Case Number: 3334177/2018 (V)

EMPLOYMENT TRIBUNALS

Claimant:		**Respondent:**
Yvonne Gregory	**v**	Robert Davies John West Limited

Heard at:	Reading by Cloud Video Platform	**On:** 1, 2 and 3 March 2021
Before:	Employment Judge Chudleigh	

Appearances
For the claimant: Mr D. Moher, solicitor
For the respondent: Ms G Crew, counsel

JUDGMENT

The judgment of the Employment Tribunal is:

1. The claimant not constructively dismissed by the respondent within the meaning of s. 95(1)(c) of the of the Employment Rights Act 1996.

2. Accordingly, her complaints of unfair and wrongful dismissal are not well founded and are dismissed.

REASONS

1. The agreed issues were as follows:

Constructive Unfair Dismissal

1) Did the respondent commit a repudiatory breach of the claimant's contract of employment?

2) The claimant alleges that the respondent breached the implied term of mutual trust and confidence. The claimant relies upon the following alleged beaches:

a) March 2012 not offering the claimant a full-time position.

b) Allegedly refusing the claimant a pay rise in July 2013.

c) Allegedly withholding relevant information from the claimant in September 2014.

d) On or about March 2015 Bob Davies asking the claimant to take on additional responsibilities and when the claimant proposed a pay rise, Bob Davies allegedly behaving in an overbearing manner saying "Yes, but you will not be getting it", and slamming his fists down on the table saying "It's finished, just get on with your job."

e) In April 2015 being asked repeatedly Robert Nursey for password information/being unjustly directed to disclose personal password information.

f) Between July and November 2015, Kevin Davies challenging the claimant about how staff were to take their remaining holiday entitlement and how this was to be managed/the company withdrawing a previously enjoyed flexibility on the carryover of annual leave.

g) On or about the 5th November 2015 the respondent allegedly unfairly blaming the claimant for an error in Bob Davies' salary.

h) In November to December 2015 by Kevin Davies requesting passwords and access codes for the Sage accounting and payroll software.

i) On the 14th January 2016 Bob Davies sending the claimant an allegedly rude and aggressive email.

j) In January 2016 the respondent asking the claimant to coordinate the Client Contract Information as an additional responsibility.

k) On or about the 31s March 2016 the respondent without consultation informing the claimant that it was outsourcing the payroll and pension functions, thus reducing the claimant's responsibilities.

l) In or about April 2016 at the claimant's annual review, the respondent failed to give the claimant a pay rise and told her that Libby and Anna had complained that she was really rude without providing her with any more information.

m) In or about the 21st April 2016, Kevin Davies being unjustifiably secretive in providing the claimant with information relating to salaries; exemplified by his taking seven days to provide the claimant with the salary information that she sought.

n) In or about May 2016 the claimant not being a signatory for the Santander bank account.

o) Kevin Davies alleged failure to reply to the claimant's request to discuss her role on 16 June 2016.

p) In or about the 21st July 2016, the respondent informing the respondent that the last two days of sick leave would be paid at half pay

q) On the 30th September 2016, when the claimant chose not to attend a team building event, the respondent requiring the claimant to attend work.

r) In or about the 7th April 2017 the respondent not giving the claimant a pay rise.

s) On or about the 1st June 2017, the claimant says that she was refused access to the Santander bank account on the basis that it that "purely for salaries and that she did not need access"

t) On or about the 11th July 2017 the claimant was kept in the dark about Sue Reed's holiday entitlement and Kevin Davies' holiday entitlement.

u) In or about September 2017 the respondent allegedly removing the

responsibility of dealing with new employee contracts and starting documentation from the claimant.

v) Between 20th March – 19th April 2018 the respondent failed to engage in meaningful negotiations.

w) On or about 9th May 2018, on her return to work from a period of sickness, Kevin Davies behaving in a hostile manner towards the claimant;

x) On the 10th May 2018 the respondent suggesting that the claimant would leave a conference call.

y) That the respondent failed to deal with her grievance in a proper manner which breached the implied term of mutual trust and confidence (see para 99 of her Grounds of Claim); and/or ii) the implied right to have a reasonable opportunity to obtain redress in respect of her grievance (para 100 of her Grounds of Claim);

3) If the conduct as set out above is found to have occurred, did it amount to a repudiatory breach of the implied term of mutual trust and confidence?

4) In so far as the claimant is relying upon a cumulative series of events, what was the "last straw" identified by the claimant and did it contribute to the breach of the implied term of mutual trust and confidence? The claimant says that the last straw was the respondent's failure to deal with her grievance.

5) If the respondent did not commit a repudiatory breach of the claimant's contract of employment, did the respondent demonstrate an intention to commit a repudiatory breach of the claimant's contract of employment (the claimant says that this was an intention not to deal with her grievance) (para 101 of her Grounds of Claim).

6) If the respondent is found to have fundamentally breached the claimant's contract of employment, did the claimant resign in response to that breach of contract or anticipatory breach of contract?

7) Did the claimant resign without delay, so as not to constitute affirmation or acceptance of the breach of contract (or anticipatory breach of contract)?

8) Did the respondent dismiss the claimant for a potentially fair reason, namely, conduct and/or capability, pursuant to Section 98(2) Employment Rights Act 1996 ("ERA 1996")?

9) Was the dismissal of the claimant by the respondent fair, pursuant to Section 98(4) ERA 1996?

<u>Wrongful Dismissal</u>

10) Whether, if the respondent committed the behaviour alleged in paragraph 2(a)-(x) above, the claimant was entitled to treated herself as dismissed with immediate effect and to resign without giving the respondent the contractual notice period of one calendar month.

