



# EMPLOYMENT TRIBUNALS

**Heard at:** Southampton (by video)      **On:** 13 April 2021

**Claimant:** Ms Jane McCarthy

**Respondent:** Milford Del Support Agency Limited

**Before:** Employment Judge Fowell

**Representation:**

**Claimant:** Mr R Wayman instructed by Real Employment Law Advice Ltd

**Respondent:** Mr M West, instructed by Moorepay Ltd

## JUDGMENT (ON LIABILITY)

1. The claimant was constructively unfairly dismissed.
2. The dismissal was in breach of contract.
3. There was no unlawful deduction from wages.
4. The compensation payable to the claimant is increased by 15% under s.207A of the Trade Union and Labour Relations (Consolidation) Act 1992 to reflect the respondent's failure to follow the ACAS Code in relation to her grievance.
5. The parties will be notified of a date for the remedy hearing.

## REASONS

### Introduction

1. These written reasons follow oral reasons given at the hearing and the opportunity has been taken to edit it further to avoid even greater length.
2. The claim is brought by Ms Jane McCarthy. She complains of constructive dismissal and that her dismissal was in breach of contract. A complaint of unlawful deduction from wages was also brought but has not been pursued.
3. She worked for the respondent, Milford Del Support Agency Ltd, for over four years. They provide a range of care services - residential care, domiciliary care, supported

accommodation and specialist care for adults with disabilities and complex needs – and operate from a number of sites on the Isle of Wight. It is a family firm with two directors, Mr Tony Delannoy and Ms Hannah Delannoy, but the day-to-day management of the company is in the hands of Ms Kelly Pointing, the Registered Manager. Estimates of the number of staff varied from about 85 to 120, though they grew during the period in question.

4. Ms McCarthy worked for them from 2016, first as a Deputy Manager, then from April 2018, as Whole Service Assistant Manager. In each case she was reporting to Ms Pointing and acted as her number two.
5. Summarising her case, she says that she was overworked and then resigned in October 2019. She then agreed to stay but tensions remained. She and Ms Pointing had a meeting on 20 November which did not go well. Shortly afterwards she went off sick for over a month. When she came back she says that she was marginalised and that duties were taken off her. Then she was laid off for a week due to Covid and after that she was disciplined for taking an hour and a half off work over lunch. She raised a grievance about this and the final straw was that the company would not postpone her disciplinary hearing until the grievance had been dealt with. She resigned on 18 March 2020.

### **Constructive dismissal**

6. The test for constructive dismissal derives from the wording of section 95 of the Employment Rights Act 1996:
  - (1) For the purposes of this Part an employee is dismissed by [her] employer if (and, subject to subsection (2) ... only if) – ...
    - (c) the employee terminates the contract under which [she] is employed (with or without notice) in circumstances in which [she] is entitled to terminate it without notice by reason of the employer's conduct."
7. It is well established that a person is entitled to resign where the employer is guilty of a fundamental breach of contract, in this case the implied duty of trust and confidence. According to the House of Lords in the case of **Malik v BCCI** [1997] UKHL 23 such a breach occurs where an employer conducts itself "in a manner calculated or likely to destroy or seriously to damage the relationship of trust and confidence". Hence, the main issue here is whether the respondent did so.
8. I heard evidence from Ms McCarthy, Ms Pointing the Registered Manager, and Ms Hannah Delannoy, the director who dealt with Ms McCarthy's grievance. The hearing was conducted by video. A number of technical difficulties were encountered, resulting in the loss of about three hours over the two days, so it was not possible to deal with remedy today.
9. One notable feature of the hearing was the conspicuous lack of documents from the company, a failure that led to a costs application immediately before this hearing. That has yet to be resolved, but there was no application for an adjournment. Some

of that lack of paperwork may be due to the size of the bundle which was initially limited to 100 pages. That was intended to be a total in addition to Tribunal documentation, a point which may not have been appreciated at the outset, but a subsequent direction increased the total. However, there is still no company handbook, no disciplinary procedure, no grievance procedure, nothing concerning the layoff policy, or even a contract of employment for Ms McCarthy.

