EMPLOYMENT TRIBUNALS

Claimant: Ms D Cordon

Respondent: Isa Lea Limited

Heard vis Cloud Video Platform **On:** 6, 7, 8 and 9 April 2021

Before: Employment Judge Brewer

Representation

Claimant: In person
Respondent: Ms C Meenan, Counsel

JUDGMENT

1. The claim for constructive unfair dismissal fails and is dismissed
2. The claim for wrongful dismissal fails and is dismissed
3. The claim for unpaid wages fails and is dismissed

REASONS

Introduction

1. This case came before me for a 4 day hearing. The claimant is claiming constructive dismissal, wrongful dismissal and that she is owed two hours' pay. The claimant represented herself, although she had previously received legal advice about her claim. The respondent was represented by Ms Meenan of Counsel. The claimant gave evidence and did not call any other witnesses. For the respondent, I heard evidence from Matthew Kerry, Senior Manager in Wales, Julie Goodacre, Contract Manager, Pauline Zielinska, Accounts Manager and John White, Senior Manager in Nottingham.

2. I had before me written statements from all of the witnesses and an agreed bundle of relevant documents running to 267 pages. At the end of the

evidence, I heard submissions from both parties. I also received written submissions from Ms Meenan which I have taken into account.

3. At the outset of the hearing, I explained to the claimant what was meant by a 'last straw' constructive dismissal and I also explained the procedure we would be adopting for the hearing. Finally, I explained to her the dual purpose of cross-examination and that it was important that she challenged all aspects of the respondent's evidence with which she did not agree and, as best she could, put her case positively to the respondent's witnesses.

Issues

4. At a preliminary hearing before Judge Butler held on 21 September 2020, the following were agreed as the issues in the case:

    a. Was the claimant dismissed i.e.

        i. Did the respondent breach the implied term of trust and confidence;

        ii. Did the claimant affirm the contract before resigning;

        iii. If not, did the claimant resign in response to the respondent's conduct;

    b. If the claimant was dismissed, what was the principal reason for the dismissal and was such dismissal fair or unfair?

5. The claimant relies on the following as conduct which, taken together, breached the implied term of trust and confidence:

    a. Being told to "fuck off" by a senior manager;

    b. The claimant's grievance about the above being effectively dismissed because the manager apologised;

    c. Being subjected to disciplinary action by being given a final written warning without a hearing after the claimant left the premises following being sworn at;

    d. The claimant's appeal against the above disciplinary action not being dealt with between the date it was submitted, 8 October 2019 until her resignation on 14 February 2020;

    e. Being subject to an excessive workload with the respondent ignoring the claimant's requests for help; and

    f. Being bullied by Paulina Zielinska.

Law

6. The claimant claimed that she had been constructively dismissed. She resigned following, she says, a series of acts, faults and omissions by the respondent which, she says, amounted to a breach in the implied term of trust and confidence. The relevant law is as follows.

7. The guidance given for deciding if there has been a breach of the implied term of trust and confidence is set out in **Malik v BCCI; Mahmud v BCCI** 1997 1 IRLR 462 where Lord Steyn said that an employer shall not:

> *"…without reasonable and proper cause, conduct itself in a manner calculated [or] likely to destroy or seriously damage the relationship of confidence and trust between employer and employee."*

8. Section 95(1)(c) of the Employment Rights Act 1996 (ERA) states that there is a dismissal when the employee terminates the contract, with or without notice, in circumstances such that he or she is entitled to terminate it without notice by reason of the employer's conduct. That is commonly called constructive dismissal.

9. In the leading case in this area, **Western Excavating (ECC) Ltd v Sharp** 1978 ICR 221, CA, the Court of Appeal ruled that, for an employer's conduct to give rise to a constructive dismissal, it must involve a repudiatory breach of contract. As Lord Denning MR put it:

> *'If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer's conduct. He is constructively dismissed'*

10. In order to successfully claim constructive dismissal, the employee must establish that:

    a. there was a fundamental breach of contract on the part of the employer;

    b. the employer's breach caused the employee to resign;

    c. the employee did not delay too long before resigning, thus affirming the contract and losing the right to claim constructive dismissal.

11. I note that a constructive dismissal is not necessarily an unfair one — **Savoia v Chiltern Herb Farms Ltd 1982** IRLR 166, CA.

12. A course of conduct can cumulatively amount to a fundamental breach of contract entitling an employee to resign and claim constructive dismissal

following a 'last straw' incident even though the last straw by itself does not amount to a breach of contract — **Lewis v Motorworld Garages Ltd** 1986 ICR 157, CA. However, an employee is not justified in leaving employment and claiming constructive dismissal merely because the employer has acted unreasonably. This was confirmed in **Bournemouth University Higher Education Corporation v Buckland** 2010 ICR 908, CA, where the Court upheld the decision of the EAT that the question of whether the employer's conduct fell within the range of reasonable responses is not relevant when determining whether there has been a constructive dismissal.

13. There is no need for there to be 'proximity in time or in nature' between the last straw and the previous act of the employer — **Logan v Customs and Excise Commissioners** 2004 ICR 1, CA.

14. In **Omilaju v Waltham Forest London Borough Council** 2005 ICR 481, CA, the Court of Appeal explained that the act constituting the last straw does not have to be of the same character as the earlier acts, nor need it constitute unreasonable or blameworthy conduct, although in most cases it will do so. But the last straw must contribute, however slightly, to the breach of the implied term of trust and confidence. An entirely innocuous act on the part of the employer cannot be a final straw, even if the employee genuinely, but mistakenly, interprets the act as hurtful and destructive of his or her trust and confidence in the employer. The test of whether the employee's trust and confidence has been undermined is objective. And while it is not a prerequisite of a last straw case that the employer's act should be unreasonable, it will be an unusual case where conduct which is perfectly reasonable and justifiable satisfies the last straw test. In that context, in **Chadwick v Sainsbury's Supermarkets Ltd** EAT 0052/18 the EAT rejected a tribunal's finding that a threat of disciplinary action was 'an entirely innocuous act' that could not constitute a last straw.