Remedy

11) If the claimant's dismissal is found to be unfair, what, if any, compensation would it be just and equitable to award to the claimant, taking into account:
   a. The extent to which the claimant has complied with her obligation to mitigate her loss and the sums earned by the claimant by way of mitigation (or which would have been earned by the claimant had she complied with the duty to mitigate her loss);
   b. The extent to which the claimant contributed to or caused her own dismissal, such that any compensatory award should be reduced pursuant to s.123(6) ERA 1996

12) Did the respondent unreasonably fail to follow the ACAS Code of Practice for Disciplinary and Grievance Procedures, and would it be just and equitable to uplift the claimant's compensation?

13) Did the claimant unreasonably fail to follow the ACAS Code of Practice for Disciplinary and Grievance Procedures, and would it be just and equitable to reduce the claimant's compensation?

2. The case was heard by Cloud Video Platform as it was not practicable to hold an in-person hearing.

3. The claimant gave evidence on her own behalf. On behalf of the respondent I heard evidence from Robert Nursery, Director and Kevin Davies, Director and Chartered Architect.

4. There was an issue raised by the claimant's counsel about whether communications between the claimant and the respondent in March and April 2018 were protected conversations within the meaning of s 111A of the ERA. In the event, Ms Crew on behalf of the respondent said that she did not seek the protection of s. 111A in relation to the two letters in the bundle but she did in relation to a meeting. Mr Moher on behalf of the claimant did not seek to argue that s. 111A protection did not apply to the meeting. Accordingly, there was an agreed position and I was not required to decide the matter.

5. I made the following findings of fact:

   1) The respondent is a chartered architect practice that employees 12 people. Its main office is in Staines but it has other offices in Chulmleigh, Devon, Spike Island, Bristol and Charente Maritime in France.

   2) The claimant worked for the respondent from 6 April 2004 until her resignation on 10 July 2018. She was employed as a part-time book-keeper/administrator working at the Staines office. In addition, she was company secretary from 1 October 2004. She reported to Bob Davies, a director. The other directors who played a part in the events described below were Rob Nursey and, from September 2015 Kevin Davies (Bob Davies' son).

3) Her hours were initially 22.5 hours a week worked over three days a week. However, from September 2011 until January 2014, the claimant worked the same hours over two days. This was in order to undertake a second part time job and arose from a short-term salary reduction by the respondent from March 2010 to June 2010. The claimant worked for a veterinary surgery between January 2010 and March 2011. She then got a part-time job working for Waitrose. Libby Reynolds was in the same position; having had a temporary pay cut she too took a second job.

4) In March 2012, Libby Reynolds was offered a full-time position by the respondent, enabling her to give up her second job. The claimant was concerned that there was no discussion with her at the time about her increasing her hours now that the respondent was in a better financial position, but Ms Reynolds did a different job to the claimant. There was a business need to increase her hours but not those of the claimant. The claimant's contractual hours remained 22.5 hours a week.

5) The respondent was keen for the claimant to return to work over three days so she was present in the office more regularly. On 18th July 2013 the Bob Davies, a director incentivised the claimant to return to three days a week by telling her that she could have a pay rise if she reverted to three days a week. The claimant was able to accommodate this request and in January 2014 she returned to three days a week. In August 2013 she received a pay rise of the full time equivalent of £1,500 per year.

6) The claimant understood the reasoning for wanting her back in the office three days per week but considered that offering a pay increase as collateral was insensitive, controlling and intimidating.

7) Kevin Davies was not yet a director of the respondent but was considering becoming one. On 24th September 2014 Kevin Davies rang the claimant and asked for a copy of the respondent's cash flow (the financial forecasting spreadsheet). The claimant refused to give it to him as it contained sensitive financial information and had restricted access. Kevin Davies said he would get it from Bob Davies. The claimant wrote to Bob Davies on that day to notify him. He advised the claimant to treat Kevin Davies as a Director.

8) On 24th March 2015 at the annual review meeting Bob Davies asked the claimant to take on the task of chasing staff to get jobs completed and project work issued. He said "*Give them a hard time"* and "*We know you are capable of doing it".* The claimant thought this was flippant, insulting and negative but it was intended to be motivational.

9) The same day the claimant asked the respondent to consider giving her a pay rise in light of the new responsibilities. She asked if her pro rata pay could be raised to £30,000 per year which was the full time equivalent of £50,000;

10) The next day - 25 March 2015 Bob Davies advised the claimant of the staff

annual pay increases. The claimant was not getting the pay rise she sought. She asked him if they had considered her proposal. He said yes but she would not be getting it. The claimant asked if the respondent could reconsider the decision, as she had performed well and they were asking her to do an additional task. Bob Davies got angry, slammed his fists down on the table and said "*It's finished, just get on with your job".* He then stood up and walked out of the room.

11) The claimant was upset that Bob Davies had spoken to her like that. Accordingly, she left the office and went home for the rest of the day.

12) The next day Rob Nursey asked the claimant to explain what had happened in the meeting with Bob Davies. He said that Bob could "*be volatile*". He also said that he could see that she was upset and asked what they could do to make her happy. There was then a discussion about holiday entitlement which was a matter the claimant had an ongoing concern about.

13) In April 2015 Rob Nursey asked the claimant for a list of the passwords on her work PC as he needed them to access some financial documents. In my view this was a reasonable management instruction. She refused to give them to him and told him to gain access though the respondent's IT company. A few days later he again asked for the password to the claimant's PC so he could send out invoices in her absence. The claimant considered that it was very rare for invoices to be sent out in her absence, and explained this but he persisted in requesting access to her computer. The claimant said that they could have access to the same files to send invoices out without having the password. She failed to accede to his instruction.

