



EMPLOYMENT TRIBUNALS

Claimant: Ms Perla Cunha

Respondent: Leather Unlimited

RESERVED JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD: on CVP

On: 8, 9 & 10 February 2021

Employment Judge: Employment Judge Henderson (sitting alone)

Appearances

For the claimant: Ms P Mathur (Pupil Barrister)

For the respondent: Mr A Williams (Solicitor for Peninsula)

JUDGMENT

The claimant's claim for constructive unfair dismissal succeeds (on liability) for the reasons set out below.

There shall be a Remedies Hearing (1 day) on 17 March 2021 (as agreed with the parties at the hearing). This shall be a remote hearing using CVP.

Directions for CVP Remedies Hearing

By no later than 12 March 2021, the respondent must email a copy of the remedies bundle, the witness statements, any skeleton or opening, and any other relevant document, or a link to a site from which they can be downloaded, to londoncentralet@justice.gov.uk. The respondent should copy the claimant into this email. Each party shall be responsible for ensuring they have access to the same written materials that have been sent to the tribunal in a format appropriate to them.

The respondent's email should include **the case number and hearing date and say "FAO THE CVP CLERK" in the subject line.**

All written materials should be provided in pdf format and should be rendered text readable. Witness statements should be provided in a separate bundle.

All witnesses when giving evidence must have access to:

- a. Their own witness statement
- b. The witness statements of all other witnesses (as they may be questioned on these)
- c. The bundle

The documents must be clean copies, without any markings, highlighting, notes or bookmarks.

Each party shall be responsible for ensuring the witnesses they are calling have access to the required written materials in a format appropriate to them.

REASONS

Introduction

1. This was a claim for constructive unfair dismissal brought by an ET1 lodged on 30 October 2019. The claimant commenced work as a Sales Executive with the respondent on 13 April 2015 and resigned with effect from 12 September 2019. The respondent is a small company, specialising in the design and sale of a wide range of leather goods produced by artisans in Bangladesh and promoted around the world. The respondent describes itself as a fairtrade company but does not belong to any fair trade organisations.

Agreed List of Issues

2. At the commencement of the hearing, the parties' representatives confirmed that they had agreed a list of issues as follows:
 - The Claimant ("C") claims constructive unfair dismissal under Section 95 (1) (c) of the Employment Rights Act ("ERA") 1996. References in squared brackets are to the relevant numbered paragraphs in either the Particulars of Claim ([C]) or the Grounds of Resistance ([R])

Repudiatory Breach

-Did the respondent (R) commit a repudiatory breach of contract through breach of the implied term of mutual trust and confidence? In particular, can any of the following conduct be established? If so, does it cumulatively amount to a breach of the implied term of mutual trust and confidence?

-Failure to provide C with a written copy of the contract of employment or statement of employment particulars until 12th August 2019. This was not disputed by the respondent.

-Travel: Differential treatment of C with respect to travel to international trade shows. R's response to C's inability to continue travelling to international trade shows. **[C/7, C/13]**

-Health and Safety issues including R's failure and unwillingness to put reasonable health and safety procedure in place for out of office work. This was a reference to putting various procedures and policies in place for international work-related travel following the claimant's experience in May 2018, when travelling with Ms Weldon. **[C/8 C/22]**

-CW's disclosure of PC personal and private HR issues to Stacy Morris ("SM") on 29th July 2019. CW's disclosure of contents of C's grievance letter dated 04.08.2019 to R's staff. **[C/17]**

-Changes to job roles/job tasks: Removal of C from 'the website project' and other tasks from 30th July 2019 onwards. **[C/17]**

-Invitations to Resign/ Impressions of Being Pushed Out of Leather Unlimited. **[C11- 23 July 2019; C16- 30 July 2019; C18- 31 July 2019; C19- 31 July 2019; C22- 5 August 2019; C23-6 August 2019; C25- 9 August 2019]**

-Handling of Claimant's Grievance: Refusal to deal with C's grievance promptly and without unreasonable delay. The claimant confirmed that this referred to the fact that the respondent had initially suggested that no grievance meeting should be held while the claimant was on sick leave. **[C23; C24, C25]**

-Belittling and Humiliating treatment including in front of colleagues, customers and office visitors. This is a reference to events on 23 and 24 July 2019 **[C10, C11, C14 and C13]**

-Abusive and intimidatory behaviour in communications and correspondence with C. **[C16- 30 July 2019]**

-Was CW's conduct during the formal grievance meeting on 4th September 2019 the 'last straw'? Did it contribute, however slightly, to the breach of the implied term of trust and confidence?

-Did C resign in response to that last straw?

Unfairness of Dismissal

-If C establishes that she was constructively dismissed, can R show a potentially fair reason for dismissal?

-If so, was the dismissal outside of the range of reasonable responses available to R in all the circumstances?

-Was the dismissal outside of the range of reasonable responses taking into account the factors set out in paragraphs (a) – (i) above.

- Did R place adequate weight on C's previous unblemished disciplinary record/work record?
- Did R comply with ACAS Code of Practice on Grievance and Disciplinary Procedure?
- Would the Claimant have been dismissed in any event (**Polkey**)? Did she contribute towards her dismissal so that her compensatory award should be reduced (section 123 (6) ERA)

Remedy

- Is the Claimant entitled to compensation for unfair dismissal?
- If so, what is the value of the basic award to which the Claimant is entitled?
- What is the value of the compensatory award to which the Claimant is entitled?