15. In terms of causation, that is the reason for the resignation, a tribunal must determine whether the employer's repudiatory breach was 'an' effective cause of the resignation. However, the breach need not be 'the' effective cause — **Wright v North Ayrshire Council** 2014 ICR 77, EAT. As Mr Justice Elias, then President of the EAT, stated in **Abbycars (West Horndon) Ltd v Ford** EAT 0472/07,

> *"the crucial question is whether the repudiatory breach played a part in the dismissal', and even if the employee leaves for 'a whole host of reasons', he or she can claim constructive dismissal 'if the repudiatory breach is one of the factors relied upon"*

16. If the employee waits too long after the employer's breach of contract before resigning, he or she may be taken to have affirmed the contract resulting in the loss of the right to claim constructive dismissal. In the words of Lord Denning MR in **Western Excavating (ECC) Ltd v Sharp** 1978 ICR 221, CA, the employee

> *"must make up his mind soon after the conduct of which he complains: for, if he continues for any length of time without leaving, he will lose his right to treat himself as discharged"*

17. This was emphasised again by the Court of Appeal in **Bournemouth University Higher Education Corporation v Buckland** 2010 ICR 908, CA, although Lord Justice Jacob did point out that, given the pressure on the employee in these circumstances, the law looks very carefully at the facts before deciding whether there really has been an affirmation. An employee's absence from work during the time he or she was alleged to have affirmed the contract may be a pointer against a genuine affirmation.

18. The Court of Appeal in **Kaur v Leeds Teaching Hospitals NHS Trust** 2019 ICR 1, CA, held that, in last straw cases, if the last straw incident is part of a course of conduct that cumulatively amounts to a breach of the implied term of trust and confidence, it does not matter that the employee had affirmed the contract by continuing to work after previous incidents which formed part of the same course of conduct. The effect of the last straw is to revive the employee's right to resign.

19. The Court of Appeal in **Kaur** (above) offered guidance to tribunals, listing the questions that it will normally be sufficient to ask in order to decide whether an employee was 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 cumulatively, amounted to a repudiatory breach of trust and confidence?

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

20. In relation to the two hours pay, this is put as either an unlawful deduction or as a breach of contract. For reasons which follow I need say no more about that.

21. Finally, in relation to wrongful dismissal, this is a claim for breach of contract in relation to notice pay. The burden of proof is on the claimant to show that the respondent breached her contract by not paying her notice pay.

Findings of fact

22. I make the following findings of fact (numbers in square brackets are references to pages in the hearing bundle).

23. The respondent is a laundry company which undertakes contract cleaning for large and small organisations. At the relevant time the respondent operated from two facilities, one in Wales and the other in Nottingham. The contracts can be for laundry services to be delivered over periods to suit the customer: daily, weekly, monthly, twice monthly etc. The respondent employed around 30 staff in Nottingham and around 11 in Wales. The production line in Nottingham has capacity to throughput 35,000 garments each week. The actual throughput varies, but Mr White's evidence about this, which was not challenged and which I accept, was that the average throughput was around 12,000 to 14,000 garments each week, and thus at all times there was spare capacity in Nottingham.

24. The claimant commenced employment with the respondent as a Laundry Operative on 4 May 2010, having worked for them previously between 1999 and April 2009. The claimant was employed in Nottingham.

25. In March 2015 the claimant was promoted to the position of Production Supervisor, in which position she remained until the termination of her employment. The claimant's Terms of Employment are at [36 - 43].

26. The claimant was a valued member of staff and at the time the incidents below started had worked continuously for the respondent without apparent incident for around 9 years. She had known the senior managers for over 20 years.

27. Mr Kerry is the senior manager in the respondent's Welsh facility. Mr White has the equivalent role in Nottingham. The claimant's immediate line manager was her sister, Ms Kelly Cordon. In turn Mr White was her line manager.

28. Part of Mr Kerry's role is responsibility for the respondent's IT infrastructure, and part of that role is to provide training to staff when there have been what he described as "*significant updates*". One such update was being rolled out to the Nottingham facility in late September/early October 2019. Mr Kerry thus planned to attend Nottingham to provide training on the update. That training usually takes around 30 minutes. Mr Kerry had informed Mr White that this training would be taking place in the week commencing 30 September 2019, but the exact date would not be known until it was confirmed that the update had been installed. On 3 October 2019 the update was installed and Mr Kerry told Mr White that he was driving to Nottingham on the evening of 3 October 2019 and would deliver the short IT training session to the management team on the morning of 4 October 2019 [60 – 61].

29. Mr Kerry attended the Nottingham facility on 4 October 2019 as planned. He asked Mr White, Ms Goodacre, Ms K Cordon, Ms Ireland (Engineer Packer) and the claimant to attend the training which was to take place on the shop floor. All those asked attended. Before the training could start, the claimant asked a number of questions about the training, such as when it was arranged, when Mr White knew about it and so on. At some point Mr Kerry swore at the claimant saying, "*fuck off*" and words to the effect that she should leave [60 - 61]. The claimant not only left the shop floor, she in fact left work entirely.

30. On the same day, 4 October 2019, Mr White sent the claimant a letter inviting her to a meeting "*with regards to you walking out of the premises…during a training meeting*" and the letter was clear that "*the meeting will be to decide whether disciplinary action is to be taken against you*" (for ease I shall refer to this meeting as the "Investigation Meeting") [63].

31. On 7 October 2019 the claimant rang to advise the respondent that she would not be coming in to work as she was off sick. The claimant spoke to Dawn Parsons. Ms Parsons shared an office with others including Ms Zielinska. Under a financial arrangement which the claimant had with the respondent, the claimant was paying to the respondent the sum of £50.00 per fortnight. The latest payment was due on 4 October 2019 but had not been paid and while the claimant was on the phone to Ms Parsons, Ms Zielinska asked Ms Parsons to remind the claimant about the unpaid £50 [103].

32. On 8 October 2019 the claimant raised a grievance. She raised three concerns. First, that Mr Kerry had spoken to her in an "*aggressive manner*"; second, that she had been upset "*because [she] couldn't cope with the work load but you still demanded me to fulfill my job*"; third, harassment by reason of the respondent posting letters at her house and by Ms Zielinska "*when ringing in to say I wouldn't be attending work*" [67].

33. On 9 October 2019 the claimant provided a fit note which stated that the claimant was unfit for work until 16 October 2019 [70].

34. On 16 October 2019 the claimant told the respondent she would be returning to work on 17 October 2019. Mr White sent a text to the claimant stating:

> *"Hi Donna, thanks for letting us know…Could you please start at 9.30 am and come and see Julie and myself before entering the factory. Thank you. John"* [72]

35. The claimant responded:

> *"No worries John. I understand I will still be paid from 07:30 as per rota? See you tomorrow…"* [72]

36. On the same day Mr White posted a letter by hand to the claimant. This letter said that the claimant's grievance was being investigated and that the claimant would still be required to attend a meeting about her leaving the premises on 4 October 2019. That meeting, the Investigation Meeting, was to take place on the claimant's return to work. The letter told the claimant she could bring a colleague to the meeting [73].

37. On 17 October the claimant attended the Investigation Meeting. She was accompanied by a colleague, Andy Edge. Mr Edge took notes of the meeting [77 – 79], as did Ms Goodacre [74 - 79].

