EMPLOYMENT TRIBUNALS

Claimant
MISS R JEFFERY

Respondent

BUSY BEES NURSERY LIMITED

Heard at: Southampton (by CVP) On: 7 and 8 June 2021

Before: Employment Judge Dawson

Appearances
For the claimant: Representing herself
For the respondents: Ms Keogh, counsel

JUDGMENT

1. The claimant was unfairly dismissed by the respondent.
2. The amount of the compensatory award to which the claimant is entitled is reduced by 15% pursuant to section 123 Employment Rights Act 1996.
3. The respondent was in breach of contract in failing to pay the claimant notice pay.
4. The remedy to which the claimant is entitled will be determined at a remedy hearing on 28 June 2021 at 10 AM.
5. The claimants other claims are dismissed.

REASONS

Introduction

1. By way of brief overview, the claimant brings claims of unfair dismissal, wrongful dismissal (breach of contract in respect of notice pay), for holiday pay and non-payment of wages. The claims arise out of the claimant's employment as joint nursery manager on a three day a week basis during 2019/2020

(although the claimant's employment as joint manager started before then). The respondent's case is that standards in the nursery slipped so significantly during 2019 that it suspended the claimant in order to investigate her, then conducted a disciplinary process with her and demoted her. It denies that it acted in any way inappropriately and says that the claimant resigned from her employment.

2. The claimant agrees that she resigned and does not substantially challenge the respondent's case that nursery standards slipped in 2019. She says that she was not given sufficient support, especially when the other people with whom she was joint manager went on maternity leave. She asserts that the respondent was in repudiatory breach of contract entitling her to resign without notice. The claimant makes a number of residual claims.

3. The hearing took place on 7 and 8 June 2020 and on behalf of the claimant I heard from herself, Ms Hastie and Ms Fernie. On behalf of the respondent I heard from Ms Martin who was an area director for the respondent and conducted the disciplinary hearing and Ms Claydon who dealt with the claimant's grievance and who was the Deputy Operations Director. I also received a witness statement from Joanne Trelford-Davies, another area director of the respondent but she did not attend to give evidence and no reference was made to her witness statement.

4. As set out below I received a joint bundle of documents from the parties which ran to 251 pages and a short supplemental bundle from the claimant.

Procedural Background and Application to Amend

5. The claimant presented her claim form on the 15th June 2020. In box 8.1 she ticked the box to say that she was bringing a claim of unfair dismissal and for notice pay and also stated that she pursued claims in respect of breach of duty of care, injury to feelings and psychological injury.

6. The tribunal did not treat the claim as including a claim of disability discrimination and listed the matter for a 2 day hearing before a judge sitting alone. Upon receiving the claim form and having presented a response, the respondent wrote to the tribunal on two occasions requesting a preliminary hearing to clarify the issues. The tribunal declined to direct that such hearings take place. Instead, initially, the tribunal directed the respondent to ask for further information from the claimant.

7. The respondent made that request and, in particular, asked the claimant the following questions

Of paragraph 8.1 of the ET1, the Claimant has indicated the claim she is also making additional claims of breach of duty of care, injury to feelings and psychological injury.

Request:

2. Can the Claimant clarify whether she is making any discrimination claims which would entitle her to an award for injury to feelings?

3. If the Claimant is making discrimination claims, can the Claimant confirm:

3.1 What protected characteristic she relies upon;

3.2 What less favourable treatment she has suffered as a result of that protected characteristic, in each and any alleged instance confirming the date and name of individual concerned?

4. If the Claimant is not making any discrimination claim, can the Claimant confirm what other such claim or claims she is making in order to be entitled to injury to feelings and/or psychological injury?

8. The claimant replied as follows

Of paragraph 8.1 of the ET1, the Claimant has indicated the claim she is also making additional claims of breach of duty of care, injury to feelings and psychological injury.

Request:

2. N/A

3. N/A

3.1 N/A

3.2 N/A

3.3 If the Claimant is not making any discrimination claim, can the Claimant confirm what other such claim or claims she is making in order to be entitled to injury to feelings and/or psychological injury?