10. The company's written evidence is also very brief. The two witnesses each gave a statement of just three pages, which is particularly surprising given that there was a 24-page Particulars of Claim and a further, though less-detailed, statement from Ms McCarthy. In very many cases therefore there is no evidence to dispute Ms McCarthy's case and so I am bound to prefer her account.

### **Findings of Fact**

11. Ms McCarthy worked at the company's head office in Shanklin, on the Isle of Wight. There were two main residential care homes on the island: Sea Gables and Stoneleigh. Towards the end of her employment they also took over Saint Peter's View. Because of the range of services and the fact that it is a round-the-clock operation there is a lot for the managers to cover. Ms McCarthy and Ms Pointing both worked very long hours during 2019, often ending at 8 pm or even later. Ms McCarthy put the average figure at over 50 hours per week, which was unchallenged, and she had certainly signed an opt out under the Working Time Regulations relating to a maximum 48-hour working week. They shared an office and worked closely together. The directors had a much less significant role in the day-to-day operations and only came in for the regular meetings.
12. As a senior manager Ms McCarthy did not receive any overtime for her extra hours. She also had to be on call on a regular basis, not as first line cover in case anyone needed care but as a backup in case support was needed for the duty manager. That duty involved taking a few calls each week, but needless to say it put an additional strain on them both.
13. The company was always looking for new staff. It was difficult to find and retain them. In September and October 2019 they were very shorthanded indeed, and were carrying out a large recruitment drive. Ms McCarthy was spending a good deal of her time conducting interviews and staff inductions on top of her normal duties, so although recruitment would help to solve her problems in due course it added extra work for the time being.
14. At around the same time, in October 2019, the company took over the care of a new service user at Sea Gables, someone with very challenging care needs requiring three members of staff working round the clock. Hence 12 people were needed, each of whom had to be recruited or reassigned from elsewhere.
15. Following this new arrival Ms Pointing was spending most of her time at Sea Gables, juggling these care requirements. That left Ms McCarthy at the Head Office in Shanklin, handling most of the day to day management of the company. It was so

busy in fact that she postponed her holiday in September 2019.

16. Unsurprisingly, by the end of October she had reached breaking point. On 28th she submitted her resignation. She emailed the directors to express her regret, wished everyone well, explained that she had the utmost respect for Ms Pointing and said that she would work her notice, but she simply could not manage the hours any longer.

*Retraction of resignation and return to work*

17. After that Mr Delannoy came to speak with her, and Ms Pointing too. Some reassurances must have been given, perhaps that the new people were coming on stream, and she agreed to retract her resignation and soldier on. But the situation remained very difficult; Ms Pointing was still mainly at Sea Gables, and a lot of her time was still taken up with the new service user.
18. That meant that Ms Pointing was mainly communicating with Ms McCarthy by email. Getting a stream of emails is a very different from sharing an office. Ms McCarthy felt that it would have been better to have at least a daily call to discuss things. Having looked at a good number of those emails during the course of this hearing, Ms Pointing's email style is quite direct. That may have been accentuated by her own pressure and lack of time, but it made an unfavourable impression on Ms McCarthy and on others. Emma Bruce, the new HR manager, and Jessica Collingwood, the Rota Coordinator, were also unhappy, and Ms McCarthy feared that they too might submit their resignations.
19. So, she contacted Ms Pointing and suggested a meeting. She initiated it by a fairly business-like email (p.90) and the response from Ms Pointing was perhaps even more frosty and demanded details - "Why do you have a very unhappy team?"

*Meeting on 20 November 2019*

20. The meeting to clear the air took place on 20 November 2019. The directors were also present. It seems that Ms Pointing had asked them to attend, though this cannot have helped to produce an open atmosphere. Ms McCarthy outlined their concerns first. Clearly she was in a difficult position between these two more junior managers on the one hand and Ms Pointing and the directors on the other. Ms Bruce and Ms Collingwood then gave their views. However it was presented, there was a degree of criticism of Ms Pointing and her communication style. It cannot have been a pleasant experience for her and there was no real meeting of minds. All agree however that Ms Bruce and Ms Collingwood were in tears by the end. Ms Pointing felt that this McCarthy was siding with them, and referred later to Ms McCarthy rolling her eyes when she was speaking.
21. This meeting was something of a watershed. Ms McCarthy was no longer seen as "one of us" by the directors but as "one of them" - on the other side, with the complainants.

