasting over two sides of A4 (p132) which took effect on 1 Nov 2018. She said that her position was untenable. She referred to the meeting on 10 Aug 2018 which she described as 'being shouted at for 40 minutes' when the respondent was aware of her mental health issues. She also described how, on 27 Aug 2018, Ms Swinney told everyone there would be a staff meeting the following Monday which the claimant would be required to attend, although it was her day off, and she would have a 'follow on interview' afterwards, but she did not know what that meant. She was in anxiety and distress about that, especially after the meeting of 10 Aug 2018. She got signed off work. Ms Swinney instructed her to close down the respondent's horses Facebook page which she had spent her own money promoting. No-one expressed any interest in her welfare. Ms Swinney and her team unfriended her on social media. Someone told her that Ms Swinney had told a volunteer that she was playing the mental health card and was unable to pay her rent due to drinking. She felt that this was a breach of privacy and her contract of employment and that she was unable to return due to her personal information and circumstances being discussed publicly. She said that there was a culture of not respecting the privacy of staff and gave an example of a volunteer's treatment. She said that she had to conclude that she had suffered the same treatment and that she had been advised she may have a constructive dismissal case. She then went on to complain about her tax code.
53. She did not mention in the letter the texts between Mr Thompson and her daughter. This was put to her in cross examination and she accepted this was the case. It was also put to her that she did not mention the texts in her witness statement, which she accepted and said

they were in the evidence bundle so she did not think it necessary to mention them in her witness statement. The claimant did not mention the texts sent to her daughter in her claim form.

54. No other cross examination was put to the claimant about the content of her resignation letter. She was not asked whether it seemed to be saying that the reason for her resignation was a breach of her confidentiality by Ms Swinney.
55. The claimant's GP notes record that, on 27 Sep 2018, in a consultation with her GP, the claimant said she was going to resign from work. It had been going round that she had a mental health problem. The claimant felt this was very unsupportive of her employer and the stress was not worth staying at work for. The respondent did not cross examine the claimant on these notes in the hearing.

Claimant's demeanour

56. The claimant was calm and collected for most of the hearing, but did break down in tears under cross examination.

Evidence related to the breach of contract claim

57. The claimant said she had never seen any payslips when working for the respondent and that she did not see any for the first time until her adviser requested them from the respondent after she left her employment. The respondent said that it did provide payslips to the claimant from June 2016, which were as found in the hearing bundle, which it found in the claimant's pigeon hole at its premises, left there for the claimant to collect.
58. By letter of 4 Nov 2018, the claimant's adviser wrote to the respondent requesting the claimant's pay slips. They were provided by the respondent by letter of 30 Nov 2018.
59. Dr Bauer's oral evidence was that the claimant raised an issue with her relating to her payslip, asking what a deduction was which showed on it, which Dr Bauer explained to her. The payslips showing this deduction are from after May 2017 and do not show the deduction for rent payments.
60. The bundle payslips (from page 84) showed that, from 2 June 2016 to 5 May 2017, the claimant was paid wages of £1248 gross per month, from which rent of £532.22 was deducted, leaving a gross figure payable of £715.78. After tax, the net monthly sum paid to the claimant was £581.66. The respondent's evidence was that the rent was legitimately deducted in respect of the claimant leaving in Mr Thompson's and Mr Davies' home.
61. For the period from 5 Jun 2016 to 5 May 2017, the Electronic Payslips show gross monthly pay of £657.18, and no rent deduction, leaving a net sum payable after tax of £657.18. Neither the Electronic Payslips nor the bundle payslips show any additional sum paid to the claimant after May 2017 to make good any underpayment
62. Mr Davies' oral evidence was that, prompted by the Claimant in 2017, he had requested that the pay roll company correct the Claimant's pay slips for the months of March, April and May 2017 (and only those months) in order to reflect that in those months she was no longer living at the Retreat and so not paying rent, and was working four days a week as opposed to six. Mr Davies said he had not checked this against the amounts actually paid to the claimant and could not say whether the amounts paid to the claimant were as shown on the Electronic Payslips. He could not say why the Electronic Payslips for the period Jan and Feb 2017 (which were the only prior to March 2017 Electronic Payslips then available at the

hearing) showed no rent deduction. He conceded that they indicated that the claimant had been paid the incorrect sum.

63. As the respondent did not contest this, and indeed its case was that it was entitled to deduct money for rent from the claimant's wages, we accept that the sums actually paid to the claimant were as shown on the payslips in the bundle.
64. In written submissions after the hearing, the respondent said that the amendment of the payslips prior to May 2017 was an error by the payroll company and offered to submit further evidence on this.