14) The claimant felt that the respondent was asking for passwords because it did not trust her.

15) In April 2015 Rob Nursey mentioned to the claimant that Kevin Davies was looking to either negotiate a better price with the respondent's accountant or move to another accountancy company. This was the first time she was advised of this possible change. A month later the claimant was told by Kevin Davies to change the accountancy fee in the cash flow to a reduced figure. The claimant felt that as company secretary there was a requirement for her to know about this and/or sharing this information would have been courteous. However, she was given the information at an appropriate time and there was no particular need for her to have known about this issue sooner.

16) In around July 2015 Kevin Davies began reviewing the respondent's policy on the carry over of holiday entitlement. All staff contracts provided that the employee was not entitled to carry over holiday but employees had been allowed to carry over days nevertheless. Kevin Davies decided the respondent should tighten up on this and only allow holiday to be carried over in exceptional circumstances. There was an exchange between Kevin Davies and the claimant on this topic in October 2015. She had three weeks holiday left to take. Kevin Davies said that it would be useful to know how to manage her workload during her holidays. This was all normal management stuff. It was not unsurprising that a new director who was given the responsibility for looking after staff would seek

to clarify and tighten up on matters such as holiday. There was no hidden agenda on the part of the respondent.

17) On 16th July 2015 Kevin Davies asked the claimant if she could drop off completed accounts to the accountant. she was told to get the accounts dispatched as soon as possible. The claimant felt that as company secretary she should have been informed about this sooner.

18) On 5 November 2015 the claimant was sent an email by Bob Davies requesting alterations to the salaries of Kevin Davies and Bob Davis. The claimant sent an email back seeking clarification of various matters. She was very unhappy with the email sent to her as she thought it implied that she had made an error, but I disagreed. It was a reasonable management instruction to make some payroll alterations and adjustments and not a criticism of the claimant.

19) At about this time Kevin Davies (who was now responsible for staffing matters), suggested that it might be a good idea to outsource payroll and pension (the new auto-enrolment requirements were looming). He sent an email to Bob Davies and Rob Nursey on 5 November 2015 mentioning this. He said *"To avoid storm outs and hoo haa, it may be a solution to outsource…..it could relieve both pressure, time and knowledge".* The reference to storm outs was to the meeting in March 2015 when the claimant became upset. Payroll was part of the claimant's responsibilities, but only occupied her for a half day a month. Moreover, the claimant had recently complained of having too much work. The claimant did not see that particular email but was written to separately on 5 November 2015 and was told that the issue of workload and pension etc would be discussed and the respondent would seek advice.

20) Bob Davies responded to Kevin Davies email of 5 November to the directors saying *"I am not at al happy that one person can have such a drastic affect on the smooth running of the practice. Whether Yvonne continues or not I think we should have a back-up on everything she does. If she is away from most of December, using up the reminder of her holiday as she intimates, we will have to face up to the problem immediately*". Again, this was not copied to the claimant.

21) The claimant's case was that there was some form of conspiracy to get rid of her and that this email is evidence of that. I concluded that there was no such conspiracy at any stage in the claimant's employment although it is plain that the view was that it would be helpful for the business not to be so reliant on the claimant which was a reasonable business decision in my view. In fact, the clamant was viewed as a very good performer.

22) In November and December 2015 Kevin Davies emailed the claimant requesting passwords and access codes for the Sage software on her PC. It was unclear on the evidence when the passwords were provided by the claimant although it was common ground that they were provided at some point in this period.

23) The claimant was on holiday for an extended period in December 2015.

24) On 14th January 2016 – the claimant wrote to Bob Davies about whether to invoice a client. The reply was 'NO' email reply. This was a curt reply and was, in my view, rude.

25) On 27th January 2016 the claimant received an email from Kevin Davies with an invoice attached from 'Employment Law Plus' suggesting that it was for an emerging employment policy document as required by Chartered Practice Membership although the respondent had never needed it before. No rationale was provided to the claimant as to why this was required.

26) `Then on 29th January 2016 Kevin Davies asked the claimant to coordinate client contract information adding to the claimant's workload. In my view this was a reasonable management instruction and commensurate with the claimant's duties which included invoicing clients.

27) At a meeting on 4 February 2016 Kevin Davies told the claimant that the respondent would be looking at outsourcing pensions and payroll. Then on 31st March 2016 the claimant received an email explaining that payroll was being outsourced with effect from 1 April 2016, the very next day. The claimant considered that this was very late notice and I agreed that it might have been preferable to have let the claimant know the decision had been made sooner.

28) In April 2016 the claimant had an annual Review with Rob Nursey and Kevin Davies. The claimant was advised that there had been a complaint made about her the previous year by co-workers Libby and Anna who had said that she was rude. Despite her request, the claimant was given no further details. This was because the two women did not want to raise a formal complaint and the respondent did not know the specifics.

29) The claimant did not receive a pay rise at this time as her current salary was above market rates. The claimant was not only employee not to receive a pay increase in 2016.

30) On 21st April 2016 the claimant asked Kevin Davies for salary information for reporting purposes and he replied with a combined salary figure. The claimant needed the director's and staff salaries split which Kevin Davies supplied on 28th April 2016. The claimant felt distrusted and considered that the lack of information prevented her from doing her job. However, she did not need to know individual salaries for reporting purposes and it was, in my view, perfectly adequate for her to be provided with the overall figures by Kevin Davies.

31) An account with Santander Bank was opened on 5 May 2016 by the respondent. The claimant was not a signatory, but she did not need to be as that account was purely for pensions and payroll which were not within her remit. She remined a signatory to the other bank account held by the respondent.