Conduct of the Hearing

3. The hearing was listed for three days and was held remotely using the Cloud Video Platform (CVP). The hearing had originally been listed in April 2020 but had been postponed due to the restrictions imposed at that time by the Government in response to the coronavirus pandemic. The parties had originally hoped the hearing could be held in person, but unfortunately the London Central Tribunal at Victory House was closed due to a faulty ventilation system, accordingly, the parties agreed to a remote hearing via CVP.
4. I agreed with the parties at the commencement of the hearing that we would deal with the issues on liability first and deal with remedy if time allowed.
5. I reminded the parties that although there was an apparent informality in conducting the hearing "on screen" it was nevertheless a formal court hearing and should be treated as such. I had to remind Ms Weldon of this several times as she had omitted to turn off/silence her phone and iPad and often left her chair to move around her office. I also had to ask her not to interrupt other witnesses when they were giving evidence and at one point had to insist that she mute her microphone. The claimant had flagged at the Case Management Hearing in April 2020 that due to her anxiety and panic attacks she would need adjustments (while giving evidence) of more time to locate documents and regular breaks. These adjustments were made available to the claimant but were not always accepted by her: in fact the claimant's evidence was relatively brief and lasted in total for 1 hour 35 minutes (including supplemental questions; 25 minutes of cross-examination; Tribunal questions and re-examination).

Day 1

6. At the commencement of the hearing Ms Weldon (the owner and Managing Director of the respondent) had technical problems joining the hearing. This was resolved and the hearing eventually commenced at 10.30.

7. I confirmed with the parties' representatives that they (and their witnesses) all had copies of /access to the Agreed Bundle of documents (171 pages) – page references in this Judgment and Reasons are to that bundle. I had written statements from all the witnesses, who adopted these statements on oath as their main evidence to the Tribunal.
8. I heard evidence from the claimant and on her behalf from Mr Ian Causer (Senior Employment Advisor at Homerton University NHS Trust – based within the Talk Changes (therapy) service). Mr Causer also had some minor problems connecting to the hearing with both camera and microphone but these were resolved in a relatively short time. Ms Weldon had expressed concern at proceeding to hear Mr Causer's evidence with only audio facilities.
9. Ms Weldon commenced her evidence for the respondent at 2.25 pm on Day 1. However, early during her cross-examination it became clear that she was working from a different set of documents to the Agreed Trial Bundle. Ms Weldon had apparently taken the hard copy trial bundle prepared for the hearing in April 2020 and had added various documents to that, which meant that the page numbers did not match those of the Agreed Bundle. I could not allow Ms Weldon to simply print ad hoc documents off her computer as she offered to do. Mr Williams confirmed that Ms Weldon had been sent an electronic version of the Agreed Bundle, but he said it would take Peninsula five days to be able to produce a hard copy bundle for her use. It was agreed that Ms Weldon would arrange for the Agreed Bundle to be printed out (in its entirety) and we would re-commence her evidence on 9 February.
10. Ms Weldon was reminded that she remained on oath overnight and must not discuss the content of her evidence with any of the other witnesses or with Mr Williams.

Day 2

11. I heard the remainder of Ms Weldon's evidence. Unfortunately during the evidence of Stacy Morris (Accounts Clerk for the respondent) at around 3pm there was an emergency, localised power cut at the Judge's premises and the hearing could not continue for the remainder of the afternoon. The parties were notified of this by the Tribunal.

Day 3

12. I heard the remainder of Ms Morris' evidence and also heard evidence from the respondent's witnesses: Alex Clapcott (Business Consultant, Coach and Advisor with Sequencx; Nonde Kashita (formerly Sales Administrator for the respondent from January 2014 – November 2019) and Phoebe Ugowe (Sales Executive at the respondent). I received (by email) written submissions and heard oral submissions from both parties' representatives.
13. I reserved my judgment and agreed a provisional date for the Remedy Hearing (if required) of 17 March 2021 (1 day) with the parties,

explaining that this should not be taken as an indication of my decision. It was agreed that this hearing (if needed) could be held via CVP.

Findings of Fact

14. I shall only make such findings of fact as are relevant to the issues for determination in this case. The majority of the factual issues were not disputed.

General Overview Chronology

15. The claimant was employed on 15 April 2015. She was not given a written contract of employment until 12 August 2019. It was accepted that she had a good working relationship with her colleagues and initially had a good relationship Ms Weldon, who had been helpful in making loans of substantial sums to the claimant to help with her personal debts. The claimant had a clean disciplinary record and had received pay rises (October 2016 and December 2017) and bonuses of £1000 in each in December 2017 and December 2018.
16. The claimant believed (paragraph 7 of her witness statement) that she had been successful, following an interview in February 2017, in obtaining the position of Company Director and that she had taken on additional responsibilities, although this had never been formalised. Ms Weldon and the respondent's other witnesses said the claimant's belief was incorrect and that she had never been promoted to a director or managerial role. The claimant went on several trips abroad with Ms Weldon during her employment.
17. In March 2019 the claimant told Ms Weldon that she was planning to leave the respondent as she may be moving outside London. It was agreed that she did not give any formal notice of termination. The claimant remained in employment. Following a request from Ms Weldon, the claimant confirmed in writing on 19 June 2019 that she was no longer intending to leave the respondent (pages 40-41) and Ms Weldon noted that she would stay with the respondent for the foreseeable future.
18. The claimant said at paragraph 13 of her witness statement that at the beginning of summer 2019 Ms Weldon confirmed that the Director's position was no longer available as the claimant indicated that she was no longer willing to undertake international travel. This is inconsistent with the claimant's evidence that she was already appointed (though not formally in writing) as a Director in February 2017. Given this inconsistency, I prefer the respondent's evidence on this matter and find that the claimant had never been a Company Director of the respondent.
19. Over the period July-August 2019 there were several incidents of disagreement between the claimant and Ms Weldon and lengthy and often acrimonious/confrontational emails/correspondence were exchanged between them.