- Neglect. Breach in Duty of Care. Mental health affected, diagnosed with Anxiety and ongoing prescribed medication.

- Breach of confidentiality. Staff team being made aware of my Suspension. Consequently colleagues left questioning what I had done to be suspended, this caused me further anxiety as I was to have no physical or verbal contact with the staff or nursery.

- Lack of support and communication during suspension. Despite numerous pleas of needing reassurance this was not supported causing further anxiety, distress along with work related stress. I was also told by Jo Westwood from HR in an email that ‘there is absolutely no reason for me to be scared of going out in public or avoid anyone that you come in contact with’.

- Breach in Busy Bees Health and Safety Policy, monitoring ill health. No attempt from Busy Bees to acknowledge my ill health or makes steps to aid recovery.

9. The respondent, therefore, treated the case as not including a claim of disability discrimination and the matter proceeded to a final hearing.

10. Various directions were made in response to applications by the parties for an increase in the bundle length and the word count of the witness statements. The respondent sought an increase in the page limit of the bundle to 200 pages, which was granted - excluding pleadings (see the tribunal direction of 14th May 2001, no further extension was requested). With the claimant's consent I permitted the respondent to adduce an additional document during the course of the hearing. In addition, the claimant was granted permission to provide a supplemental bundle of documents. I record, having regard to a submission made by the respondent's counsel during closing submissions, that at no point prior to the end of the case did the respondent suggest that it had been unable to place before the tribunal documents that it wanted to rely upon and although the respondent's counsel's submissions suggested that might be the case, she did not apply to adduce further documents. The claimant sought an increase in the word limit on her statements which was granted, the respondent did not seek any increase.

11. On 19 May 2021, the claimant applied to amend her claim form following an attempt with the respondent to agree a list of issues. She stated that she had learnt, upon receiving the draft of list of issues, that her claim was for constructive dismissal only. She stated that she honestly believed that her claim included a claim for injury to feelings and psychological injury and stated that she had now learnt and understood that claims for injury to feelings and psychological injury fell under the heading "discrimination by way of disability due to my mental health". She therefore sought to add a claim of discrimination due to disability.

12. The respondent resisted that application and the matter was listed to be dealt with at the start of the final hearing. The judge making that direction indicated as follows:

    "In addition to the cases referred to by the respondent in their objection to the claimant's application to amend, the parties may find it useful to consider guidance from the Employment Appeal Tribunal in the case of *Miss J Pranczk V Hampshire County Council UKEAT/0272/19/Vp* and the case of *Mrs G Vaughan V Modality Partnership UKEAT/0147/20/Ba (V)*, on the matters to be considered by the ET when considering whether or not to grant an application to amend. Both can be accessed on the Employment Appeal tribunal website using the search facility. "

13. In *Pranczk,* the EAT held "54. If, on a fair objective reading of the claim form in the present case, as a whole, no additional claim of discrimination or victimisation (in the 2010 Act sense) was properly asserted, the fact that the Claimant was a litigant in person would not make it incumbent on the Tribunal to treat it as if it contained one. Indeed, it would be wrong to do so. If, however, on a fair reading, all the factual elements of the cause of action were present, then that would be sufficient to constitute such a complaint, or, at the least, to

make it incumbent on the Tribunal to clarify whether the Claimant was indeed bringing a complaint of that sort, as in *McLeary."*

14. Having read the claim form, it seems to me that the claimant did refer to her depression and a failure to provide her with adequate support. It seems to me that the claim form, as drafted, falls within the category of claim form where it was necessary to clarify whether the claimant was bringing a claim of disability discrimination.

15. In this case, that was done by the sending of a request for further information to the claimant. She responded and stated that she was not bringing a claim of disability discrimination. In my judgment it was not incumbent upon either the respondent or the tribunal to go behind that assertion. Thus in my view the correct analysis is that the claim form should be read as if the claimant had not pleaded a claim of disability discrimination.

16. It is then necessary to determine the application to amend the claim form to add a claim of disability discrimination.