32) The claimant's contract provided that she was entitled to full salary for the first month of absence due to illness and then half pay for the next two months. The claimant was off sick with a shoulder problem in June and July 2016. She was given half pay after the first month of absence which she felt was unfair. Another

employee, Craig Lewarne had 5 weeks off sick on full pay in May 2014.

33) There was an office team building outing to Stourhead on 30 September 2016. The claimant declined to go but was still expected to be in the office and work.

34) In April 2017 the claimant did not get a pay rise but this was because she was already paid above the market rates. She was given a bonus of £1,068 in December 2017 and was told at that time that her input was highly valued and the respondent was looking forward to the year ahead.

35) On 16 June 2016 the claimant emailed Kevin Davies saying that there were a few things in relation to her role that they needed to discuss but she got no reply. This was shorty after it was discovered that the claimant had opened a Santander bank statement when she should not have done so. The claimant did not chase Kevin Davies for a meeting.

36) Sue Reed's hours were not fixed and were increased when there was sufficient demand and resource to pay her. The directors agreed their holiday between themselves. The clamant believed that she was kept in the dark about Sue Reed's and Kevin Davies' holiday entitlement and she raised this on 11 July 2017. However, the records were given to the claimant by the respondent when she requested them. There was nothing untoward in this.

37) Historically the claimant had prepared contracts for new starters but in or around July 2017 it was decided that Kevin Davies would do this with Sue Reed. It was not a significant matter as it was a small company. In the period from then to the termination of the claimant's employment there was only one new starter. There was no suggestion that the claimant was short of work and this change made minimal difference to her.

38) On 20 March 2018 the claimant wrote to the respondent and said that it had pained her that her relationship with management was strained and she had concerns about her future in the company. She proposed terms for a settlement agreement. There was then a meeting, the content of which is agreed to be covered by the protection in s. 111A ERA. On 19 April 2018 the respondent wrote to the claimant saying '*This is to confirm that we do not accept your settlement proposal nor are we making you redundant*' and reminding her that she had the right to raise a grievance.

39) The claimant was off work with ill health at the beginning of May 2018 and returned to work on the 9th May. Kevin Davies did not speak to the claimant when she arrived at the office as he was busy, but he did have normal work-related conversations with her that day. The claimant would have reported back in to Bob Davies after her absence.

40) The next day, 10 May 2018 the claimant was asked to attend a conference call with CMAP who were pitching to supply some software that the claimant and others could potentially use. The claimant was not aware of the CMAP meeting until she arrived at the office that morning. The CMAP representative said they would start off with the finance, which was contrary to the agenda presented

prior to the meeting but was the area that concerned the claimant. Once this had been completed she was told by the CMAP representative that she could leave the call if she wished but "*do not feel as if you have to leave*".

41) The claimant raised a lengthy written grievance on 16th May 2018 covering substantially the same matters raised in this claim. A grievance meeting was held on 6 June 2018. The claimant was not allowed to bring a friend to this meeting but she was told that she could be accompanied by a fellow worker or a trade union representative which was in accordance Acas guidance. The meeting lasted at least two hours and was attended by Rob Nursey and Kevin Davies as well as the claimant. The directors addressed matters under three broad headings and then gave the claimant the opportunity to address other matters.

42) Rob Nursey told the claimant that he had written up his notes from the meeting on the 8 June 2018 and that Kevin Davies needed to read through them and make any amendments.

43) The claimant was on annual leave from 13 to 22 June 2018 and returned to work on 27 June 2018.

44) Rob Nursey was also going on holiday during this time. He asked the claimant if she wanted the notes before she left for her holiday but she said that she was happy to wait until she got back.

45) He therefore sent the notes to the claimant on 28 June 2018. The claimant reviewed those notes and on 5 July 2018 emailed the respondent saying that she did not agree the notes and attached copies of her own notes. She raised the delay in dealing with the grievance in that email.

46) The respondent was then required to cross reference both sets of notes which was a time-consuming process. Kevin Davies responded to the claimant's email on 6 July 2018 when he said that the respondent would issue a formal reply to the grievance as soon as possible.

47) By 10th July 2018 the claimant still had not received a response from the respondent to her grievance. She felt to that this was the final straw and that her contract of employment had been broken irrevocably. She resigned by letter with immediate effect that day setting out that she believed that the respondent's actions had entitled her to resign without notice.

48) After the claimant's resignation the respondent sent her a comprehensive response to the grievance on 17 July 2018.

49) I accepted that the claimant felt undervalued by the respondent from about 2015 onwards. I also accepted that although the respondent valued the claimant as an employee, from 2016 they found her at times to be easily upset and offended such that Rob Nursey felt that talking to her "began to feel like walking on eggshells".

Submissions of the parties

6. Both counsel relied on comprehensive written submissions for which I was grateful. There was no issue between them as to the law. The essence of the respondent's case on the facts was that there was reasonable and proper cause for the instructions given to the claimant and no breach of contract. By contrast, the claimant's position was that the was a conspiracy to push her out and undermine her and that there had been a repudiatory breach of contract.

The law

7. Section 95(1)(c) of the ERA provides that an employee is taken to be dismissed by his employer if *"the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct".*

8. Conduct giving rise to a constructive dismissal must involve a fundamental breach (or breaches) of contract by the employer; the breach(es) must be an effective cause of the employee's resignation; and the employee must not, by his or her conduct, have affirmed the contract before resigning.

9. If a fundamental breach is established the next issue is whether the breach was an effective cause of the resignation (**Nottingham County Council v Miekle and Abbey Cars Ltd v Ford EAT 0472/07**).