20. On 30 July Ms Weldon left two documents marked "Without Prejudice" on the claimant's desk: it was accepted by the respondent that the content of these documents did not attract Without Prejudice privilege. The documents suggested that the claimant should look for "the right job" and leave the respondent. At a meeting on 31 July 2019 with the claimant and Ms Morris, Ms Weldon (in response to a question from the claimant) indicated that she did not believe a continued relationship was desirable. Shortly after that meeting, Ms Weldon placed a reference letter on the claimant's desk (page 53).
21. The claimant was signed unfit for work by a medical certificate (page 54) from 1 to 22 August 2019 due to "stress at work". The claimant accepted in her oral evidence that her anxiety was a pre-existing condition but had been exacerbated by workplace stress; namely her relationship with Ms Weldon.
22. On 3 August 2019 (page 55-6) Ms Weldon wrote to the claimant (among other things) raising the issue of repayment of the personal loans she had made to the claimant and giving the claimant unsolicited advice on her private life/family relationships.
23. On 5 August 2019 the claimant sent Ms Weldon her medical certificate and also submitted a lengthy grievance (pages 57-62) itemising her various complaints. Ms Weldon then took formal advice from Peninsula who originally suggested that the grievance should not be dealt with while the claimant was on sickness absence. The claimant sent a further medical certificate on 22 August 2019 (page 68C) signing her off work until 19 September 2019.
24. The claimant sought assistance from Mr Causer to whom she was referred as part of her counselling support from Talk Changes at the NHS Trust. As the claimant indicated she wished to proceed despite her sickness absence, a grievance meeting was held on 4 September 2019 at Mr Causer's offices; with him present as the claimant's companion. The claimant resigned with immediate effect on 12 September 2019 as she said "the workplace environment has become untenable".
25. Dealing in turn with the alleged breaches raised by the claimant.

Failure to provide written employment contract

26. It was agreed that although the claimant had commenced employment in April 2015 she was not provided with written Terms and Conditions of Employment until 12 August 2019 (after she had formally raised this in her grievance letter of 4 August 2019) and shortly before she resigned. Ms Weldon said that she did not deal with HR within the company and had hired Peninsula to handle such matters for her. She recognised that it was an employer's duty to provide a written statement of Terms and Conditions; that

she had not complied with that duty, but said that the company was now “all in order”.

27. Whilst in no way condoning the respondent’s failure to provide a contract in writing (as required by statute) I note that the claimant had worked for many years without a written contract and had not raised any formal objections until around July 2019. Whilst not acceptable conduct and far from best practice, I do not find that this was a breach of the contractual implied term of mutual trust and confidence by the respondent.

Differential Treatment as regards international travel

28. The Claimant contends that she was never under a contractual obligation to travel abroad to international trade shows with Ms Weldon; she had volunteered to travel abroad to provide assistance and help bring in more sales. However, she says that when (in December 2017) she informed Ms Weldon that she would no longer be able to travel abroad due to childcare responsibilities, she was threatened with and subjected to differential treatment, when compared with Ms Kashita, who did the same job but was never expected to travel.

29. There was no written contract for the claimant – but Ms Kashita said that she had received a written contract when she joined the respondent in January 2014. That contract contained a term requiring her to travel, but she had agreed with Ms Weldon at an early stage in her employment, that she could not travel outside the UK because of her childcare responsibilities and this contractual term was removed. Ms Kashita said that there had been no problem agreeing this with Ms Weldon.

30. Ms Weldon’s evidence was consistent with Ms Kashita’s. Ms Weldon said that she had been happy to take the claimant on international trips, especially as she had good linguistic skills (speaking English, Spanish and Portuguese). However, when the claimant said that she could no longer travel, this was accepted by Ms Weldon, even though it was not ideal. Further, the contract of employment sent to the claimant in August 2019 contained a term referring to travel abroad (as mentioned by Ms Kashita); the claimant objected to this and it was removed (page 67). This is wholly consistent with the treatment afforded to Ms Kashita.

31. Ms Weldon explained in her evidence that her reference in emails in December 2017 (pages 34-36) to the fact that not travelling abroad may hamper the claimant’s career progress, was to the claimant’s aspirations for more managerial/directorial roles within the company. Ms Kashita had no such ambitions and Ms Weldon had been happy to allow her to continue in her role without travelling abroad. This was the same for the claimant as regards her sales executive role. In fact, the claimant continued travelling abroad with Ms Weldon (of her own volition).

32. I found the claimant's evidence on her wishes with regard to international travel to be unclear. It seemed that she was happy to accommodate the travel requirements while she believed that she would be promoted to a directorial role and expected a salary increase which would enable her to pay for childcare. When she found out that there was no intention to promote her, she no longer wished to travel with Ms Weldon. However, there was no evidence to suggest that Ms Weldon insisted on this after the claimant's objections. Ms Weldon was very clear that she never forced the claimant to accompany her on foreign trips. I accept Ms Weldon's evidence on this point.
33. The claimant's main objection (as mentioned in her oral evidence) appeared to be that she had been asked in early 2019 to renew her passport (to have more than 6 months before expiry) in anticipation of a trip to Las Vegas, but was then told in April 2019 that Ms Ugowe was going on the trip instead. This appears to be a complaint that she was not taken on a foreign trip – which conflicts with her complaint that she was required to travel, when she did not wish to do so.
34. However, the claimant accepted that she had told Ms Weldon in March 2019 that she was looking for another job (as she was thinking of moving outside London). She also accepted in her oral evidence, that it was possible that Ms Weldon had felt that Ms Ugowe should attend the Las Vegas conference so that she could follow up on leads, in case the claimant left the company in the interim. In fact, the claimant confirmed (after being asked by Ms Weldon) in June 2019 that she was not intending to leave the respondent and had changed her mind about moving outside London. (pages 40-41) and did travel to Las Vegas with Ms Weldon in June 2019 (see below).
35. I find that the claimant has not shown on a balance of probabilities that there was a breach of the implied term of trust and confidence under this head of complaint.