38. On 4 November 2019 Mr White wrote to the claimant about both the grievance and her walking out on 4 October 2019 [82]. The letter said:

> *"I have spoken with Mr Matthew Kerry and he has stated his apology to you and sent the attached letter…*
> *We have decided that…no further disciplinary action will not be taken against you…(*sic*)…we deem your grievance closed…this will stay on your employment record for a period of 12 months…"*

39. The letter of apology [83] from Mr Kerry states that he had apologised to Mr White for the swearing and that:

> *"It is out of character for me to [swear] and it will not happen again…and I apologise…"*

40. I have included in my quote at paragraph 37 above the obvious typographical error. During the hearing it became clear, and I accept, that what the respondent meant by the letter was that although no disciplinary action would be taken against the claimant, the correspondence about the incident would be placed on file in case the claimant did something similar in which case it would be treated as gross misconduct.

41. On 6 November 2019 the claimant sent to the respondent a letter of appeal. She said that she wished to appeal the grievance outcome (she alleged that the delayed apology was not sincere), she queried the outcome of the potential disciplinary allegations and requested to be paid for two hours owed from 17 October 2019. The claimant also pointed out that the complaints of harassment and about overwork had not been addressed [84 – 85].

42. Mr White responded on the same day [86 – 87]. He pointed out that Mr Kerry had been away for two weeks and had returned on 4 November, hence the apology that day. He also said that there had been no disciplinary action and that although the response could have been more clearly worded, Ms Zielinska did not harass the claimant. As to the workload issue, Mr White confirmed that the issue of new staff was being addressed and finally he acknowledged that two hours' pay was owed and that it would be paid. Curiously perhaps, despite those responses the letter ends with Mr White stating that:

> "*your appeal has been passed to the Managing Director for his review*".

43. I shall return to this point in the discussion below.

44. On 20 December 2019 the claimant's solicitor wrote to Mr White [94 – 96]. The letter makes a number of allegations including alleged clear breaches of employment law, breaches of the ACAS Code of Practice on Disciplinary and Grievance Procedures and breaches of "*all decent HR practice*". I do not need to say more about the content of that letter save that it ends as follows:

> *"…the Company's failure to treat our client's alleged disciplinary offence and grievance fairly, combined with the aggressive and hostile bullying to which she has been subjected, amounts to a fundamental breach of trust and confidence. We look forward to the Company confirming a date for her appeal hearing…Our client reserves all her rights in respect of claiming a constructive unfair dismissal…"*

45. The claimant's solicitor also submitted a Data Subject Access Request (DSAR) [97 – 100].

46. Mr White responded by email of the same date stating that the business was now closed until 6 January 2020, that the DASR would be responded to but that an additional 11 days may be necessary because of the 11 day closure [101].

47. The respondent says that it paid to the claimant the two hours pay owed in her December pay processed on 27 December 2029 [35L].

48. During January 2020, Mr White took a number of witness statements pending the proposed appeal hearing. Ms Zielinska provided a statement on 2 January 2020 [103], Ms Parsons on 7 January 2020 [106], Ms Kelly Cordon on 7 January 2020 [107] and Ms Ireland also on 7 January 2020 [108].

49. On 20 January 2020 Mr White emailed that claimant's solicitor asking her to provide three dates on which the claimant would be available to attend an appeal hearing [109 – 110]. Having received no response Mr White chased for a response on 23 January 2020 [109].

50. On 30 January 2020 the claimant's solicitor responded to Mr White, however, no dates for a hearing were sent. Instead, the solicitor asked Mr White a number of questions including who would hear the appeal, whether all of the complaints the solicitors set out in their letter of 20 December 2019 would be covered, stating that the statements provided did not cover all of those issues and asking if he, Mr White, was going to provide a statement [116 – 117].

51. The respondent responded to the DASR which was acknowledged by the claimant's solicitor by email on 11 February 2020 [118]. In that email the solicitor reiterates the questions that were asked in the letter of 30 January 2020 and demanded a response within the next two days.

52. On 14 February 2020 the claimant's solicitor wrote to the respondent confirming that the claimant was resigning with immediate effect [119 – 120]. The letter stated that the claimant was relying on a breach of trust and confidence. It stated that the matters which amounted to the breach were:

    a. Closing the claimant's grievance without a meeting and without hearing the claimant's version of events;

    b. Giving the claimant a final written warning without a hearing or an investigation and without giving her the right of appeal;

c. Not replying to the solicitor's questions asked on 30 January 2020;

d. Not replying to those same questions as required in the 11 February 2020 email, within two days.

53. I note of course that the matters now relied on by the claimant as constituting straws in her last straw constructive dismissal claim differ significantly from the above list.

54. On 19 February 2020 early conciliation began. It ended on 19 March 2020 [1] and the claimant's ET1 was presented on 1 May 2020.

Discussion and conclusion

55. I shall start by reminding myself of the claimant's straws in this last straw constructive dismissal case. The claimant relies on the following:

a. Being told to "fuck off" by a senior manager;

b. The claimant's grievance about the above being effectively dismissed because the manager apologised;

c. Being subjected to disciplinary action by being given a final written warning without a hearing after the claimant left the premises following being sworn at;

d. The claimant's appeal against the above disciplinary action not being dealt with between the date it was submitted, 8 October 2019 until her resignation on 14 February 2020;

e. Being subject to an excessive workload with the respondent ignoring the claimant's requests for help; and

f. Being bullied by Paulina Zielinska.

56. There is no suggestion by the claimant that any one of the above matters in and of itself amounted to a fundamental breach of contract. It is the cumulative effect of each act or omission which it is said constituted the breach of the implied term of trust and confidence. One notable absence from the above list is a definitive last straw, a matter I shall return to below.

57. I shall deal with each alleged straw in turn.

Mr Kerry swearing at the claimant

58. I start with what is in effect the simplest allegation, that the claimant was sworn at by Mr Kerry on 4 October 2019. In short, she was. A number of people heard it, including Mr White. Mr Kerry accepted it and he of course apologised.

The context is important as it does have some bearing on what transpired thereafter.

59. On the morning of 4 October 2019, a request was made of the claimant and others to attend a short, necessary training session to be given by Mr Kerry who had travelled from Wales specifically to deliver the training. In my judgment the requirement to attend the training was a reasonable management instruction.

60. Initially the claimant was asked to attend the training by Mr Kerry. She failed to attend. She was asked again by Ms Kelly Cordon, who had been sent to get her. As she arrived the claimant began asking a number of questions about when the training was arranged, who arranged the training and how long had they known about it. In cross-examination, the claimant said that she should have been told of the training in advance to allow her to arrange for her attendance. I accept that the claimant was busy at work but no doubt all of those who attended were busy. The fact is that it is an implied term of the employment contract that employees should comply with reasonable management instructions and asking an employee to attend training is a reasonable instruction.