10. In this case the claimant relies at least in part on what she says was a breach of the implied term that the employer should not, without reasonable and proper cause, conduct itself in a way that is calculated or likely to destroy or seriously damage the relationship of mutual trust and confidence that exists between an employee and her employer. Both limbs of that test are important. Conduct which destroys trust and confidence is not in breach of contract if there is reasonable and proper cause.

11. It is irrelevant that the employer does not intend to damage the relationship, provided that the effect of the employer's conduct is such that the employee cannot be expected to put up with it **(Woods v W M Car Services (Peterborough) Limited) [1981] ICR 666)**. It is the impact of the employer's behaviour assessed objectively on the employee that is significant - not the intention of the employer **(Malik v BCCI [1997] IRLR 462).** It is not however enough to show that the employer has behaved unreasonably although "*reasonableness is one of the tools in the employment tribunal's factual analysis kit for deciding whether there has been a fundamental breach"*: **Buckland v Bournemouth University Higher Education Corporation [2010] IRLR 445.**

12. The breach of the implied obligation of trust and confidence may consist of a series of actions on the part of the employer which cumulatively amount to a breach of the term, though each individual incident may not do so. In **Omilaju v Waltham Forest LBC [2005] ICR 481** the Court of Appeal said:

"Although the final straw may be relatively insignificant, it must not be

utterly trivial: …

… what is the necessary quality of a final straw if it is to be successfully relied on by the employee as a repudiation of the contract? …The quality that the final straw must have is that it should be an act in a series whose cumulative effect is to amount to a breach of the implied term… Its essential quality is that, when taken in conjunction with the earlier acts on which the employee relies, it amounts to a breach of the implied term of trust and confidence …If the final straw is not capable of contributing to a series of earlier acts which cumulatively amount to a breach of the implied term of trust and confidence, there is no need to examine the earlier history to see whether the alleged final straw does in fact have that effect.

Moreover, an entirely innocuous act on the part of the employer cannot be a final straw, even if the employee genuinely but mistakenly interprets the act as hurtful and destructive of his trust and confidence in his employer. The test of whether the employee's trust and confidence has been undermined is objective."

13. A breach of the implied term of trust and confidence is necessarily a repudiatory breach of contract **(Morrow v Safeway Stores [2002] IRLR 9).**

14. In **Kaur v Leeds Teaching Hospitals NHS Trust 2018 EWCA Civ 978** the Court of Appeal listed 5 questions that it should be sufficient ask in order to determine whether an employee has been constructively dismissed;

    a. what was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, his or her resignation?

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

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

    d. If not, was it nevertheless a part of a course of conduct comprising several acts and omissions which, viewed together, amounted to a (repudiatory) breach of the implied term of trust and confidence? (If it was, there is no need for any separate consideration of the previous possible affirmation).

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

11 Subsequently in **Williams v Governors of Alderman Davies Church in Wales Primary School [2020] I.R.L.R. 589** the EAT proposed some possible permutations of this guidance at §§32 and 33 and at §33 said:

"…. what if the answer to question four is "no"? That is the scenario with which this ground of appeal in the present case is concerned. The answer is, that if the

most recent conduct was not capable of contributing something to a breach of the Malik term[1]*, then the Tribunal may need to go on to consider whether the earlier conduct itself entailed a breach of the Malik term, has not since been affirmed, and contributed to the decision to resign."*

12 Mr Moher relied on the decision of **Hilton v Shiner Ltd [2001] IRLR 727** in support of his argument that changing an employee's contractual duties, whether by removing some duties or requiring the employee to perform new ones, is likely to constitute a repudiatory breach. However, it is of note that this is a matter of degree – see § 28

"Requiring an employee to cease doing what has been his principal job, and to require him to take up a new role, in circumstances in which there had been no allegation of dishonesty against the employee would in our view amount to a variation of the employee's contract. We do not think that such a variation could be imposed upon the employee without his consent. To attempt to do so would, we think, almost always be capable of being a repudiatory breach. Whether it reached the materiality sufficient for the breach to be repudiatory has to be judged objectively, by reference to its impact upon the employee, as the cases to which we have referred show. Once the breach is of sufficient materiality to be regarded as repudiatory, the motive that underlay it becomes irrelevant".

13 It is an implied term that the employer will give an employee a reasonable opportunity to obtain redress in respect of a grievance; a breach of this term will constitute a repudiatory breach (***WA Goold (Pearmak) Ltd v McConnell [1995] IRLR 516*****).**

14 In relation to affirmation the EAT gave an overview of the general principles in **WE Cox Turner (International) Ltd –v Crook [1981] ICR 823**: *"Mere delay by itself (unaccompanied by any express or implied affirmation of the contract) does not constitute affirmation of the contract; but if it is prolonged may be evidence of an implied affirmation: Alan v Robles 1969 1 WLR 1193. Affirmation of the contract can be implied. Thus, if the innocent party calls on the guilty party for further performance of the contract, he will normally be taken to affirm the contract since his conduct is only consistent with the continued existence of the contractual obligation."*

15 Having found that there was a dismissal within the terms of section 95(1)(c) the tribunal has to consider whether that dismissal was fair or unfair within s.98 of the ERA. In these circumstances it is for the employer to show what was the reason for the dismissal and whether that reason was a potentially fair reason for dismissal falling within section 98(1).

Conclusions

15. The first matter for me to address was whether the respondent committed a repudiatory breach of the claimant's contract of employment. The claimant

[1] Adopting an expression used by Underhill LJ in **Kaur** to mean the implied term of trust and confidence – see § 38.

indicated in her evidence that it was not until 2015 that matters began that she was really concerned about, but she did not abandon events that preceded that time. Accordingly, I addressed each issue individually. I then stood back and considered the cumulative effect of all matters found proved. I bore in mind at all time that I was to apply an objective test.