*Following the meeting*

22. After that meeting, on 22 November, Ms Pointing sent an email to Ms McCarthy and the two more junior managers stating that the directors were “saddened” by what had taken place and that they would be individual follow-up meetings that week - “Things cannot continue as they are”. Ms McCarthy was away that week, having her delayed holiday, and when she got back she found that Emma Bruce had resigned. This was hardly encouraging. Ms McCarthy felt that from then on Ms Pointing was distant and had a cold manner towards her, and there certainly seems no obvious warmth in her later communications.
23. This is apparent from the next email she sent (p.93), taking Ms McCarthy to task over this meeting. She described it as “totally inappropriate and inappropriate on many levels” and “to seriously pose questions for myself and the company directors.” There is an implied threat in that remark, which also exposes the dividing line between Ms McCarthy on the one hand and Ms Pointing and the directors on the other. It clearly caused Ms McCarthy some stress because she saw her GP that day and was signed off with stress. The upshot is that the working relationship suffered a heavy blow from the meeting on 20 November from which it never recovered.

*Work related stress and anxiety*

24. She was signed off for three weeks to begin with. While she was off, on 19 December, Ms Pointing came to see her. She says that she brought flowers and that they had a friendly discussion. Ms McCarthy said that it was a little awkward to begin with, but it was fine and had been amicable.
25. However, she remained off sick leave until 16 January 2020. On 10 January, ahead of that return, she had a further meeting with Ms Pointing to discuss her return to work. Afterwards Ms McCarthy was asked for a fit note, which she provided. The request was understandable; she had of course resigned in October because of her heavy workload and had now suffered this relapse. There must have been real concern about re-integrating her, regardless of the events of 20 November. On the sick note her GP had ticked the box to say that she was fit for work with amended duties.

*Unilateral change of duties*

26. They met again on 15 January, the day before her return, to discuss it. That discussion was recorded in an email from Ms Pointing, noting that Ms McCarthy just wanted to ensure that her working hours were no more than 40 per week as a rule, although she could work over those hours if there was an emergency or a deadline to meet. However, Ms Pointing was intent on removing many of her duties as well. Her email (pp. 104 and 105) records that she was introducing a series of changes to Ms McCarthy’s role:

“As you can understand your role as Whole Service Assistant Manager is a pivotal role within Milford Del and your role is to support me in the safe and effective

operational running of Milford Del. This naturally, Jane, comes with high levels of demand therefore creating stressful working times, due to your position in the company and the levels of service we provide.”

27. One of the changes she introduced was to remove Ms McCarthy’s oversight of emails from other managers and reports. Hitherto, such emails were automatically copied to her so that she could keep on top of the fast-moving changes in rotas and the needs of service users, and the change was unwelcome. The email went on:

“If you decide that the role of Whole Service Assistant Manager *in its entirety* is not a role you wish to pursue due to the pressures, and wish to be considered for an alternative position, I’m happy to have these discussions.” [Emphasis added]

28. There is a clear implication here that if Ms McCarthy was not able to do the sort of extended hours she had previously managed then she was not really able to cope with the demands of this role.
29. Coupled with the email change, there was a change in her place of work. She was going to be working for two days a week from the new site at St Peter’s View, a series of eight flats owned by the company. This was to cover for the Deputy Manager there, someone who would normally report to Ms McCarthy.
30. The return to work plan she set out in this email went further, breaking down her activities on a day by day basis and even listing the particular meetings she was to attend. Many of her normal duties, such as overseeing rota management, line managing the supervisors and interviewing staff were all absent.