17. In considering the application to amend the starting point is the overriding objective which requires:

> **Overriding objective**
>
> **2.** The overriding objective of these Rules is to enable Employment Tribunals to deal with cases fairly and justly. Dealing with a case fairly and justly includes, so far as practicable—
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> (a) ensuring that the parties are on an equal footing;
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> (b) dealing with cases in ways which are proportionate to the complexity and importance of the issues;
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> (c) avoiding unnecessary formality and seeking flexibility in the proceedings;
>
> (d) avoiding delay, so far as compatible with proper consideration of the issues; and
>
> (e) saving expense.
>
> A Tribunal shall seek to give effect to the overriding objective in interpreting, or exercising any power given to it by, these Rules. The parties and their representatives shall assist the Tribunal to further the overriding objective and in particular shall co-operate generally with each other and with the Tribunal.

18. It is also important to note the Presidential Guidance on General Case Management and in particular Guidance Note 1. The guidance note requires that tribunals must carry out a careful balancing exercise of all the relevant

factors having regard to the interests of justice and the relative hardship that will be caused to the parties by granting or refusing the application.

19. I considered *Selkent v Moore [1996] ICR 836, 843F in which the EAT stated "*It is impossible and undesirable to attempt to list them exhaustively, but the following are certainly relevant.

    a. *The nature of the amendment.* Applications to amend are of many different kinds, ranging, on the one hand, from the correction of clerical and typing errors, the addition of factual details to existing allegations and the addition or substitution of other labels for facts already pleaded to, on the other hand, the making of entirely new factual allegations which change the basis of the existing claim. The tribunal have to decide whether the amendment sought is one of the minor matters or is a substantial alteration pleading a new cause of action.

    b. *The applicability of time limits.* If a new complaint or cause of action is proposed to be added by way of amendment, it is essential for the tribunal to consider whether that complaint is out of time and, if so, whether the time limit should be extended under the applicable statutory provisions, e.g., in the case of unfair dismissal, section 67 of the Employment Protection (Consolidation) Act 1978.

    c. *The timing and manner of the application.* An application should not be refused solely because there has been a delay in making it. There are no time limits laid down in the Regulations of 1993 for the making of amendments. The amendments may be made at any time — before, at, even after the hearing of the case. Delay in making the application is, however, a discretionary factor. It is relevant to consider why the application was not made earlier and why it is now being made: for example, the discovery of new facts or new information appearing from documents disclosed on discovery. Whenever taking any factors into account, the paramount considerations are the relative injustice and hardship involved in refusing or granting an amendment. Questions of delay, as a result of adjournments, and additional costs, particularly if they are unlikely to be recovered by the successful party, are relevant in reaching a decision".

20. The effect of *Selkent* has been considered in *Vaughan v Modality Partnership* UKEAT/0147/20/BA, where HHJ Tayler stated:

> 20. In *Abercrombie* Underhill LJ went on to state this important consideration, at paragraph 48: "Consistently with that way of putting it, the approach of both the Employment Appeal Tribunal and this court in considering applications to amend which arguably raise new causes of action has been to focus not on questions of formal classification but on the extent to which the new pleading is likely to involve substantially different areas of inquiry than the old: the greater the difference between the factual and legal issues raised by the new claim and by the old, the less likely it is that it will be permitted."

> 21. Underhill LJ focused on the practical consequences of allowing an amendment. Such a practical approach should underlie the entire balancing exercise. Representatives would be well advised to start by considering, possibly putting the *Selkent* factors to one side for a moment, what will be the real practical consequences of allowing or refusing the amendment. If the application to amend is refused how severe will the consequences be, in terms of the prospects of success of the claim or defence; if permitted what will be the practical problems in responding. This requires a focus on reality rather than assumptions

21. The amendment does not require significant changes to the claim form for the reasons I have given. Most of the factual matters are pleaded, but the respondent has prepared on the basis that no claim of discrimination has been made.