A - March 2012 not offering the claimant a full-time position.

16. The claimant was employed in a part-time role. She did a different job to Libby Reynolds who was made full time in March 2012. It was not a breach of the implied term of trust and confidence (referred to herein as 'the Malik term') not to offer the claimant a full-time role. There was no evidence of a business need for a full time book-keeper/administrator and company secretary and no obligation on the respondent to take the claimant on full-time when Ms Reynolds' hours were increased.

B - ***Refusing the claimant a pay rise in July 2013.***

17. The claimant was in fact given a pay rise in August 2013. However, there was no obligation on the respondent to give the claimant a pay rise in any given year and she was one of three employees who was given a pay rise in 2013.

18. The claimant's real concern was that the respondent indicated that it would not give her a pay rise unless she reverted to three days a week rather than working her 22.5 contractual hours over two days. The respondent preferred the claimant to work over three days for sound business reasons and there was nothing untoward about them seeking to incentivise her to return to her original working pattern of three days a week by offering her a pay rise to do so.

C - Withholding relevant information from the claimant in September 2014.

19. The information being referred to in this allegation was the news that Kevin Davies was thinking of becoming a director of the respondent, a matter that prompted him to ask the claimant for some financial information on 24 September 2014 (to undertake due diligence) which the claimant refused until she had permission from the directors to release it.

20. Kevin Davies did not become a director until September 2015. Objectively viewed, I saw no reason why the claimant was required to be told that he was thinking about becoming a director in 2014. In the event, the claimant quite properly held off giving Kevin Davies the confidential information he wanted to see until she had express permission to release it. It might have been better if Kevin Davies had sought this permission before asking the claimant but the way events transpired was perfectly untoward. I concluded that the claimant was oversensitive about this issue and read too much into it.

D - On or about March 2015 Bob Davies asking the claimant to take on additional responsibilities and when the claimant proposed a pay rise, Bob Davies allegedly behaving **in an overbearing manner saying**

21. On 24 March 2015 the claimant was asked to take on the task of chasing staff to

get jobs completed and project work issued. He said "*Give them a hard time*" and "*We know you are capable of doing it*". The claimant thought this was flippant, insulting and negative t but it was intended to be motivational.

22. Objectively construed these were not flippant, insulting or negative comments but were innocuous – the claimant was essentially being told that the role of chasing staff to get jobs completed and project work issued was one that she was well capable of taking on and was being motivated to do it.

23. The meeting was an annual review which was a time for discussing all matters relating to the claimant's work, not just pay so there as nothing untoward in this being brought up.

24. The claimant had asked for a pay rise to £30,000 per year which on a pro rata basis was £50,000 per year. This was a very high sum and unrealistic (she was on the full time equivalent of £34,500). The claimant was given no pay rise that year and when she raised the subject on 25 March 2015 having also raised it the previous day, Bob Davies became angry and said "*Yes, but you will not be getting it".* He then slammed his fists down on the table and said "*It's finished, just get on with your job."*

25. I think it is regrettable that Bob Davies lost his temper with the claimant. I understand why he did – her pay demand was excessive but this did not excuse his conduct and objectively construed his behaviour was a breach of the Malik term in my view.

E - In April 2015 being asked repeatedly by Robert Nursey for password information/being unjustly directed to disclose personal password information*.*

26. The claimant used a PC belonging to the respondent when at work to undertake her duties. In my view it was a reasonable management instruction to ask her to supply her passwords, whatever the reason they were needed. Moreover, I concluded that they were needed for legitimate business reasons including having access to the claimant's PC when she was not at work and because Sage software was installed only on that device.

27. This was not a breach of any term of the contract on the part of the respondent.

F - Between July and November 2015, Kevin Davies challenging the claimant about how staff were to take their remaining holiday entitlement and how this was to be managed/the company withdrawing a previously enjoyed flexibility on the carryover of annual leave*.*

28. There was no breach of contract on the part of the respondent in relation to this issue. Tightening up on the carrying over of holiday to align with that provided for the contracts of employment was perfectly permissible despite the flexibility previously enjoyed.

29. It was also proper for the respondent to want to understand how to cover for the

claimant was to be arranged when she was off work especially as she was to be taking a three-week holiday in December 2015.

G - *On or about the 5th November 2015 the respondent allegedly unfairly blaming the claimant for an error in Bob Davies' salary.*

30. The claimant was not blamed for any error in Bob Davies salary. There was no breach of contract. The respondent issued a reasonable management instruction to rectify some pay discrepancies. The claimant asked for clarification which was given and she then made the adjustment. This was all perfectly regular.

H - *In November to December 2015 by Kevin Davies requesting passwords and access codes for the Sage accounting and payroll software.*

31. This was a reasonable management instruction and not a breach of contract.

I - On the 14th January 2016 Bob Davies sending the claimant an allegedly rude and aggressive email.

32. This email from Bob Davies in which he responded to a question from the claimant about an invoice was rude. He simply said "NO" in capital letters. Objectively construed, this just falls short of being a breach of the Malik term in my view. It was rude, but not a breach of contract. All rude behaviour on the part of employers is not a breach if the implied term. I will however, weigh this issue into the balance when I consider the cumulative effect of the respondent's behaviour.

J - In January 2016 the respondent asking the claimant to coordinate the Client Contract Information as an additional responsibility.

33. This was a reasonable management instruction. The claimant had not done this before but it was appropriate for her role as a bookkeeper and administrator.

K - On or about the 31s March 2016 the respondent without consultation informing the claimant that it was outsourcing the payroll and pension functions, thus reducing the claimant's responsibilities.