*Return to work*

31. So, Ms McCarthy returned to work on 16 January 2020 and applied herself to these new, much reduced duties. While at St Peter’s View she was put on some shift work to cover support workers, often by text message or at very short notice, That included been told by Ms Pointing by text on 20 January to cover a shift the next day and to work with a service user she had not worked with before. Ms McCarthy also received text messages from other members of staff requiring her to go on shift to cover absences, members of staff she would normally have managed.
32. The changes in her duties and the way they were implemented therefore amounted to a very public loss of status for her within the organisation. She was also excluded from at least one managers’ meeting, held on 17 January, her second day back, after she left the office. The company says that it was to discuss interviews in which she had not taken any part, but she was not invited, and the implication is that such meetings were only for those prepared to put the necessary hours in.

*Meeting on 31 January 2020*

33. Ms McCarthy challenged these changes at a meeting on 31 January, a meeting called by Ms Pointing and attended by some of the other, newly recruited managers. She asked why her usual duties had been given to other people. The response was

that she could not handle the workload and the hours required of her and so new managers had had to be recruited. Ms Pointing went on to say that her new role was no longer necessarily based at head office and she might be sent to work at various locations. Ms McCarthy responded that she felt she was being pushed out of the business.

34. There was a further incident that day, after work, at a local pub. As with many of the details above, it was set out in the Particulars of Claim and not addressed in the respondent's evidence. Suffice to say that Ms Pointing was there with a couple of Deputy Managers from work and Ms McCarthy was there with a couple of her friends, one of whom was an ex-employee. There was clearly some history or tension between the two groups. Ms Delannoy arrived to join Ms Pointing's group and set out some chairs to create a barrier between them. A little later Ms McCarthy was approached by a man from the other group, who knew her name and asked her (presumably sarcastically) if she was stressed or upset, given her the impression that he knew that she had been off sick and why. That was a disturbing incident for Ms McCarthy. Ms Pointing or Ms Delannoy were apparently spreading the view, even outside the office, that she was something of a malingerer.

*Further changes*

35. Ms McCarthy had accrued a good deal of holiday because she was unable to take it in 2019. After two weeks back at the end of January she was off again for three weeks' planned leave, so by then should have been in a position to resume her previous role. However, her duties were in fact reduced even further. This further change was introduced at a meeting she had on 27 February 2020 with Ms Pointing at their Head Office. Also there were the Deputy Manager of Sea Gables and Caroline Bishop, the new Safeguarding and Compliance Manager. Ms McCarthy was told that her laptop had been given to a new member of staff. She was also told to complete some mandatory training in the office before she could do some work on shift, and that she no longer had her own desk in head office and would need to use someone else's desk to do the training.
36. Later that day she received an email from Ms Pointing requiring her to report to Stoneleigh, a different centre again, to cover the manager there. Ms Pointing explained at this hearing that there had been a major safeguarding incident there, the police were involved and the manager had been suspended. She wanted Ms McCarthy to meet her there to help deal with things. That urgency is not really apparent from the email however. The main lesson I draw from this incident is that Ms Pointing now regarded Ms McCarthy as someone she could move around as management cover as the need arose.
37. It was around this time that Ms McCarthy noticed that the job title shown on her emails had changed to Deputy Manager, the role she had before 2018. The company had external IT consultants and the email signatures were automatically generated. Mr Wayman submitted that this was far too coincidental but it seems to me possible that an external IT consultancy may have simply reinstated a previous job title. It would have been a very crass and obvious mistake for the employer to

make so I prefer the view that it was probably an accident. Nevertheless it caused some concern to Ms McCarthy.

38. Ms McCarthy did not simply accept these changes. On 27 February she emailed Ms Pointing to express her concern about what was going on with her role. The reply from Ms Pointing, (p.114) was again under the guise of concern for her welfare:

I have not changed your hours, salary or role. ... I will not be back in the situation we were in in November 2019, or see you at a point where the role impacted so negatively on your well-being. ... I can't have a Whole Service Manager unable to manage/perform due to her workload being so high it is unsustainable."