Failure to provide safe workplace (Health & Safety issues) re travel

36. The Claimant set out her health and safety concerns in her official grievance letter of 4 August 2019 (pages 57-62 at page 59). She detailed an incident which occurred on 29 June 2019 when the Claimant travelled to Las Vegas with Ms Weldon. Ms Weldon was held back by airport security and customs police in relation to undisclosed samples for 2 hours and threatened with deportation. The Claimant was stranded without any local currency, hotel reservations, no emergency contacts, return ticket and the UK office was closed. Following this incident, the Claimant reiterated the need for Risk & Emergency/Health & Safety procedures. However, this was not acted upon and the claimant said that at the grievance meeting Ms Weldon dismissive and disparaging of her concerns, saying that such a policy was not needed as it was simply a matter of common sense.
37. There were three sets of notes of the grievance meeting held on 4 September 2019: the respondent's note at pages 70-75 (prepared

from the manuscript notes of Danielle Boyd pages 76-89); Mr Causer's note at pages 89A-B) and the claimant's note at pages 95-99). All the versions agree that Ms Weldon said that she now ensured that all samples were disclosed when she travelled; she mostly travelled alone and so no policy was necessary most of the time but that if the claimant felt strongly about this, Ms Weldon would ask her new administrator to deal with this.

38. In her oral evidence Ms Weldon acknowledged that the incident had been a serious one; that nothing similar had ever happened before and that it had been distressing for both the claimant and herself. She said she was always concerned about her staff's safety and felt very embarrassed about the incident. Ms Weldon said that the grievance meeting had been a difficult and fraught meeting and that her attitude at that meeting had not necessary fully reflected her opinion. She confirmed that there was now a protocol in place as regards foreign travel.
39. I do not find that this was a breach of the implied term of trust and confidence by the respondent.

Disclosure of the claimant's personal issues to Ms Morris

40. The claimant says that on 29 July 2019, Ms Weldon met with Stacy Morris (who was not responsible for HR and had no management responsibilities over the Claimant) to discuss the Claimant's personal and employment issues. This was without the Claimant's consent or knowledge and constituted a breach of confidentiality as well as breach of the implied term of mutual trust and confidence
41. Both Ms Weldon and Ms Morris accepted that this had occurred. Ms Weldon said that Ms Morris and the claimant were friends and that following some lengthy and acrimonious email exchanges with the claimant, Ms Weldon wanted to seek Ms Morris' help in understanding what the claimant wanted and why she was so apparently distressed. Ms Weldon did not regard this as a breach of confidentiality as she said that the respondent was a small company, without HR resources and that the claimant would have shared her concerns with Ms Morris and others. I accept that this may well be Ms Weldon's honest opinion, but I find that this was clearly a breach of her duty of confidentiality as an employer.
42. I asked Ms Morris about this incident. She said that she and the claimant were friends and confided in each other about workplace and other matters. She said that she would regard such discussions as private (for example Ms Morris said that the claimant had fairly well established plans to start a catering business) and would not disclose them to Ms Weldon. However, Ms Morris did not appear to have had any reservations in discussing the claimant's personal situation with Ms Weldon as she said that the claimant had discussed this openly with others in the company.
43. I asked Ms Weldon why she had not approached the claimant direct to discuss the situation with her. She said that the claimant had

written emails so she had replied in the same way. Ms Weldon was unable to explain why she had not thought to speak to the claimant in person. She also confirmed that she had not thought to seek assistance from Peninsula in how to contact/discuss matters with the claimant.

44. I find that Ms Weldon's conduct was a breach of the implied term of trust and confidence. This was not necessarily deliberate or malicious, but as an employer Ms Weldon should have been aware that it was not appropriate for her to discuss an employee's personal situation with another employee (who was not her line manager or in HR etc). The fact that the other employees (such as Ms Morris) may have known already known about such matters from the claimant, does not make any difference.

Disclosure of the claimant's grievance letter to other employees

45. Ms Weldon accepted that she had told other members of staff (who were not HR or who had any managerial responsibility for the claimant) that the claimant had raised a grievance in August 2019. This was confirmed by Ms Morris, Ms Kashita and Ms Ugowe, who said they were aware of the grievance but not of all the details of it.
46. Ms Weldon said she wanted to check some of the matters raised by the claimant, but she was clear in her evidence that these discussions were not part of any investigation into the claimant's grievance; nor had she asked Peninsula to assist her with such an investigation.
47. Again, I find that Ms Weldon's conduct was a breach of the implied term of trust and confidence. Once more, Ms Weldon was not necessarily acting in a malicious manner, but she should have been aware (or have been made aware by her advisors) that it was not appropriate for her to discuss an employee's grievance openly with other employees – unless by way of an investigation, which this clearly was not.

Changes to job roles/tasks

48. Following the meeting with Stacy Morris in the Claimant's absence (see above) Ms Weldon informed the claimant that she was removing responsibilities from her, including the website project. The claimant says that this was in spite of her objections to removal of responsibilities on the basis of what Stacy Morris had said to Ms Weldon without the Claimant's knowledge or consent (email on 30 July 2019 at page 48 from the claimant to Ms Weldon). However, I find no reference to the claimant objecting to removal of her responsibilities in that email. There are several clarifications of her position on international travel; her interest in a director's role and a reference to "constant attacks" from Ms Weldon and finding a professional way forward.
49. I do not find that there was any breach of the implied duty of trust and confidence. The claimant has not shown that there was any change to her contractual duties or responsibilities.