61. Mr Kerry said in evidence that he became frustrated by the claimant's questions and accepted that he did tell the claimant to "*fuck off*". The witness evidence is clear that it was not uncommon to hear people swear on the shop floor and the claimant accepted that she too previously used this kind of language. Having said that, Mr Kerry accepted that he should not have sworn at the claimant, which he said, and I accept, was out of character. He did of course apologise, which is a matter I shall return to.

The claimant's grievance about the above being effectively dismissed because the manager apologised

62. This issue arose following the claimant having submitted a grievance about the 4 October 2019 swearing incident by her letter of grievance dated 8 October 2019 [67]. The grievance process is set out at [41]

63. The question is whether, having received a grievance about the swearing, the respondent 'dismissed' that grievance. The respondent says that the following show that it did not dismiss the grievance:

    a. The letter dated 16 October 2019 informed the claimant that "*an internal investigation is being undertaken with regards to your complaint and further information when known will be reported back to you when the investigation is complete*" [73];

    b. There was a meeting on 17 October 2019 at which the 4 October 2019 incident was discussed. The claimant disagrees with this, she says it was not discussed;

c. Mr Kerry's letter of apology dated 4 November 2019 shows that the respondent took the matter seriously although again the claimant disagrees.

64. Turning to the 17 October 2019 meeting, the notes taken by Ms Goodacre [74 – 76] cover this discussion which takes up around three-quarters of the first page of her notes. The claimant asserts that because that same discussion does not appear in the handwritten notes taken by Mr Edge, the respondent's minutes have been falsified. I do note that Mr Edge's notes at [77] start by saying "*Are investigating grievance*", so clearly this is not a verbatim note. The respondent's notes say that the claimant was asked to recall her account which she did. Given that both Mr White and Ms Goodacre were present on 4 October 2019, and so knew what had happened, and given that they both attended the 17 October 2019 meeting, there seems no good reason why they would have felt the need to fabricate the minutes as alleged. They could simply have agreed that there was no need to discuss the matter further because everyone already knew what had happened.

65. What the claimant says about the apology is that the timing of the apology shows that it was not sincere. She concluded this because it was sent to her a few hours after she had asked Mr White about the progress of her grievance [84]. In my judgment the timing of the apology does not show that it was insincere. In his evidence Mr Kerry explained that he was on holiday for the last two weeks of October 2019. He spent the first week at home and the second week abroad. In the first week he did attend to the October 2019 payroll run for which he was responsible. The claimant says that she does not accept that Mr Kerry was on leave because during the third week of October Mr White advised her to contact Mr Kerry over an issue she had, and he would not have done that had Mr Kerry been on holiday.

66. There are a couple of things to say about this. First Mr White was not cross-examined about whether he knew Mr Kerry was away. Given that Mr White and Mr Kerry are of the same seniority, given that they work at different locations and given that they do not cover each other's work, there seems to me to be no reason why Mr White would have known Mr Kerry's movements and thus no reason to infer that him telling the claimant to contact Mr Kerry is evidence that Mr Kerry was not away and that he has therefore has deliberately lied about that.

67. Second, the fact that Mr Kerry ran the October payroll is simply evidence that he did that while on holiday. It is not evidence that he was not at home on holiday when he said he was.

68. On balance I accept the respondent's evidence that there was a coincidence of timing between the claimant chasing the progress of her grievance and Mr Kerry returning from holiday and apologising. I have no doubt, having heard him give evidence, that Mr Kerry's apology was sincere.

69. What then can we conclude on this point? I agree with Ms Meenan's submissions that far from being dismissed, the claimant's grievance was

upheld, it was decided in the claimant's favour, and the outcome was that she received a written apology from a senior manager. To put it another way, the claimant's grievance about the swearing was not effectively dismissed because Mr Kerry apologised, the apology is evidence that the outcome of the grievance was that it was upheld.

Being subjected to disciplinary action by being given a final written warning without a hearing after the claimant left the premises following being sworn at

70. The next issue is that the claimant asserts that she was subjected to disciplinary action by being given a final written warning without a hearing after the claimant left the premises following being sworn at.

71. To put some context around this, on 4 October 2019, following Mr Kerry swearing at her, the claimant left the premises and did not return. She accepted that she had no permission to leave work. The claimant also accepted in her oral evidence, that by leaving work the respondent had one person short which could negatively impact the running of the business.

72. The claimant also accepted in her oral evidence that, in the above circumstances, it was fair for the respondent to look at what she had done and to at least consider whether or not to take disciplinary action. That must be correct. Every employer is entitled to consider whether conduct was inappropriate and, if so whether it warrants disciplinary action.

73. There is no question that the respondent did consider whether it should take disciplinary action.

    a. The letter of 4 October 2019 stated that the proposed meeting is to "*decide **whether** disciplinary action is to be taken against you*" (my emphasis) [63];

    b. The letter of 16 October 2019 also stated the meeting would be to "*decide **whether** disciplinary action is to be taken against you*" (my emphasis) [73]; and

    c. At the start of the meeting on 17 October 2019 Mr White said that "*this was not a disciplinary*" [74] and Mr Edge's notes say nothing to indicate that the meeting was a disciplinary [77].

74. Most importantly, the letter of 4 November 2019 made clear to the claimant that no further disciplinary action would be taken. Mr White stated that "*no further disciplinary action will…be taken against you at this point*" [83];

75. When the Claimant queried, on 6 November 2019, the *"conclusion of the original allegation of me facing disciplinary action*" [84], Mr White told her that "*We have decided after our meeting not to take further action with regards to your walking out of the business*" [86].

76. Whilst I accept that the use of the word "*further*" in the above correspondence might have suggested that some disciplinary action had previously been taken, it is clear from the entire correspondence and meeting notes that there simply was no disciplinary action taken against the claimant for leaving the workplace without permission on the morning of 4 October 2019.

77. I do acknowledge that the claimant's concern may have been that the incident of her walking out was to be put on her record but that is not what she complains about. Her complaint is squarely about being given a final written warning without a hearing which, on any reading of the evidence simply was not the case.

The claimant's appeal against the above disciplinary action not being dealt with between the date it was submitted, 8 October 2019 until her resignation on 14 February 2020

78. The next issue is that the claimant alleges that her appeal against the disciplinary action was not being dealt with between the date it was submitted, "8 October 2019", until her resignation on 14 February 2020.