#### *Lay off*

39. On 1 March Ms McCarthy's daughter, who also worked for the company, came back from holiday in Dubai. She was suffering from headache and sickness, which may or may not have been Covid-related. It was before the first lockdown period but Covid was very much in the news. Ms Pointing texted her to say that:

"Due to the current situation **and previous issues** Milford Del has taken the decision to lay you off in line with the company handbook." [Emphasis added]

40. A person may be laid off if there is a temporary lack of work and the contract allows it. It is rare these days, but persists for some junior or manual workers. A very modest "guarantee payment" is available from the government to cover some of the loss of wages.
41. There was no question here of a lack of work for Ms McCarthy. She could simply have worked from home on her laptop. Ms Pointing had previously worked with her at Ms McCarthy home in this way. She makes the point that Ms McCarthy did not offer to work from home but she was simply told to stay at home and the following morning, 2 March, she was told to return her laptop. This was so that it could be 'cleaned.'
42. Ms Pointing sent a follow up letter, by email, which also contained a mixed explanation. It said that she was an infection risk and it was also due to the "continual challenge around alternative work offered" - a clear reference to her disputing the changes imposed.

#### *Grievance*

43. So, on 5 March, a few days later, Ms McCarthy raised a grievance about her treatment it and sent it by email to Mr Tony Delannoy. He passed it on to Ms Hannah Delannoy because he was out of the country. I conclude that Ms Pointing found out about very shortly afterwards. There was by that stage a very close cooperation between them.
44. Once Ms McCarthy's daughter reported that she was not infectious Ms McCarthy was told by Ms Delannoy to return to work the following Monday. Ms McCarthy wrote back to say that she was coming back under protest and regarded the decision



to lay her off as a fundamental breach of contract.

45. The layoff had been for two weeks, so she had made some personal appointments which were still in her diary when she was invited back. The first was on the Monday morning. She raised this with Ms Delannoy before she returned to work, who told her to pass it onto Ms Pointing, who was away. So, it was not until that Monday morning that Ms Pointing found out about it. She responded brusquely by email, asking why she had not asked sooner and why she needed it. Given that response Ms McCarthy decided to cancel the appointment.

*Disciplinary matters*

46. The next day she had another personal errand planned. Her GP's practice was closing and she had to re-register elsewhere. It was not a medical appointment but it was nevertheless an important personal errand. She emailed Ms Pointing asking to take her lunch break off site. Having received no response, at about 1220 or 1225 she left anyway. When she returned she found that there was an email from Ms Pointing (p.153) at 1227 saying that she should not go but she could leave early that day at 1630 if need be.
47. Ms McCarthy rang her about this. Ms Pointing wanted to know how long she had been away and she said she was out for an hour and a half. At this, Ms Pointing sent her an email asking her to attend an investigation meeting at 1630 that day. It was regarding an allegation that she had an absent without leave and for "gross insubordination". Needless to say Ms McCarthy was stunned to receive it.
48. Shortly before 1630 she was approached by a trainee manager, Mr Brendan Dorman, who said that he had been asked to conduct an investigation meeting with her. Since he was new and more junior than her she declined to go ahead.
49. That evening, Ms McCarthy emailed Ms Delannoy to let her know why she had declined to attend the meeting. She also expressed her concerns she was being victimised by Ms Pointing because of her grievance. Ms Delannoy was of course dealing with her grievance and had written to Ms McCarthy that day inviting her to a grievance investigation meeting. But this was not to be with Ms Delannoy herself but with Ms Bishop, the new Compliance and Safeguarding Manager. She of course reported to Ms Pointing.
50. The disciplinary investigation meeting was then reconvened for 9 am on 12 March. It was to take place with Ms Annabel Robbins, the new HR manager. I heard evidence from Ms Delannoy that this was a time of huge upheaval with Covid, and that she was working all hours trying to get PPE organised and safe food supplies for the service users and staff, together with countless other tasks. I entirely accept that, but nevertheless this disciplinary process appears to have been made a priority.
51. Ms McCarthy attended the meeting and defended her actions. She explained that she had not received an email back from Ms Pointing by the time her lunch break

started, a point was has not been disputed, and said she did not believe it would be a problem as it never had been before.