Belittling and humiliating treatment in front of colleagues

50. There was also evidence given of an occasion on 23 July 2019 which arose from a misunderstanding of instructions given by Ms Weldon to the claimant. The claimant thought she was being asked to obtain quotes from a shortlist of IT companies, but went back to Ms Weldon to say that she did not have enough information about the services needed to obtain a useful quote. Ms Weldon believed that her instructions had been to contact the IT companies listed to ask if they would be interested in taking on work from a small company such as the respondent and if so then further contact could be made about obtaining quotes.
51. The claimant said Ms Weldon had been rude to her in front of others in the office and snatched the papers from the claimant's hand and given them and the task to Ms Ugowe. The claimant said she had been humiliated by Ms Weldon's behaviour.
52. Ms Weldon did not believe she had been rude but accepted that she had spoken harshly to the claimant and she had been frustrated that the claimant had not listened properly to her instructions. She said she had snatched the papers off the claimant's desk (not from her hand) and had given the work to Ms Ugowe who had completed the task in 30 minutes. Ms Weldon said that the claimant had been fraught that day and had been rude to Ms Weldon.
53. There was no documentary (or other evidence) presented in relation to this incident. On the basis of the evidence before me, I accept on a balance of probabilities, Ms Weldon's assessment that this was incident where both parties must carry some blame and neither party behaved well or in a professional manner. However, I do not find that this incident was a breach of the implied duty of trust and confidence, but part of the stresses and strains of a busy and pressurized workplace.

Abusive and intimidating comments in communications/correspondence

23 July email

54. Following the incidents (set out above) on 23 July 2019, Ms Weldon emailed the Claimant asking her to *'make a list of things you would like to pursue in order to sell our leather goods in any industry, country or whatever'* (page 45C)
55. The Claimant completed the task on the same day and responded by email (pages 42 – 45C). Ms Weldon replied commenting on the Claimant's suggestions in the body of the email (in bold and underlined). The claimant says that it is clear from this document that Ms Weldon's comments are destructive, aggressive, rude and belittling throughout the email. Ms Mathur gave several examples in her submissions:
56. **[42, paragraph 1]:** The Claimant suggests updated the webpages and starting online sales. Ms Weldon replies: *"you started working here 4 plus years ago so*

this is rubbish. What makes you think you had a right to even think about this when you first started!!"

57. **[43, paragraph 3]:** The Claimant suggests re-evaluating the trade shows being exhibited at. Ms Weldon replies: *"Incidentally you could have done this research at any time when you had one of your quiet periods. It is not rocket science, it only takes time which I certainly do not have.*
58. **[45, paragraph 2]:** The Claimant discusses increasing sales. Ms Weldon replies: *"The truth is you have little or no respect for me or my experience because you are so self-opinionated (as evidenced by your comments about how brilliant you are)..."*.
59. **[45, paragraph 5]:** The Claimant discusses Ms Weldon's refusal to do the New York show. Ms Weldon replies: *"How dare you say this to me??? I refused to do a trade show! Why should I spend my money and time on something that is patently a waste of time...?"*
60. The email and her comments above (among others) were put to Ms Weldon in cross examination. Ms Weldon accepted that the claimant's email of 23 July was generally written in polite and respectful tone; had been well thought out and contained some good suggestions, though she noted that many of the suggestions had already been considered/tried and proved unsuccessful. This showed the claimant's lack of experience: Ms Weldon said she was simply replying honestly to the suggestions.
61. However, Ms Weldon accepted (with hindsight) that her tone could be construed as rude; was inappropriate and lacked professionalism and she apologised for this. She said it had been a fraught time for her; she had been tense and she felt that the claimant had been making things difficult for her. She did not accept that she had been aggressive or abusive. I accept Ms Weldon's retrospective assessment of her comments in that email.
62. I do not find that Ms Weldon's email responses were abusive or intimidating – but they were unprofessional, inappropriate and ungracious. Ms Weldon could have found a better way of expressing herself, whilst still being honest in her responses. The comments were not sufficient of themselves to be a repudiatory breach of the implied term of trust and confidence, but were part of a series of such potential breaches.

24 July Correspondence

63. On the 24 July 2019, the claimant emailed Ms Weldon to discuss the matters which occurred on the previous day (page 46-46F). The claimant says that she was trying to be conciliatory towards Ms Weldon to build a positive relationship going forwards, but that Ms Weldon's responses were excessively rude, disparaging and belittling of the Claimant's concerns and suggestions. Ms Mathur again gave examples, including:

64. The Claimant writes: *"I am sure we can find a way of clearing the air which is currently unhealthy and of finding the best way to work together". (page 46F)*
- a. Ms Weldon responds: *"I regret to say that I do not believe your discontent can be resolved as long as you are working here as you will feel the need to blow up every few months for one reason or another. You have a choice now, either move or put up and shut up as they say".*
65. The Claimant writes: *"I have to say that the level of stress and anxiety that I find myself under these last weeks has been overwhelming. I feel like I am being punished but I don't know for exactly what. (page 46E)*
- a. Ms Weldon responds: *"You might want to think about the stress I have to take on. Someone has to ensure we earn enough money in order to pay all the expenses including staff salaries each month".*
66. These examples were put to Ms Weldon in cross examination. Ms Weldon accepted that her comments had been unwise and unprofessional, and that her comment about *"put up or shut up"* was as she said in her oral evidence, "why we're here today".
67. However, I note that Ms Weldon also said (page 46F) *"You need to take your undoubted skills elsewhere, where they are truly appreciated. You say I do not respect my staff. That is patently untrue. Some of the things you said to me in the email you wrote yesterday are positively rude and certainly very disrespectful. It is my company, I am the boss and if you do not like it, you can do something about it".*
68. Ms Morris, Ms Nashita and Ms Ugowe all said in their oral evidence that the claimant was often rude and aggressive towards Ms Weldon, especially in the last few months of her employment and that she did complain frequently about the company and Ms Weldon. They also said that both the claimant and Ms Weldon were confrontational with each other.
69. I note that Ms Weldon's comments in her email about leaving the company were not dissimilar in principle to the claimant's notifying Ms Weldon in March 2019 that she was planning to leave and look for another job and that is not of itself a repudiatory breach of contract – however, Ms Weldon's choice of expression and tone was far from ideal.