The law

65. Under section 95 (1) Employment Rights Act 1996, an employee is dismissed by his employer if ... (a) the contract under which he is employed is terminated by the employer (whether with or without notice)... or (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.
66. We have set out the law on constructive dismissal above in para 11. A high threshold must be met to show a repudiatory breach of contract by the employer.
67. Under Rule 3 of the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994, proceedings may be brought before an employment tribunal in respect of a claim of an employee for the recovery of damages or any other sum (other than a claim for damages, or for a sum due, in respect of personal injuries) if – (a) the claim is one to which section 131 (2) of the 1978 Act applies and which a court in England and Wales would under the law for the time being in force have jurisdiction to hear and determine, (b) the claim is not one to which article 5 applies and, (c) the claim arises or is outstanding on the termination of the employee's employment.
68. Under rule 7 of the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994, a complaint may be brought within the period of three months beginning with the effective date of termination of the contract giving rise to the claim.
69. Under section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992, the Tribunal may make a reduction in an award of up to 25% if the claimant fails unreasonably to comply, with the ACAS Code of Practice on Grievance Procedures.

Conclusions

70. We place no reliance on the unsigned witness statements submitted by the claimant where the witnesses did not attend to give evidence.

Constructive dismissal claim

Was there a repudiatory breach of contract?

71. The first alleged repudiatory treatment by the respondent to the claimant is that, at a meeting with Mr Thompson on 10 Aug 2018, Mr Thompson verbally abused the claimant, screaming and shouting at her, telling her she was ungrateful to him for what he had done for her and attacking her character. We have contradictory accounts of this meeting and must determine if Mr Thompson's conduct in the meeting was repudiatory of the claimant's contract.

71.1. We consider that the meeting was an emotional one on both the claimant's and Mr Thompson's part. Mr Thompson saw it as an opportunity to raise some pent up grievances about the claimant as shown from his notes and the agenda. Mr Thompson's notes show, from the way his writing goes into capitals, his annoyance at the claimant for complaining after all the financial support he considered that he had given her, as listed in his notes.

71.2. Ms Swinney's written statement said that Mr Thompson was not shouting at the claimant or giving her grounds to be upset. We found Ms Swinney's statement moderate in tone. In contrast to Dr Bauer's statement, it did not list out misconduct of the claimant, and we felt it presented a reasonably balanced tone. We accept her evidence on the tone of the meeting.

71.3. The claimant broke down in tears at being cross examined by Mr Thompson in the tribunal hearing and we consider it very likely that she would have broken down in tears in the 10 August meeting, merely from being challenged about matters; her emotional response does not prove that there was aggressive behaviour from Mr Thompson at a level to make it repudiatory.

71.4. This conclusion is supported by the fact that the claimant continued to go into work after the meeting and did not go off work sick until she found out she was going to have to face another meeting which she guessed may be as upsetting as she found the one of 10 Aug 2018.

72. We therefore find that the claimant did not suffer treatment in the meeting of 10 August which was a fundamental breach of trust and confidence.

73. The second alleged repudiatory treatment by the respondent to the claimant is messages of 4 Sep 2018 sent by Ian Thompson to claimant's daughter.

73.1. We consider that, first, it was entirely inappropriate for an employer to be writing to an employee's daughter about her mother's employment, or indeed to any third party with no legitimate reason to be made aware of it. This was a fundamental breach of the employer's duty of confidentiality of employee's affairs and a breach of trust and confidence.

73.2. Secondly, the content of the texts was a breach of trust and confidence in effectively saying the claimant was about to be dismissed. There is no other reasonable interpretation for the words, 'Your mum and The Retreat have come to the end of their

journey together.... 'it's time to finish the links with her and The Retreat'. These words indicate that there was no doubt about what was to happen. Therefore, the decision was already made. The words reasonably indicated that no procedure would be followed or, if it were, it would be a sham. Given that the text was sent to the claimant's daughter, it was reasonable to assume that the content would be passed on to the claimant.

73.3. The respondent argued that the claimant knew that Mr Thompson did not have the power to dismiss her, and that this would be a decision for the trustees, so that it was not a repudiation of the contract for him to have indicated she would be dismissed. The claimant's evidence was that Mr Thompson made it clear in the texts that she would be dismissed with no disciplinary process being followed. We agree that this is what would reasonably be concluded from the texts, as quoted above. Mr Thompson was a founder of the respondent, chair of its trustees and its Project Director. He was in control at the respondent and it was reasonable for the claimant to conclude that he would dismiss her without process, from the content of the texts.

73.4. The content of the texts, in the context that it would be assumed they would be seen by the claimant, was a repudiatory breach of trust and confidence.