34. Payroll had been a responsibility of the claimant. It was a task that occupied her for about a half a day a month. She had not previously dealt with pensions but auto-enrolment was looming. I agreed with Mr Moher that removing responsibilities from an employee could amount to a breach of contract. However, it was a legitimate business decision to outsource, it was a relatively small part of the claimant's role and the claimant was busy at work and not at any time, whether before or after this change, underutilised. Accordingly, I was firmly of the view that the outsourcing of these functions to a third party was not a breach of any term of the contract.

35. Moreover, I did not agree that there was a lack of consultation as the claimant was told about this issue at a meeting on 4 February 2016.

L - In or about April 2016 at the claimant's annual review, the respondent failed to give the claimant a pay rise and told her that Libby and Anna had complained that she was really rude without providing her with any more

information.

36. The failure to give the claimant a pay rise was not a breach of contract. She had no entitled to one and was paid above market rates for her role.

37. However, I consider that it was unfair to have raised the issue of the claimant's alleged rudeness to two of her colleagues with her without giving her any details. The two women did not wish to make a formal complaint so in the circumstances it would have been better not to have said anything as the claimant had no opportunity to defend herself. I considered that it was unfair, upsetting for the claimant and a breach of the Malik term to raise this issue without giving the claimant any details so she could understand what was being said against her.

M - In or about the 21st April 2016, Kevin Davies being unjustifiably secretive in providing the claimant with information relating to salaries; exemplified by his taking seven days to provide the claimant with the salary information that she sought.

38. This was not a breach of contract. It was perfectly proper for Kevin Davies to provide the claimant with the information as he did rather than give her access to the source salary information.

39. Further, although the delay of seven days might have been annoying to the claimant, that was because Kevin Davies was busy and for no other reason.

N - In or about May 2016 the claimant not being a signatory for the Santander bank account.

40. This was not a breach of contract. The claimant did not need to be a signatory to this account as it was for payroll and pension use only.

O - Kevin Davies alleged failure to reply to the claimant's request to discuss her role on 16 June 2016.

41. It was discourteous for Kevin Davies not reply to this email from the claimant, but objectively construed, the failure to reply was not so serious in itself amount to a breach of the Malik term. Again, I will weigh this matter into the balance when I assess the cumulative effect of the respondent's conduct in due course.

P - In or about the 21st July 2016, the respondent informing the respondent that the last two days of sick leave would be paid at half pay

42. The claimant was given her contractual sick pay entitlement and this cannot be a breach of contract in my view even though there was an occasion in 2014 when another employee was given 5 weeks sick pay rather than one month. Each case turns on its own facts and I could detect nothing untoward about this issue.

Q - On the 30th September 2016, when the claimant chose not to attend a team building event, the respondent requiring the claimant to attend work.

43. I did not agree that this was a breach of contract in any shape or form. It was not a holiday. It was a team building day that the claimant should have attended especially as she felt that relations between her and the respondent were poor. It would have been a good opportunity for relations to have been worked on. I did not accept the claimant's evidence that other employees were allowed to take holiday if they did not attend.

R - In or about the 7th April 2017 the respondent not giving the claimant a pay rise.

44. This was not a breach of contract. There was no obligation on the respondent to give her a pay rise and she was already paid above the market rate.

S - On or about the 1st June 2017, the claimant says that she was refused access to the Santander bank account on the basis that it that "purely for salaries and that she did not need access"

45. This was not a breach of contract. The claimant was no longer responsible for payroll and she did not need access to this account. Indeed, she agreed at the grievance hearing that she did not need to know individual salaries to do her job.

T - On or about the 11th July 2017 the claimant was kept in the dark about Sue Reed's holiday entitlement and Kevin Davies' holiday entitlement.

46. The claimant was not deliberately kept on the dark about holiday entitlements Sue Reed's hours were not fixed and were increased when there was sufficient demand and resource to pay her. The directors agreed their holiday between themselves. The holiday records were given to the claimant by the respondent when she requested them. There was nothing untoward in this and it was not a breach of contract.

U - In or about September 2017 the respondent removing the responsibility of dealing with new employee contracts and starting documentation from the claimant.

47. This was a very small part of the claimant's role and it was legitimate for Kevin Davies to take over this aspect of her job. The claimant was not short of work and a slight rejigging of activities in this manner was not a breach of contract.

V - Between 20th March – 19th April 2018 the respondent failed to engage in meaningful negotiations*.*

48. It is agreed between the parties that the contents of the meeting are covered by the protection of s. 11A ERA. The facts that the parties have agreed are not protected are that on 20 March 2018 the claimant wrote to the respondent saying that it pained her that her relationship with management was strained and she had concerns about her future in the company. She proposed terms for a settlement agreement. On 19 April 2018 the respondent wrote to the claimant saying '*This is*

to confirm that we do not accept your settlement proposal nor are we making you redundant' and reminding her that she had the right to raise a grievance.

49. Mr Moher argues that the respondent could have done more to make the claimant feel that it wanted her to stay in employment and this is true, but it was not a breach of contract to write as the respondent did. It was a perfectly proper letter and there is no basis for a finding of repudiatory conduct.

W - On or about 9th May 2018, on her return to work from a period of sickness, Kevin Davies behaving in a hostile manner towards the claimant.

50. It was not a breach of contract for Kevin Davies not to speak to the claimant on her return to the office from sick leave that day. She reported back to Rob Davies regarding her sickness absence and Kevin Davies did not engage with the claimant as he as busy. Moreover, Kevin Davies had ordinary interactions with the claimant that days regarding work matters. It was not a situation whereby he was deliberately ignoring her. There was no breach of contract.

X - On the 10th May 2018 the respondent suggesting that the claimant would leave a conference call.