*Grievance Meeting*

52. The grievance meeting then took place the following Monday, 16 March, with Ms Bishop. Ms McCarthy told her that she wanted to add a complaint to victimisation, i.e. that this disciplinary allegation was a reprisal for having raised a grievance.

*Invitation to disciplinary hearing*

53. Also that day, Ms McCarthy received an invitation to a disciplinary hearing on Wednesday 18 March 2020, to be chaired by Ms Delannoy. The invitation letter stated that the outcome may be a warning. However, it added that a failure to attend the hearing without good reason “will be treated as a wilful refusal of a reasonable management instruction and will be added to the matters of concern already under consideration”. Further, “a repeated wilful refusal of a reasonable management instruction may be deemed to be Gross Misconduct.”
54. On 17 March Ms McCarthy emailed Ms Delannoy to ask her to suspend the disciplinary meeting (p.164). She explained again that part of her grievance was that the disciplinary proceedings were a sham and an act of victimisation for raising the grievance, adding that if the disciplinary hearing were not postponed her position would be untenable. Ms Delannoy knew what that meant. She realised that Ms McCarthy was likely to resign if she went head but she decided to go ahead anyway. On 18 March, the day of the disciplinary hearing, she replied to say that the disciplinary hearing would go ahead as planned. Ms McCarthy emailed back at 1248 to say that this was a fundamental breach of contract, leaving her with no choice as to treat herself as constructively dismissed.

*Post resignation*

55. There was then a gap of five days until 23 March, a long time by comparison of the disciplinary process, until Ms McCarthy received a reply from Ms Delannoy acknowledging her resignation. The resignation was in fact given a passing mention in a letter inviting her to a further grievance meeting. Ms McCarthy replied to say that she would attend that meeting but it was subsequently cancelled and never rescheduled. Hence, no effective grievance process took place.
56. However on 13 May, two months later, Ms McCarthy received a long grievance outcome letter. It was put together by Ms Delannoy and (she said) Mr Delannoy, who had no direct knowledge of events. The conclusion seems to have been based squarely on information provided by Ms Pointing, who saw things very differently.
57. This document and the process generally was therefore something of an empty shell. The grievance investigation meeting with Ms McCarthy was relatively short and there were no interviews with other members of staff, not even with Ms Pointing to get her side of the story. She was simply involved in rebutting the allegations. By then, these proceedings were underway and some response was called for.

## Conclusions

58. The facts here are unusually clear here, so the conclusions can be more briefly stated. The list of issues is quite long, setting out many alleged breaches, but the only significant ones are those which caused Ms McCarthy to resign.
59. The first one raised is the long hours being worked in 2019, but on that point it is clear that Ms McCarthy waived the breach by withdrawing her resignation.
60. There were however a number of breaches of the duty of trust and confidences here, starting with the lack of consultation on her return to work, both in January and in February 2020. All of the changes were imposed on her against her will and without any medical cause. And although all were couched in terms of concern for Ms McCarthy's welfare, I am satisfied that they were in fact motivated by a desire to marginalise and exclude her, and that this followed the bruising meeting on 20 November 2019 when she was perceived to have sided with more junior managers against Ms Pointing. She would have been entitled to resign in response to those changes, but did not.
61. This was followed by the way these changes were being implemented, with her being given numerous subsidiary duties such as having to cover and assist more junior members of staff. That shows that her loss of status was made public. A further feature was her being moved from pillar to post around the organisation, and the removal of her desk and laptop. All this amounted to a further attempt to induce her to resign, and hence a further fundamental breach. It is difficult to identify each crack in the relationship and say whether this or that one amounted in itself to a fundamental breach, but I am satisfied that after the changes that were introduced to her role in January and February they were taken as far as possible by Ms Pointing, so as to undermine and humiliate her. Those attempts desire to further undermine therefore amount to a further blow to the relationship, revealing itself in these numerous cracks, and illustrated by the incident in the pub on 31 January.
62. Thirdly, there was the separate and clear-cut breach of contract implicit in the decision to lay her off. Since there is no evidence of a contractual right to do so I conclude that it was a breach of contract. And since it affected pay it was fundamental. But the damage was not just limited to pay. It was a further public slight, undermining her position in the company and conveying the message that her work was of no value and so there was no need for her even to have a laptop. And it was clearly done as a reprisal for the fact that she was challenging the changes that have been made (see paragraph 39 above) and that in turn reinforces my view that those changes were not being made out of concern for her welfare.
63. The fourth breach concerns the disciplinary process. Mutual trust and confidence can be undermined by the way in which an employer carries out a disciplinary procedure, although such situations are rare. In **Alexander Russell plc v Holness** EAT 677/93, an unreported case cited in the IDS Handbook on Contracts of Employment, the Employment Appeal Tribunal upheld an employment tribunal's finding that an employer had been oppressive in summoning an employee to a