79. I first note that the Claimant's appeal was in fact submitted on 6 November 2019 and clearly, she cannot show that it was any fault of the respondent to not deal with an appeal in a period before it was even submitted. Taken at face value this allegation fails at the first hurdle. However, taking a less strict approach to the agreed issues, if I assume this is simply an error then the allegation may be read thus:

> *The claimant's appeal against the above disciplinary action not being dealt with between the date it was submitted until her resignation on 14 February 2020*

80. As I set out in my introduction, I did explain to the claimant that it was important for her to put her case to the respondent's witnesses. As it transpired, the claimant did not ask any questions about the appeal and as Ms Meenan submits, she did not, at any point, suggest that anything about the way the appeal process was dealt with was a straw as alleged or at all. Nevertheless, this is in the agreed list of issues and therefore merits discussion.

81. Can it be said that the claimant's appeal was not dealt with?

82. The first thing to note is that the appeal issue is expressly put as the claimant's appeal against her final written warning. On one view, given that there never was a final written warning, there can have been no appeal against it and, arguably, simply telling the claimant that there was no disciplinary action and then doing nothing would have been a reasonable option for the respondent. Perhaps to its credit, the respondent did not take that approach and sought to deal with the appeal by following a process which I shall come to. I simply add at this point, that having decided to accept the appeal and run with it, it was then incumbent on the respondent either to not act in a way which breached the

implied term of trust and confidence, nor do, nor omit to do, anything which cumulatively with other matters breached that term.

83. So, what did the respondent do?

84. The respondent's immediate response was the letter from Mr White of 6 November 2019. In this he acknowledged receipt of the grievance, explained the delay in Mr Kerry's apology, confirmed that there was no disciplinary action, confirmed that staff vacancies were being addressed, confirmed that the two hours pay would be paid, dealt with his view of what happened with Ms Zielinska and informed the claimant that her appeal had been passed to the Managing Director for review [86-87].

85. The Claimant submitted a DSAR on 20 December 2019 [97-98], the contents of which were relevant for the proposed appeal hearing. The DSAR was dealt with by 11 February 2020 [118]. I entirely accept Ms Meenan's submission that given the DSAR dealt with materials concerning the claimant's grievance, it was important to complete the DSAR prior to having an appeal hearing.

86. In early January (bearing in mind that the respondent shut down for 11 days over the Christmas and New Year period), Mr White gathered witness statements from potential witnesses about what they saw on 4 October 2019. Those statements are at [107,108]. Mr Kerry was spoken to again [109 - 110]. The claimant was informed of this on 20 January 2020 [109 - 110].

87. On 20 January 2020, the respondent was ready to hear the grievance and invited the claimant to an appeal hearing to "*discuss [the respondent's] findings and discuss [the claimant's] appeal"* [109-110]. The respondent asked the claimant's solicitor to provide availability by giving three dates on which the claimant could attend a hearing. The respondent did not receive a response from the solicitor and Mr White emailed again on 23 January 2020 asking for a response "*as soon as possible*" [109].

88. Again, at the risk of being accused of pedantry, if the allegation is literally that the claimant's appeal was not dealt with between the date it was submitted until her resignation on 14 February 2020, on any reading of what took place, that was clearly not the case. It was being pursued and as I have found, by 20 January 2020, almost a month before the claimant resigned, the appeal was ready to be heard.

89. Significantly, in my judgment, after 20 January 2020, the delay in holding an appeal was in fact the fault of the claimant. No doubt acting on instructions, the claimant's solicitors did not respond to the respondent's emails of 20 and 23 January 2020 until 30 January 2020 [116 - 117]. In their response, instead of providing the dates of availability Mr White was seeking in order that he may arrange the appeal hearing, the claimant's solicitors asked a number of questions none of which the respondent was required to answer before setting up the appeal hearing. They asked:

    a. Who would hear the appeal;

b. Whether all of the complaints the solicitors set out in their letter of 20 December 2019 would be covered; and

c. Stating that the statements provided did not cover all of those issues, and asked whether Mr Kerry was going to provide a statement?

90. Those may have been questions to which the claimant wanted answers, but they were not a reason for the claimant to fail to provide dates of her availability for the appeal hearing she was seeking.

91. Mr White did not respond to the questions and the claimant's solicitors emailed again on 11 February 2020 [118]. That letter required a response to their previous letter, and for the respondent to provide a date for the appeal hearing. They set a deadline of two days to respond. The respondent did not respond within the two days and, as we know, the claimant resigned with immediate effect on 14 February 2020. In the resignation letter the solicitors, again no doubt acting on instructions, said that:

> "*it is now patently clear that the Company is not taking our client seriously***"** [120].

92. What, in my judgment, this amounts to is a claimant setting up an artificial barrier to the appeal hearing and when the respondent does not make it over the barrier, to allege that therefore the respondent has done something wrong. The failure to respond to wholly unnecessary questions, and the failure to do so within two days does not amount to the respondent "*not taking our client seriously*". It amounts to no more than not making it over a wholly artificial barrier created by the claimant. I reiterate that on any reasonable reading of the evidence the claimant's appeal was "*dealt with*" and was ready for hearing by 20 January 2020.

Being subjected to an excessive workload with the respondent ignoring her requests for help

93. There are obviously two connected allegations in this issue: did the claimant have an excessive workload, if so, did the respondent ignore her requests for help? I turn first to the excessive workload allegation.

94. The claimant's case altered during the course of the hearing in a quite fundamental way. Initially the case appeared to be that she had to provide cover for those staff who were absent; she said she was literally undertaking the entire work of two absent full time staff, which meant that along with her own work as Production Supervisor, her workload was excessive. The respondent submits, and I largely agree, that claimant's evidence on this issue was confusing.

95. Under cross-examination, the claimant's evidence was that there was no culture of lending a hand at the respondent, as Ms Meenan put it to her, and that, as I

have set out above, she, personally, had to fulfil the full-time role of all of her supervisees who were not in attendance as well as doing her own work.

96. However, later in cross-examination, the claimant accepted that when those she supervised were absent everyone in production chipped in to help and there was a culture of lending a hand. She nevertheless maintained that her workload was excessive.

97. In relation to her role as Production Supervisor, the claimant seemed initially to say that her duties had increased. She was promoted to that role in 2015. It took quite a lot of questioning to get the claimant to accept that the duties of the role of Production Supervisor had not altered since she took on the role. Those duties were always:

    a. Supervisor;
    b. Heinz man move;
    c. Rollovers;
    d. Ragging;
    e. Own clean labels;
    f. Audit paperwork;
    g. Envision/Alarms;
    h. Chemicals;
    i. Covering staff;
    j. UPS;
    k. Hub;
    l. Production Worksheets Folder;
    m. Still Ins.