Invitations to Resign/ Being Pushed Out of respondent

70. On 30 July 2019, Ms Weldon placed two letters headed "Without Prejudice" on the claimant's desk. These letters were not produced in the Trial bundle, however Ms Weldon accepted that in the letters, she repeated her suggestion that the claimant may be better off leaving the company. The letters were in response to the emails the Claimant had written on 23 and 24 July 2019 and it was accepted that the letters had no "proper" without prejudice content, as there was no offer of settlement made. The claimant says that the letters made

her feel unwanted in the company and as if she was being pushed out of employment.

71. At a meeting on 31 July 2019 with the claimant, Ms Weldon and Ms Morris, Ms Weldon (in response to a question from the claimant) indicated that she did not believe a continued working relationship was desirable. Shortly after that meeting, Ms Weldon placed a reference letter on the claimant's desk (page 53).
72. In her oral evidence Ms Weldon said that the claimant had indicated as far back as March 2019 that she wished to leave the company; she had since that time expressed continued dissatisfaction with various aspects of the company and how it was run. Ms Weldon said that she did not feel that it made sense to "put sticking plaster" on an ongoing problem – as the claimant consistently complained to Ms Weldon and others. Ms Weldon had believed that the best approach for both parties was a parting of the ways, as the claimant was clearly not happy; she did not believe that she was forcing her out of the company.
73. I accept that Ms Weldon's evidence was honest and that she genuinely believed that she was not forcing the claimant out of the company. However, the combination of the repeated suggestions that the claimant should consider leaving combined with prematurely providing a reference letter, which had not been requested, did suggest that she was pursuing the claimant's departure with undue haste.
74. I find that this conduct was capable of being a breach of the implied duty of trust and confidence.

Refusal/delay in handling the claimant's grievance

75. The claimant maintains that Ms Weldon refused to address her grievance in a timely manner and that this amounted to a breach of the implied term of trust and confidence.
76. The claimant submitted a formal grievance on 5 August 2019 (pages 57 – 62). On 6 August 2019, the Claimant wrote to Ms Weldon asking her to deal with the grievance as soon as possible as this would contribute to the Claimant's quick recovery (page 63). Ms Weldon responded on 7 August 2019 stating that she had referred the matter to her HR advisors (Peninsula) who had told her not to deal with the grievance until the Claimant was able to return to work.
77. The claimant then made numerous requests for her grievance to be dealt with prior to her return to work – as she hoped that this would facilitate her return to work. The claimant then sought assistance from Mr Causer who stepped in to discuss matters with Ms Weldon (page 69B). As a result of their discussions, Ms Weldon agreed (with Peninsula's confirmation) to hold a grievance meeting on 4 September at Ms Causer's offices and with Mr Causer accompanying the claimant.

78. This is the full extent of the respondent's "refusal and delay". Mr Causer said he had never come across an employer not wishing to hold a meeting during an employee's sickness absence. However, I do not accept this to be the case. It is not uncommon for employers to be cautious and for the sake of both parties (and especially the employee's well-being) to wait until the employee is fit to return to work before holding such meetings. Indeed, as Mr Causer recognised in his email to Ms Weldon on 23 August (page 69B), it is best to judge such situations on a "case by case basis". Ms Weldon was following her initial (understandably cautious) advice from Peninsula, but accepted that the claimant was anxious to proceed with the grievance and accordingly agreed to carry on with the process. I find that there was no refusal as such; the delay of one month (from 5 August to 4 September) was not excessive in all the circumstances and was not unreasonable.
79. I do not find that this constituted a breach of the implied term of trust and confidence.

The Grievance Meeting on 4 September 2019 – "The Last Straw"

80. The claimant resigned in response to the last straw of the grievance meeting on 4 September 2019. This is apparent from the Claimant's letter of resignation at page 105. Specifically the claimant says that this was in response to the following conduct during the grievance meeting:
81. Ms Weldon's attitude to the grievance meeting i.e., being unclear as to whether grievance meeting or investigation, addressing answers to Mr Ian Causer and not the Claimant.
82. Ms Weldon's belittling and disparaging attitude towards the Claimant's mental health and failure to acknowledge impact of her actions on the Claimant's health.
83. Ms Weldon's admissions relating to travel abroad, health and safety at work, without prejudice letters, breach of confidentiality, manner of communication with the Claimant, attitude and behaviour towards the Claimant and overall lack of remorse for this.
84. Ms Weldon's unwillingness to improve the working relationship going forwards and making it clear to the Claimant that she would not be welcome at the Respondent.
85. Mr Williams suggested in his brief cross examinations of the claimant and Mr Causer, that the meeting on 4 September was not a grievance meeting and that it had been set up by the claimant and Mr Causer and not by Ms Weldon. This was denied by the claimant and Mr Causer and was clearly incorrect as Ms Weldon's own evidence confirmed very clearly that she had consulted Peninsula when she received the claimant's grievance and that this meeting was part of that process. This is also acknowledged in the ET3.