74. The third alleged repudiatory breach by the respondent to the claimant was the postings of Mr Thompson described above. Since these postings started at 19.41 on 1 Oct 2018 after the resignation of 00.27 of the same date, they clearly cannot have led to the resignation and there is no requirement to consider them further.

Did the claimant affirm the contract of employment before resigning?

75. The respondent said that the claimant affirmed the contract by failing to resign for a month after the texts. The texts were sent on 4 September and the resignation was on 1 October. The claimant did not work in the intervening period but was signed off work sick. We do not consider that a delay of less than a month is sufficient to affirm the contract, particularly where the employee is not at work, but sick at the time. We do not accept the respondent's argument that the sending in of sick notes affirms a contract of employment. It is what is required to continue getting payment.

Did the claimant resign in response to the respondent's conduct?

76. Was the respondent's conduct a reason for the claimant's resignation? It need not be the reason for the resignation. In a challenging case, we find this the most difficult aspect of the case.

77. The respondent argued that the repudiatory conduct was not the reason for the resignation because:

77.1. There was a delay prior to resignation.

77.1.1. We do not consider that a delay of less than a month between a repudiatory act and a resignation shows that the repudiatory act was not reason for the resignation, particularly when the claimant was signed off sick at the time.

77.2. The claimant resigned because of her deteriorating mental health and because she knew that she would face serious disciplinary charges on her return to work.

77.2.1. We have found that the claimant had fluctuating mental health throughout her time with the respondent and we do not consider it likely that she would have

resigned in response to a deterioration when she had been suffering fluctuations periodically.

77.2.2. We have found above that the claimant had no knowledge that she would face any disciplinary charges on her return to work.

77.3. The claimant had found a new job. We do not need to consider whether or not this was the case. Even if the claimant had found a new job, that would not negate the reason for the resignation being the respondent's breach, it being an economic necessity for most people to be in work.

78. What we find the most troubling with regard to the claimant's case on the reason for resignation is the evidence contained in her resignation letter, as supported by her GP notes, as being the reason for her resignation. In her resignation letter, the claimant said that Ms Swinney had told a volunteer that she was playing the mental health card and was unable to pay her rent due to drinking. She felt that this was a breach of privacy and her contract of employment and that she was unable to return due to her personal information and circumstances being discussed publicly. She said that there was a culture of not respecting the privacy of staff and gave an example for a volunteer. She said that she had to conclude that she had suffered the same treatment and that she had been advised she may have a constructive dismissal case. This clearly sets out (and particularly the part we have underlined) that the reason for the claimant's resignation was what she saw as Ms Swinney's breach of her confidentiality. Her GP notes then support this by recording that the claimant said she was going to resign from work and then referring to the fact that it had been going round that she has a mental health problem. The claimant then told her GP felt this was very unsupportive of her employer and the stress was not worth staying at work for.

79. The reason for resignation given in her resignation letter and confirmed by the GP notes was the claimant's belief that the respondent had breached her privacy and discussed her mental health. We consider that this evidence makes it clear that this was the reason for the claimant's resignation. This reason for resignation was not relied on by the claimant when she explained her case and we heard no evidence on it. On the face of it, therefore, the claimant's constructive dismissal claim should fail because the claimant has not shown that she resigned because of the texts.

80. Although the respondent cross examined the claimant on the fact she did not mention the texts in her resignation letter, it did not put to the claimant that the reasons for her resignation given in her resignation letter and confirmed by her GP notes were the real reason for her resignation, and not those upon which she relied when putting forward her case. Nor did the respondent's closing submissions make this point.

81. The Tribunal has great concerns that the claimant's claim for constructive unfair dismissal should be dismissed on grounds which a professionally represented respondent did not put forward in its closing submissions and in circumstances in which the claimant was not cross examined on the reasons for leaving she gave in her resignation letter and as recorded in her GP records.

82. Ultimately, though, we feel that we cannot ignore the weight of written evidence about the reason for resignation we have set out above. We consider that this overrides the respondent's failures in presenting its case. Given we consider it clear that the claimant resigned because of the perceived breach of confidentiality by Ms Swinney, we cannot hold that she resigned because of the texts which Mr Thompson sent to her daughter. These texts were not even mentioned in the resignation letter.

83. Therefore, we find that the claimant has not shown that she was constructively dismissed by the respondent. Accordingly, we must dismiss her unfair dismissal claim. We do so reluctantly because we are most concerned by the repudiatory actions of the respondent as referred to above in para 73.

Breach of contract claim

84. We do not accept the respondent's submission that the breach of contract claim is out of time. It was presented within three months of the termination of the contract giving rise to the claim and the sum was outstanding on the termination of the contract. This is what is required by the law we have set out above.