98. In considering this matter Mr White had asked the claimant to set out her duties and the above list is the one she provided. In response, Mr White estimated the time/frequency of each of those duties. His notes are at [161] and are as follows:

    a. Supervisor Heinz man move – as and when, 30 minutes a week possibly;
    b. Rollovers – as and when, maximum 1 hour a week;
    c. Ragging – 2 hours a week maximum;
    d. Own clean labels – as and when, 30 minutes a day;
    e. Audit paperwork – 30 minutes a day or 2 hours on Friday;
    f. Envision/Alarms – visual check, staff do the work;
    g. Chemicals – supervise staff doing this work once a week;
    h. Covering staff – as and when, supervisor role;
    i. UPS – as and when;
    j. Hub – visual check, staff do the work;
    k. Production Worksheets Folder – same as audit paperwork;
    l. Still Ins – visual check, staff do the work.

99. The claimant did not dispute this evidence. In effect, Mr White's unchallenged evidence is that the non-supervisory work was:
    a. Heinz man move;

b. Rollovers;
c. Ragging;
d. Own clean labels;
e. Audit paperwork;
f. UPS;
g. Production Worksheets Folder.

100. Furthermore, his unchallenged evidence was that the Production Worksheets Folder work was part of the Audit paperwork, so the claimant's non-supervisory work amounted to 6 tasks taking around 9 hours per week plus whatever time was needed to ensure UPS drivers collected the correct garments for delivery to customers.

101. To put that into context, the claimant worked on average 7 hours a day or 35 hours each week leaving her 26 hours to do her supervisory role, part of which was stepping in to help production if necessary. At [162] is what the respondent says is a typical daily hours sheet for the claimant covering September, October and November 2019. It shows that she normally arrived for work at around 7.30 am. She normally left between 3.30 pm and 3.45 pm and her evidence was that she generally took 30 minutes for lunch. The unchallenged evidence from the respondent was that many production staff left early on Friday because the respondent undertook production between Monday and Thursday, so generally there was little for production staff to do on Friday, notwithstanding that they were paid to work 5 days a week.

102. Mr White's unchallenged evidence was that given the above, if there were absences, and he accepts that there were, there was sufficient capacity for production staff to assist covering for those absences. Indeed, in answer to a question from me the claimant confirmed that Friday was not a normal production day and she had time to do "*my jobs*" as she put it, although she went on to add "*not all my jobs*".

103. Even if Mr White's evidence was not correct, and I heard no evidence to suggest it was not, the claimant's assertion that she was undertaking the work of two absent full time production operatives as well as trying to do all her own work is simply not borne out by the evidence. The claimant said that she was so busy she was unable to complete the duties of supervisor, Heinz man move, rollovers, ragging, own clean labels and audit paperwork. As far as the respondent was concerned, the only thing the claimant was behind in at the end of 2019 was that she was two weeks behind with her Audit paperwork [161]. Further, she could not really be behind in supervision since that was an everyday occurrence – it was her core function; she was the Production Supervisor, so supervision was not really a separate function. Of the other duties in the claimant's role, Mr White confirmed, and again it was not challenged, that all of the customer contracts the respondent had were being met, which given that the claimant left work on time and still managed to leave early on some Fridays [see 162 and 163], does not suggest a production system that was so short of staff that duties were not being undertaken and that the claimant was doing the work of more than one person. I find that she was not.

104. I next turn to the allegation that the respondent ignored the claimant's requests for help.

105. From the claimant's evidence I agree with Ms Meenan that she seems to rely on three specific instances where she says it was, or perhaps ought to have been, clear to the respondent that she had an excessive workload and/or was requesting help with that. These are as follows:

a. In paragraph 5 of her witness statement the claimant says that on 15 July 2019 she tried to explain to Mr White that "*the work started to get on top of me again*". However, the claimant kept a detailed diary of events and I note that this was not recorded. What the claimant did record [130 – 131] is that she asked: "*what my job intales*" (sic). I agree with the respondent's submission that asking what a job entails is not the same as stating that one has excessive work or is in need of help;

b. On 23 September 2019, Ms Kelly Cordon was asked why the claimant was behind on work [136]. Ms Kelly Cordon is recorded by the claimant as stating that the claimant has been covering staff absence. She does not say that the claimant says her workload is generally excessive it is merely the reason for the then current backlog;

c. Finally, in her witness statement, the claimant says again that she "*tried to say*" that she could not cope and started to cry. At [137] the claimant records that she cried because "*could not cope with the work they demanded*" however, the claimant accepted in cross-examination that she did not actually say those words. It also does not follow that just because a person says they cannot cope at that point I should conclude a) that the workload was excessive or b) that the amount of work the claimant was doing was being demanded of her by the respondent. The respondent's evidence, stated a number of times, was that as a supervisor the claimant was expected to ensure that the work got done, not to do it all herself, although the respondent accepted that this would involve the claimant, on occasion, lending a hand along with everyone else.

106. Having said all of that, I note the evidence of the claimant's working hours and her duties I have set out above, and I conclude that even if subjectively the claimant felt too busy, objectively that was not a reasonable conclusion to draw from the facts I have found, and I do not find that the claimant's workload was excessive nor that therefore respondent ignored the claimant's requests for help, at least prior to her raising a formal grievance, part of which was having an excessive workload.

107. In cross-examination the claimant did say that she raised being overworked at the managers' regular Monday morning meetings. However, the respondent does not recognise this, it does not appear in the copious diary entries made by the claimant and I find she did not do that.

108. The claimant's grievance was in my judgment the first time she explicitly raised the issue of having an excessive workload. The respondent says that it took the claimant's concerns seriously and sought solutions. The respondent says that the evidence is clear that once requests for help were made and the issue discussed in the 17 October 2019 meeting, the claimant was in fact offered help.

109. The notes of the meeting on 17 October 2019 suggest that the claimant's concerns about workload were discussed. Some potential solutions were discussed such as employing two or three more staff, training other members of staff to input CCA figures and providing the claimant with some time to catch up with paperwork [75-76].

110. While it may be said that the respondent's response to this part of the grievance did not suggest any great concern or urgency on their part to deal with the issue, in reality, given Mr White's evidence and my findings about the claimant's likely workload, the help or potential help discussed (and in relation to recruitment, ultimately put in train) were reasonable.

111. In my judgment the claimant has not shown facts from which I can conclude that her workload was excessive. I also find that given the context and circumstances, the respondent's response to this aspect of the grievance was measured, proportionate and reasonable.

Being bullied by Paulina Zielinska, an employee of the Respondent

112. The final factual issue I have to determine relates to an incident which took place on 8 October 2019. The claimant says that an act of bullying occurred when, during a phone call she was having with Ms Parsons about her sickness absence, Ms Zielinska was overheard by the claimant asking Ms Parsons to remind the claimant that she had not paid a £50 instalment on a loan, due on 4 October 2019, and that this was therefore still owed to the respondent.