86. Ms Weldon also confirmed in her oral evidence that she had no clear idea of what the grievance meeting involved; how to go about conducting it and what was required from her following the meeting. She had not realised that she would be expected to reach a decision and to communicate that decision/outcome to the claimant in writing. As a result she did neither- she said she thought the minutes of the meeting were the outcome. Ms Weldon also confirmed that she was not familiar with the ACAS Code on Grievances and was not aware of being referred to this by her advisors. She said she had been trying to do her best under difficult circumstances.
87. Ms Weldon also said in her oral evidence that once the claimant had given her a compromise agreement at the grievance meeting, she was shocked and realised that it was “all about money” and although she tried to keep an open mind she felt the claimant needed to leave. Ms Weldon also referred to the fact that the claimant already owed her several thousand pounds in personal loans, so this made it even harder for her to accept the situation.
88. As mentioned above there were three different notes of the grievance meeting but there was general consensus that the meeting started out by discussing the points raised in the claimant’s formal grievance but degenerated into an argument between the claimant and Ms Weldon. Mr Causer said he had never been to a grievance meeting quite like this one. It is also clear that Ms Weldon did not choose to recognise the extent of the claimant’s mental health issues. She referred to incidents not being “true panic attacks” but more like claustrophobia.
89. Ms Weldon accepted in her oral evidence that she was not medically qualified, but said that as an “experienced, older person” (her words) she had the right to have her own views. She acknowledged that the claimant’s medical certificate had given “stress at work” as the reason for her sickness absence, but Ms Weldon did not believe that the claimant had any reason to be stressed at work and so did not accept that reason. She agreed that she had refused to refer the claimant for an Occupational Health report, but then also accepted that she did not understand what this was, nor had she sought advice as to what this might be.
90. On the basis of the evidence presented to me I find that the grievance meeting was a breach of the implied term of trust and confidence in the manner in which it was carried out. I also find that Ms Weldon’s approach to the claimant’s mental health issues was unacceptable and was also a breach of the implied term of trust and confidence. She is, of course, entitled to her opinion, but it is not acceptable for her as an employer to ignore medical certificates presented by the claimant. If she had doubts about their accuracy she could have referred the claimant to occupational health or an independent medical consultant; she did neither.

The working relationship between the claimant and Ms Weldon

91. Although this was not specifically raised as an issue, I find that the nature of the working relationship between the claimant and Ms Weldon (and indeed Ms Weldon and all her staff) is relevant to this case.
92. Ms Weldon is the founder, owner and MD of the respondent, which she stressed was a small company with no formal HR function. This meant that she was (on her own admission) lax about matters such as issuing written contracts of employment or confirming changes to job roles/titles, despite having a long-term relationship with her external HR advisors. Ms Weldon understandably regarded the respondent business as her own, which in her mind meant she could run it as she chose.
93. Ms Weldon was experienced and dedicated to her business and freely admitted that she treated her staff as members of her family: taking a personal interest in them and even making loans to them over and above their salaries (which gave rise to some questionable tax issues). This was especially the case with the claimant who had financial problems. Ms Weldon had also been on several overseas trips with the claimant and believed that they had a good working relationship. This meant that she frequently made allowances when the claimant was rude or aggressive towards her (which behaviour was confirmed by Ms Kashita; Ms Morris and Ms Ugowe) and had never thought to issue any warnings or raise any disciplinary issues against the claimant.
94. However, the closeness of this relationship meant that both the claimant and Ms Weldon reacted badly when the relationship began to encounter problems. Ms Weldon felt disillusioned when the claimant indicated in March 2019 that she was planning to leave and even though the claimant confirmed in June 2019 that she had changed her plans and intended to stay, the relationship was adversely affected by this event. Ms Weldon reminded the claimant about the financial loans and obviously felt she could give her advice about her private life. The claimant felt disappointed that she had not been promoted to a more senior/directorial role and this impacted on her relationship with Ms Weldon and led to her refusing to travel abroad for business. Feeling that she knew the claimant well, Ms Weldon did not accept that she had problems with stress at work, choosing to describe any problems as “claustrophobia” (as she had witnessed the claimant having problems when travelling on the underground) rather than accepting that she may have real problems with work-related and other stress.
95. Further, once the claimant raised a formal grievance and mentioned a compromise agreement, Ms Weldon had more or less formed the view that their employment relationship could not continue. She said as much in her oral evidence and Ms Ugowe said in her oral evidence that when Ms Weldon had told her about the claimant’s grievance in August 2019, she had said that the claimant would be leaving.
96. I accept that Ms Weldon genuinely believed that she had a good and close working relationship with the claimant; however, that did not remove her legal obligations as an employer.

Relevant Law

97. Mr Williams did not cite any authorities or raise any legal issues in his submissions on the grounds that they were “well-established and recognised by all parties”. Ms Mathur’s approach was more thorough, and I note below the authorities cited by her which I find are relevant to the issues and findings of fact in this case.
98. In **Malik v Bank of Credit and Commerce International SA [1997] UKHL 23** when considering the implied term of trust and confidence in the contract of employment, Lord Steyn stated – “*The implied obligation extends to any conduct by the employer likely to destroy or seriously damage the relationship of trust and confidence between employer and employee.*” Lord Nicholls stated “*The conduct must, of course, impinge on the relationship in the sense that, looked at objectively, it is likely to destroy or seriously damage the degree of trust and confidence the employee is reasonably entitled to have in his employer. That requires one to look at all the circumstances*”.
99. It is well established that any breach of the implied term of trust and confidence by an employer is “*inevitably*” a fundamental, repudiatory breach of contract entitling the employee to resign and terminate the contract, thus constituting a dismissal under S.95 (1) (c) of the Employment Rights Act 1996 (“ERA”) (**Morrow v Safeway Stores plc [2002] IRLR 9**) The question of whether the term has been breached is a fact sensitive one,
100. In **McBride v Falkirk Football and Athletic Club [2012] IRLR 22**, EAT, the EAT made clear that the test for whether trust and confidence has been broken is an objective one and should not be diluted by the concept of an ‘industry standard’ of bad management style (at [61] – [63]): it was no defence to a constructive dismissal claim for the employer to point to a high-handed and autocratic management style being the ‘norm’. As the EAT put it: ‘*An employer cannot pray in aid that he and others in his industry treat all employees badly and, therefore, treating an employee badly cannot amount to a breach of the duty to maintain trust and confidence.*’
101. In **Billington v Michael Hunter and Sons Ltd UKEAT 0578/03**, the EAT held that the employer’s invitation to B to resign on favourable terms amounted to a ‘*vote of no confidence*’ that was calculated and likely to destroy or seriously damage its relationship with B (at [25]). The EAT held that an employment tribunal had been wrong to decide that there was no fundamental breach of the implied term of trust and confidence when an employer invited an employee to resign on favourable terms - in the light of unsatisfactory performance. B had been on a written warning. She was then asked to attend an informal meeting a few weeks later to discuss new allegations of unsatisfactory performance. At that meeting B was told that if there were further customer complaints, she ‘*would very likely be dismissed*’. B’s line manager suggested that she think about her ability to do the job, and that ‘*should she decide that the job was beyond her capabilities*’, she could resign on ‘*favourable terms*’. B subsequently resigned and claimed that she had been unfairly constructively dismissed.