disciplinary hearing and giving him a final written warning for poor timekeeping, where he had been given a written warning for the same thing only 24 hours earlier.

64. Similarly, in **Stevens v University of Birmingham** 2017 ICR 96, QBD, the High Court held that the University had committed such a breach by refusing to allow Mr Stevens to be accompanied by the person of his choice at an investigatory meeting into his alleged misconduct. Although there is a right to be accompanied by a work colleague or trade union representative, the University refused to allow him to be accompanied by a representative from the Medical Protection Society (MPS) who serve a similar function to a trade union. The court regarded this as “patently unfair”, which indicates the sort of situation required for the conduct of a disciplinary process to amount to a breach of the implied term.
65. These situations do not however strike me as any more oppressive than that experienced by Ms McCarthy. It seems to me patently unfair to have treated her absence over lunch as a disciplinary matter, let alone as “gross insubordination.” As Mr Wayman submitted, there was no evidence that permission was needed to leave the site at lunch, she was not providing care and there is no evidence as to what was the norm. There is in short nothing to dispute her claim that asking permission was no more than a courtesy. It is certainly difficult to imagine this being an issue in 2019 when she and Ms Pointing were working closely together, and were there late into the evening.
66. All this was exacerbated by the way it was done, being rushed through and investigated by more junior members of staff. I therefore conclude that it was again conduct calculated or likely to destroy or seriously to damage the relationship of trust and confidence. It was effectively rubbing Ms McCarthy’s nose in her reduced status.
67. The final straw, and in my view a fifth fundamental breach, was the refusal to delay the disciplinary hearing. Tribunals are required to have regard to the ACAS Code of Practice on Disciplinary and Grievance Procedures (2015). This sets out principles for handling disciplinary and grievance procedures in the workplace. It recommends that disciplinary hearings not take place until such grievance is heard. And for good reason. It is the only fair thing to do in circumstances where an employee is saying that the disciplinary proceedings are a sham and have been got up by a manager because they have raised a grievance. That is the case even where the employee is facing dismissal, where they might end up having to pay an employee for several extra weeks in circumstances where the grievance proves to be unfounded and the employee was guilty of gross misconduct.
68. Where there is no prospect of dismissal there is no downside to the employer in postponing the hearing. And for Ms Delannoy to go ahead, having been warned that Ms McCarthy’s position would be untenable, can only be designed to provoke a resignation. It is conduct calculated to destroy or serious to damage the relationship of trust and confidence.
69. Once a fundamental breach of contract has taken place there is no ability to cure it.

The only remaining question is whether Ms McCarthy resigned in response. As already mentioned when she returned to work after the layoff (the third breach) she did so under formal protest, so certainly did not waive that breach or the later ones, which followed almost immediately afterwards. Mr West did not in fact suggest that there had been any waiver.

70. The final issue on liability concerns the uplift on damages for the respondent's failure to comply with the ACAS Code in relation to the grievance. The maximum uplift is 25%. That must be reserved for the most serious of flagrant cases. The emphasis in the Code is on the process followed and it cannot be said that this is the worst case, even though no real consideration was given to it. At least there was a grievance investigation meeting. In those circumstances an uplift a 15% is appropriate.

**Employment Judge Fowell**

**Date: 27 April 2021**

Judgment and Reasons sent to the Parties: 07 May 2021

FOR THE TRIBUNAL OFFICE