85. We do not consider it proportionate to delay judgment and arrange a further hearing to take any further evidence in relation to the payslips. The respondent was aware on the third day of the hearing that the pay slip disparity existed prior to March 2018 and could have taken steps to investigate further evidence and present it on the fourth day of the hearing.

86. There is a clear disparity between the sums payable to the claimant according to the payslips in the bundle and the Electronic Payslips. We have found that the claimant was paid the lesser sum shown on the payslips in the bundle. There is no evidence on either set of payslips that any disparity was ever corrected with a payment to the claimant. Mr Davies agreed that the bundle payslips were incorrect for the period March to May 2017. Mr Davies conceded that the payslips indicated that the claimant was not paid the correct sums for January and February 2017. Logically, that concession must also extend to the disparities showing on the payslips for the prior period 5 Jun 2016 to 5 Dec 2016, a period for which the Electronic Payslips were not available for the fourth day of the hearing (although it was within the respondent's power to have made them available.)

87. We therefore find that the correct payments to be made to the claimant are shown on the Electronic Payslips and that the amounts actually paid to the claimant are shown on the bundle payslips.

88. Therefore, for the period 5 June 2016 to 6 May 2017, the claimant's net monthly pay was £581.66 when it should have been £657.18. The loss to the claimant was therefore $12 \times £75.52 = £906.24$.

89. The claimant did not raise a grievance in relation to this sum due to her. The claimant said she did not do so because she did not know about the incorrect payment until after the end of her employment because she had not seen any payslips. The respondent said she did know about it as demonstrated by her asking Mr Davies to issue correct payslips.

90. The claimant did not raise a grievance in relation to salary payments owed to her. If, as the claimant says, this was because she did not receive any payslips until after her adviser requested them, after the end of her employment, we would accept it would not be unreasonable to fail to raise a grievance, she being a former employee, not an actual employee, and one who had activated the ACAS conciliation process.

91. There is a direct contradiction of evidence on the question of whether the claimant received any payslips, with the claimant saying she did not, until her adviser asked for them after the end of her employment, and the respondent saying they were put in her pigeon hole for her and that she asked Mr Davies to correct them and also asked Dr Bauer about a deduction shown on them.

92. On the question of pay and payslips we find that the respondent is not credible. It stated that the claimant's employment started on 1 June 2016. However, the first bundle payslip

shows a month's pay being paid on 2 June 2016, indicating that the claimant was being paid for May 2016. Further, the respondent paid two payments to the claimant's bank account in March 2016, with no payslips issued, and no statutory deductions were made. The issue of the discrepancies between 12 months paper payslips and Electronic Payslips also shows how slipshod the respondent was over payslips. We therefore accept the claimant's evidence that she did not receive payslips during her employment. Accordingly, we will not make a deduction for her failure to raise a grievance.

Further comments

93. We hope that the findings we have made in this case will put a stop to the social media adverse comments which the claimant says she has been suffering because she brought a claim against the respondent, as a charity.
94. Although we have not found that the respondent unfairly dismissed the claimant, the respondent should not feel exonerated by this judgment. The outcome could well have been different had the claimant put her case differently. We are deeply concerned by the way in which the respondent is run and the actions of Mr Thompson in particular. This is of public interest given that the respondent is a charity.
95. We have found that Mr Thompson's ill advised texts to the claimant's daughter amounted to a repudiatory breach of contract of an employee.
96. Mr Thompson's social media postings referring to 'scum bags' and 'cunt' were also highly ill advised for someone in a public position of being chair of trustees of the respondent charity and its Project Director and could easily have been misinterpreted, as they were by the claimant.
97. The atmosphere at the respondent which its managers allowed to continue appears unhealthy with Ms Swinney's text to the claimant of referring to a culture of 'bitching'.
98. With regard to the misconduct allegations made by the respondent against the claimant, either (1) they were largely fabricated and embellished by the respondent in order to defend the claim, or, alternatively, (2) the respondent failed to take action to discipline an employee over serious matters which involved health and safety breaches and theft. Neither option presents the respondent in a favourable light.

99. Of most concern was the evidence that Mr Thompson and Mr Davies seemed to have no appreciation of the boundary between their personal affairs and those of the charity. One example of this was Mr Thompson's evidence that the claimant was going to work extra hours for the respondent in order to repay a loan which he said he had made to her in his personal capacity. Another was the issue of the £500 payments made to the claimant from the respondent's bank account in March 2016. We have found that the payments were in fact for looking after the personal pets of Mr Thompson and Mr Davies. It was clearly, at the very least, entirely inappropriate for Mr Thompson and Mr Davies to be making payments of the respondent's money to the claimant as payments for their domestic arrangements.

Employment Judge Kelly

Signed on: 8 January 2021