113. The claimant says that the bullying included the fact that Ms Zielinska "shouted" this across the office so that everyone could hear, and that the issue of her loan and the repayments was private and Ms Zielinska had in effect made it public.

114. It was put to the claimant, and confirmed by Ms Zielinska's evidence, which was not challenged, that Ms Parsons and Ms Zielinska in fact sat opposite each other. Ms Zielinska estimated that they sat around a metre apart. There was no need for Ms Zielinska to shout and she did not. The Claimant's evidence for the shouting was that, as the claimant clearly overheard what Ms Zielinska said, it must have been shouted.

115. Under cross-examination the claimant conceded the point that Ms Parsons and Ms Zielinska in fact sat opposite each. She also conceded the point that at the time of the incident only Ms Zielinska and Ms Parsons were in the office. The claimant agreed that as they sat opposite each other there was

no need to shout. My note of the claimant's evidence on this point was that she said, "*I heard it clearly, agree stupid to say PZ shouted*" although she maintained that it "*came across as bullying*".

116. Ms Zielinska's evidence was that however private the arrangement was, Ms Parsons was aware of it and thus there was no issue of breach of privacy. She was not challenged on this point.

117. In my judgment it was not unreasonable for Ms Zielinska to ask Ms Parsons to relay the message as she did. She was in essence doing her job. I do not consider that by asking Ms Parsons to relay a short message about money owed amounted to bullying. It was in my judgment an innocuous act.

118. Those then are my findings on the factual allegations. I now turn to applying those facts to the law.

119. I first remind myself of the questions to be answered as set out by the Court of Appeal in **Kaur v Leeds Teaching Hospitals NHS Trust** (above). These are:

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 cumulatively, amounted to a repudiatory breach of trust and confidence?

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

120. The first question is essentially the need to determine what the last straw was. Unfortunately, the claimant's evidence was inconsistent about this.At the end of the cross-examination of the claimant I asked her to tell me clearly what the last straw was. She said it was the respondent's failure to respond to her solicitor's email of 11 February 2019. She said, "*I decided on 14 February I could not to go back, not taking me seriously, it had been going on since October*". We then looked at the documents. It was pointed out that the claimant had told her GP that she was looking for a new job as early as 9 October 2020 [179]. Further, the claimant's solicitors said in their letter to the respondent of 20 December 2019 that:

> *"…the Company's failure to treat our client's alleged disciplinary offence and grievance fairly, combined with the aggressive and hostile bullying to which she has been subjected, amounts to a fundamental breach of trust and confidence…"*

121. Leaving aside the obvious hyperbole, all of the complaints the claimant relies on in this case were present at this point. Failure to respond to her solicitor's email of 11 February 2019 is not one of the issues relied upon and set out at the preliminary hearing before judge Butler. Of course, I accept that it may be subsumed within the general allegation that the claimant's appeal against disciplinary action had not been dealt with between the date it was submitted until her resignation on 14 February 2020, but that does not resolve the problem.

122. After some time, the claimant told me that "*7 October was when I decided I could not go back to work*" for the respondent.

123. Thus, we have three possible dates when the implied term of trust and confidence was broken: 7 October 2019, 20 December 2019 and 14 February 2020.

124. If the last straw was the correspondence sent to the claimant on 7 October 2019, then it seems to me that this presents the claimant with two difficulties.

125. The first difficulty is that the two letters were first a reminder that the claimant would need to provide a fit note by 9 October 2019 and to keep in contact with the respondent about her absence. The second was unrelated to work as it was concerning a property which the claimant had rented from the respondent.

126. In my judgment the sending of these letters was an innocuous act and not capable of amounting to straws. The key letter, the work-related correspondence, merely reminds the claimant, as an employee, from when she would need to provide a fit note and what her obligations were about keeping the respondent up to date on her absence. The tone is matter of fact, it is not critical or contentious.

127. I do note that on 8 October 2019, the claimant raised a grievance seeking resolution of several concerns. Subsequent to that, as we have seen, she appealed the outcome of that grievance. By raising the grievance and/or the appeal, the claimant may be said to have affirmed the contract after the alleged breach. If that is correct, then something would have had to have occurred to resurrect the prior breaches on or around 20 December 2019 and/or on or around 14 February 2020.

128. I am mindful however that in **Kaur v Leeds Teaching Hospitals NHS Trust** (above) it was held that exercising a right of appeal against what is said to be a seriously unfair disciplinary decision is not likely to be treated as unequivocal affirmation of the contract. The EAT in that case preferred Underhill LJ's view that reliance on one contractual right does not necessarily signify an acceptance that all other contractual rights are intact. It also considered that exercising a right to raise a grievance and exercising a right of appeal both involve the utilisation of contractual rights and so any difference between the

types of proceedings initiated is immaterial. In the EAT's view, exercise of a right of grievance or appeal should not be regarded as affirmation of an employment contract as a whole. There is no anomaly in holding that a contract has been terminated for some purposes and not for others, and it would be unsatisfactory if an employee were unable to accept a repudiation because he or she wished to seek a resolution by means of a grievance procedure.

129. In my judgment the point is moot, because self-evidently if there was a repudiation on 7 October 2019 and subsequent affirmation, the claimant would simply argue that there was a further act around 20 December 2019, or around 14 February 2020, which in effect resurrected prior breaches as per **Kaur v Leeds Teaching Hospitals NHS Trust**.

130. Having said that, given that the claimant does not expressly rely on anything which occurred on or around 20 December 2019 I lastly turn to the alleged repudiation culminating on 14 February 2020.

131. As I have set out above, the claimant says she resigned at this point because the respondent failed to answer questions raised by her solicitor in their letter of 30 January 2020. It will be recalled that the claimant's solicitor, instead of providing dates for an appeal hearing, asked Mr White a number of questions about it, including who would hear the appeal, whether all of the complaints the solicitors set out in their letter of 20 December 2019 would be covered and stating that the statements provided did not cover all of those issues [116 – 117]. The respondent was not obliged to answer those questions. The claimant's solicitor sent a further by email on 11 February 2020 [118]. In that email the solicitor reiterated the questions that were asked in the letter of 30 January 2020 and demanded a response within the next two days. When there was no response the claimant resigned.