102. A breach of the implied term of trust and confidence may also arise from the way that an employer handles a grievance by an employee. In **WA Goold (Pearmak) Ltd v McConnell and anor** UKEAT/489/94, the EAT upheld an employment tribunal's decision that an employer is under an implied duty to 'reasonably and promptly afford a reasonable opportunity to their employees to obtain redress of any grievance they may have' (at 3).
103. In **Omilaju v Waltham Forest London Borough Council** [2005] ICR 481, CA, the Court of Appeal held that to constitute a breach of trust and confidence based on a series of acts (or omissions), the act constituting 'the last straw' must contribute, however slightly, to the breach of the implied term of trust and confidence (at 489 [A] – [D]). However, it also confirmed that 'the last straw' does not have to be of the same character as the earlier acts, and nor does it necessarily have to constitute unreasonable or blameworthy conduct (although in most cases it will do so).
104. In **Kaur v Leeds Teaching Hospitals NHS Trust** [2019] ICR 1, the Court of Appeal clarified that an employee who claims unfair constructive dismissal based on a continuing cumulative breach is entitled to rely on the totality of the employer's acts notwithstanding a prior affirmation of the contract, provided that the later act — the last straw — forms part of the series (at 18 [D] – [F]). It held that the effect of the final act is to revive the employee's right to terminate his or her employment based on the totality of the employer's conduct (at 18 [G] – [H]). This, at any rate, is the case if the final straw incident is not itself so damaging as to comprise a repudiatory breach in and of itself. If, however, it does comprise a repudiatory breach in and of itself and thereby triggers the employee's resignation, there will be no need for the employee to rely on the last straw doctrine as the basis for claiming that he or she has been constructively dismissed.

Conclusions

105. I have made detailed findings of fact above, based on which, my conclusions can be brief.

Constructive Dismissal

106. I have found that the following matters were breaches of the implied term of trust and confidence: Ms Weldon's breach of confidentiality and her disclosure of the claimant's grievance to other staff members; Ms Weldon's repeated invitations to the claimant to resign, exacerbated by her premature provision of a reference letter (**Billington**); Ms Weldon's poor handling of the grievance meeting (**WA Goold**) including her attitude to the claimant's mental health issues and I accept that the grievance meeting on 4 September 2019 was the last straw in the sequence of these breaches (**Omilaju** and **Kaur**). This conduct entitled the claimant to resign, and she did so, in response to that "last straw" on 12 September 2019. The claimant was on sick leave over the period

4-12 September and I do not find that there was any delay in her accepting the repudiatory breach (although this was not specifically raised as an issue by Mr Williams) or any affirmation of the contract in that period.

107. Taking all the circumstances into account I find that Ms Weldon's conduct as set out above (as the key representative of the respondent) was such as to destroy or seriously damage the degree of trust and confidence which the claimant was reasonably entitled to have in her employer (**Malik**)

108. I have found that the claimant's own conduct frequently contributed to Ms Weldon's responses on some of the matters where I have not found in the claimant's favour. I have also found that many of the problems experienced by the claimant and Ms Weldon arose from their close working relationship and within the respondent organisation generally. This relationship regularly blurred the lines between friendship and employment, which may be seen by many as desirable in the workplace. However, ultimately, Ms Weldon was the claimant's employer and, as such, she had legal obligations to the claimant, which she did not comply with. The claimant is entitled to rely on her rights as an employee, which she has chosen to do in bringing this claim.

109. The claimant's claim for constructive dismissal succeeds for the reasons set out above.

Unfairness of the Dismissal

110. The issue is then raised as to whether the respondent can show a potentially fair reason for dismissal. Mr Williams' submissions simply said on this point that if the claimant were found to have been dismissed "she contributed overwhelmingly to her own departure". This far from clear. I have found that the claimant's conduct had not been without fault; however, it is for the respondent to show (on a balance of probabilities) what the reason for dismissal was and this has not been done. The claimant was never given any formal or informal warnings about her conduct and no other potentially fair reason was identified by Mr Williams. Therefore, I find that the claimant was unfairly dismissed.

Polkey and Contributory Fault

111. On the basis of the evidence, as regards the grievance meeting on 4 September 2019 (as Mr Williams said in his submissions) "the agenda of the meeting was so unclear as to render it meaningless for practical purposes". Given that this is the respondent's own case, I cannot with any usefulness consider the application of a **Polkey** reduction. The procedure was so faulty as to render it impossible for the Tribunal to say what would have happened if a proper procedure had been followed (**Eaton Ltd v King and others [1998] IRLR 686**). Furthermore, this was a grievance (not a disciplinary) meeting. The respondent had not raised any disciplinary issues with the claimant during her employment and so the Tribunal is unable to find that she would have been dismissed in any event.

112. For the avoidance of doubt, I do not find that the claimant contributed to her dismissal. While her conduct may not have been free from blame, her behaviour did not justify the respondent's breaches of the implied term of trust and confidence.

113. There shall be **a Remedy Hearing on 17 March 2021 (1 day)** to determine the compensation to be awarded to the claimant by the Tribunal. This hearing shall be conducted using CVP as agreed with the parties.

Employment Judge Henderson

JUDGMENT SIGNED ON: 18 February 2021

**JUDGMENT SENT TO THE PARTIES ON
19 Feb. 21**

AND ENTERED IN THE REGISTER

FOR THE SECRETARY OF THE TRIBUNALS