51. It was a third party who made this suggestion after the part of the meeting that related to the claimant had concluded although the claimant was not required to leave. This was untoward and not a breach of contract.

Y - That the respondent failed to deal with her grievance in a proper manner which breached the implied term of mutual trust and confidence; and/or ii) the implied right to have a reasonable opportunity to obtain redress in respect of her grievance.

52. The respondent was addressing the grievance. There was no breach of the claimant's right to seek redress. The issue is whether in dealing with the grievance as they did, the respondent breached the contract of employment.

53. The claimant was not allowed to bring a friend to the grievance meeting but she was told that she could be accompanied by a fellow worker or a trade union representative which is standard. This was the guidance in the Acas code and it was not a breach of contract for the respondent to have followed that code. I think it would have been nice if the respondent had allowed the claimant to bring a friend to put her at ease, but it was not a breach of contract not to permit her to do so.

54. Mr Moher argued that the respondent only wanted to address a limited number of the complaints. I did not accept that. It is right that they summarised matters under three headings but the claimant was permitted to raise any issue she wished and it was a relatively lengthy meeting.

55. Dealing next with the issue of delay. I accepted the respondent's evidence that the claimant said that she was happy to wait until she got back from holiday to see the notes. The claimant returned to work on 27 June 2018 and was given the notes on 28 June 2018.

56. The claimant reviewed those notes and on 5 July 2018 emailed the respondent saying that she did not agree the notes and attached copies of her own notes. The respondent was then required to cross reference both sets of notes which was a time-consuming process. Kevin Davies responded to the claimant's email on 6 July 2018 when he said that the respondent would issue a formal reply to the grievance as soon as possible.

57. There were a large number of issues for the respondent as lay people to address and research required to be done. I did not consider that the time taken from the issue of the grievance until 10 July 2018 when the claimant resigned was such as to breach the contract in all the circumstances.

58. It was argued by Mr Moher that the whole process should be seen through the prism of the email of 5 November 2015 which evidenced an intention to get rid of the claimant. As such, it was argued that the grievance process was undertaken in bad faith. I did not accept this. The claimant had not been the easiest employee as at times she was easily upset and offended. However, she was good at her job and the respondent had no reason to want to get rid of her. I rejected the claimant's submission on this point.

59. I also considered whether there was an anticipatory breach of contract and concluded that there was no evidence to justify such a conclusion.

60. Overall, I considered that the grievance could have been done better. The claimant could have been allowed to bring a friend, it could have been recorded so there was a definitive note and it could have been undertaken more quickly. However, the way it was done was not improper and not a breach of any term of the contract objectively construed.

Cumulative effect

61. Having made findings on each act individually, I considered whether there was conduct that when viewed together amounted to a breach of the Malik term.

62. The four matters that concerned me in terms of the respondent's conduct were contained in allegations D, I. L (insofar as it related to the claimant's alleged rudeness) and O:

- D - On or about March 2015 Bob Davies saying "Yes, but you will not be getting it", and slamming his fists down on the table saying "It's finished, just get on with your job."
- I - On the 14th January 2016 Bob Davies sending the claimant an allegedly rude and aggressive email saying "NO".
- L - In or about April 2016 at the claimant's annual review, the respondent told the claimant that Libby and Anna had complained that she was really rude without providing her with any more information.
- O - Kevin Davies failure to reply to the claimant's request to discuss her role on 16 June 2016.

63. The other matters were in my view not breaches of contract even when viewed as a whole. However, I considered that the four matters outlined above were such as to constitute a repudiatory breach when viewed cumulatively. They were incidents of rudeness or inappropriate behaviour that when taken together were a breach of the Malik term. I have already found that Bob Davies behaviour at the meeting in March 2015 and the raising of alleged rude behaviour with the claimant in April 2016 without providing her any specifics were themselves breaches of that term.

64. This course of conduct lasted from March 2015 to June 2016. The claimant resigned on 10 July 2018.

65. I then turned to the questions in **Kau**r. My conclusions are in italics:

    a. what was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, his or her resignation?

       This was the matters relating to the grievance.

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

       No.

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

       No.

    d. If not, was it nevertheless a part of a course of conduct comprising several acts and omissions which, viewed together, amounted to a (repudiatory) breach of the implied term of trust and confidence? (If it was, there is no need for any separate consideration of the previous possible affirmation).

       No.

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

       Not applicable.

16 In these circumstances, I went to to consider the guidance in **Williams** at §33 (with emphasis):

"…. what if the answer to question four [in Kaur]is "no"? That is the scenario with which this ground of appeal in the present case is concerned. The answer is, that if the most recent conduct was not capable of contributing something to a breach of the Malik term, then the Tribunal may need to go on to consider

whether the earlier conduct itself entailed a breach of the Malik term, has not since been affirmed, and contributed to the decision to resign."

66. The issue therefore was whether the contract was affirmed after the impugned conduct from March 2015 to June 2016.

67. After this time the claimant remained in work for over two years. During this period, she sought to leave on severance terms in March 2018 but the respondent rejected her proposals in April 2018. She then raised a grievance in May 2018 which was unresolved at the date of the resignation.

68. My conclusion was that from March 2018 to July 2018 the claimant was not behaving as if she was affirming the contract. However, her difficulty is the delay from June 2016 to March 2018, a period of 15 or 16 months. It is clear in my view that in attending at work and delaying from June 2016 to March 2018 before seeking a protected conversation and then raising a grievance, the claimant affirmed the contract.

69. Accordingly, the claimant was not constructively dismissed and her claims fail.

_____
Employment Judge Chudleigh

Date: 3 March 2021

Sent to the parties on:

……18/3/21

For the Tribunal:

…….