132. In my judgment, given the entire context and circumstances at the time, the respondent's failure to answer the claimant's solicitor's questions was an innocuous act. I reach this conclusion because of the way the correspondence was written. In the letter of 30 January 2020, the tone strongly suggests that although the claimant would attend the appeal, as no dates for the hearing were provided, the claimant's attendance was somehow conditional upon the solicitor's questions being answered. In the 11 February 2020 email, although the solicitor still does not provide dates, and although she reiterated the questions asked on 30 January 2020, the email ends:

> *"We look forward to hearing from you with a reply to our questions* ***and a date for the hearing****…"* (my emphasis)

133. That change in tone was significant. It was more conciliatory and suggested the appeal could now go ahead on a date to suit the respondent. However, the respondent was given only two days to respond, that is two days to set up an appeal hearing where no doubt a number of diaries had to be coordinated, a room booked, a note-taker arranged and so on. The claimant's request was unreasonable and the respondent's failure to respond in the short timescale was not in my judgment a matter which amounted to a straw in this

case. As the Court of Appeal said in **Omilaju** (above), "*it will be an unusual case where conduct which is perfectly reasonable and justifiable satisfies the last straw test*". I have no doubt that not responding to wholly unnecessary questions from a solicitor when all that was required was a date for a hearing from the very person who wanted that hearing, was perfectly reasonable and justifiable conduct on the part of the respondent.

134. In short therefore, in answering the first **Kaur** question, the most recent act was the respondent's failure to answer wholly unnecessary questions about the proposed appeal.

135. The second **Kaur** question is: did the claimant affirm the contract since that act, and the clear answer is that she did not.

136. The third **Kaur** question is: if not, was that act (or omission) by itself a repudiatory breach of contract? In my judgment the alleged final straw was not by itself a repudiatory breach of contract.

137. The fourth **Kaur** question is: if not, was it nevertheless a part of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a repudiatory breach of trust and confidence? To answer this, we must look at my findings in respect of the issues of fact, that is the straws upon which the claimant relies.

138. The first straw is being told to "fuck off" by a senior manager. It is clear that this did occur.

139. The second straw is that the claimant's grievance about the above was effectively dismissed because the manager apologised. This amounts to a misunderstanding by the claimant of what in fact occurred. Far from the grievance being dismissed, it was upheld, and the outcome was that Mr Kerry provided a written apology. On any reading of the facts that was genuine. The claimant seems to have wanted disciplinary action to be taken against Mr Kerry but it was open to the respondent to deal with the grievance in the way they did and in my judgment what they did was proportionate and reasonable in all the circumstances.

140. The third straw is being subjected to disciplinary action by being given a final written warning without a hearing after the claimant left the premises following being sworn at. Put simply, the claimant was never subjected to disciplinary action, she was never given a disciplinary warning.

141. The fourth straw is that the claimant's appeal against the purported disciplinary action not being dealt with between the date it was submitted until her resignation on 14 February 2020. As the evidence shows, the appeal was clearly being progressed by Mr White and he was ready for an appeal hearing to go ahead by 20 January 2020.

142. The fifth straw is being subject to an excessive workload with the respondent ignoring the claimant's requests for help. I have found no evidence

to substantiate the allegation that the claimant was subject to an excessive workload. In any event, when the claimant raised this in her grievance the respondent took steps to assist the claimant.

143. The sixth straw is the allegation that the claimant was being bullied by Paulina Zielinska. The evidence is clear that what occurred on 8 October 2019 is about as far removed from bullying as one can get. It was an innocuous act.

144. Considering the House of Lords' formulation of the implied term in **Malik** (above), it is apparent that there are two questions to be asked when determining whether the implied term of trust and confidence has been breached. These are:

a. was there 'reasonable and proper cause' for the conduct?

b. if not, was the conduct 'calculated or likely to destroy or seriously damage trust and confidence'?

145. Dealing with the first question, in relation to each straw, my judgment is that, it cannot be said that the swearing by Mr Kerry had a reasonable and proper cause. He lost his temper and subsequently regretted it. He can explain why it happened, but it is to his credit that he did not try to justify the behaviour.

146. In my judgment, for the remaining straws, either they did not occur at all as alleged by the claimant, or if they did, even if not exactly as characterised by the claimant, each had a reasonable and proper cause which I have set out in detail above.

147. As to the second requirement for establishing a breach of the implied term as expressed in **Malik,** that the conduct must have been 'calculated or likely to seriously damage or destroy trust and confidence', I note that a breach of this fundamental term will not occur simply because the claimant subjectively feels that such a breach has occurred, no matter how genuinely that view is held. The legal test entails looking at the circumstances objectively, that is from the perspective of a reasonable person in the claimant's position (see **Tullett Prebon Plc and others v BGC Brokers LP and others** 2011 IRLR 420, CA).

148. It is entirely clear from the factual matrix in this case that, looked at objectively, the only matter which might be said to have been likely to seriously damage or destroy trust and confidence was the first straw, the incidence of swearing. But the claimant did not resign in response to that, quite the opposite, she continued to work on for more than four months.

149. For all of those reasons the claim of constructive unfair dismissal fails and is dismissed.

150. Turning to the wrongful dismissal claim, this is bound to fsail as the claimant has simply failed to show that the respondent was in breach of contract in not paying her notice pay. They did not pay it because she resigned

with immediate effect and was no longer working or making herself available for work.

151. I turn lastly to the claim for two hours pay.

152. The issue between the parties is not a complex one. As will be recalled, on 16 October 2019 the claimant was told that on her return t work on 17 October 2019, she should not arrive until 9.30 am. Her normal start time was 7.30 am and so the question was whether she should be paid for the two hours between 7.30 am and 9.30 am. The respondent agreed she should.

153. In her pay processed on 27 December 2019, the claimant was paid the sum of £20.60. This exactly equates to two hours work at the claimant's normal hourly rate. The payment is described as 'bonus'.

154. The claimant's claim is that this amount represented a bonus and not the two hours pay she was entitled to. In the previous year the claimant had received a £100.00 bonus in November. The respondent's case is that the payment described as "bonus" in the 27 December pay slip is the two hours pay owed. At [35L] is an email from the respondent's solicitor to the Tribunal, copied to the claimant dated 7 October 2020, which the claimant confirmed she received. That email is in the following terms:

> *"Pursuant to the orders made at the preliminary hearing on 21 September 2020, the Respondent was asked to clarify, by no later than 7 October 202, whether it agreed that the Claimant was owed two hours' pay and whether it had been paid. We confirm that the Claimant was owed two hours' pay and that this was paid to the Claimant in December 2019, as can be seen from the attached payslip. The two hours have been described as 'bonus' (£10.30 / hour x 2 = £20.60). Therefore, and for the avoidance of any doubt, the claimant is not owed two hours' pay as alleged or at all…."*

155. The claimant did not cross-examine the respondent's witnesses on this. She is in essence alleging that the respondent's solicitors have deliberately lied to the Tribunal over the sum of £20.60. I do not accept that. It is entirely clear to me that the payment of £20.60 in December 2020 was to meet the two hours' pay owed from 17 October 2020 and this claim also fails.

_____

Employment Judge Brewer

Date: 9 April 2021

JUDGMENT SENT TO THE PARTIES ON

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