22. The respondent, in representations made resisting the application to amend says this, "The Respondent has not considered the issue of disabled status, has not conceded the issue of disabled status, has not received a disability impact statement or medical evidence, nor details of what disability the Claimant is now seeking to rely on and/or the relevant period of any disability discrimination. In short, the Claimant's change of heart in relation to a potential disability discrimination complaint would effectively mean the Respondent having to start from scratch in relation to preparing for the Final Hearing of this matter".

23. In my judgment there would be considerable prejudice to the respondent if the claimant was entitled to bring a claim of discrimination because of disability at this stage. It would be necessary to give further directions so that the respondent was able to provide disclosure and witness statements in relation to those issues. That would inevitably mean the loss of this hearing date. I consider that a four day listing would be necessary and the earliest that such a hearing could be accommodated is April 2022. When I explained that to the claimant she was unsure as to whether she wished to pursue her application for amendment, but even if she had wanted to, it would be unfair to the respondent to lose this hearing date when its witnesses had attended the tribunal and anticipated the matter being resolved. It is prejudicial to the respondent's witnesses to have serious allegations hanging over them without resolution. There would be significant cost to the respondent if the case was adjourned and it seems highly unlikely that those costs would be recoverable from the claimant. There is also significant inconvenience to the tribunal and other tribunal users if this hearing slot is wasted.

24. In those circumstances I refused the application to amend the claim form.

The Issues

25. At the outset of the hearing I clarified the issues with the parties. In respect of the allegation of constructive dismissal the alleged repudiatory breaches of contract which the claimant relies upon are as follows:

a. A lack of support whilst at work including:

    i. No other managers covering maternity leave.

    ii. A lack of supervision meetings.

    iii. No return to work interviews.

    iv. Being required to work on non-working days

b. A threat that if the claimant did not increase her hours to a full time working role than a full time manager would be appointed to replace her.

c. The claimant ’s suspension.

d. Staff being told of the claimant’s suspension.

e. Unfair use of disciplinary procedure.

f. Inadequate communication in the disciplinary procedure including:

    i. being provided with late notice of meetings,

    ii. being provided with an inaccurate timeline of events.

g. The outcome of the dismissal procedure being predetermined.

h. The claimant not being provided with accurate minutes in respect of the disciplinary procedure.

i. The claimant not being provided with all of the evidence in the disciplinary pack.

j. The claimant not being given the right to be accompanied at the first disciplinary hearing- in that the respondent approached her colleague and said that she did not have to attend with the claimant if she did not want to.

k. Being demoted and only given the option of assistant manager roles over 100 miles away or joining the staff relief team on a zero-hours contract

l. Being paid incorrectly from April 2019.

m. When the claimant went to meet the manager who would manage her after her demotion, the manager made her feel unwelcome.

26. In addition the claimant sought to rely upon an allegation that her grievance had not been dealt with sufficiently quickly. Having heard the respondent’s objection to that, I declined to allow it to be raised as an issue since it was not pleaded and the respondent had no notice that it would be raised. The respondent told me that it would be prejudiced in dealing with that matter and in those circumstances I accepted that it was unfair to allow the point to be taken at that late stage.

27. The respondent puts in issue whether those alleged breaches happened, if they did whether they were repudiatory breaches and, if they were, whether they were the reason for the claimant resignation. The respondent also asserts that the claimant has affirmed the contract. The respondent states that if there was a dismissal, there was a potentially fair reason for the dismissal and, in any event, compensation should be reduced to reflect what would have happened if the claimant had been dealt with fairly (*Polkey*) and/or to reflect the claimant's contributory fault.

28. Other issues are adequately set out in the draft list of issues provided by the respondent, which also amplifies some of the issues which I have set out above.

    a. The claimant brings a claim of wrongful dismissal in respect of notice pay- it was agreed during the course of the hearing that that claim is for 12 weeks' notice.

    b. The claimant has now been paid her outstanding holiday pay and has withdrawn that claim.

    c. There is a claim of unauthorised deductions from wages – the claimant claims that she was entitled to a pay rise in April 2019 of 3 to 4% which she was not given.

    d. There is a claim in respect of sick pay for the period 21st December 2020 to the 7th January 2021.

Findings of Fact

29. The respondent operates nurseries across the country. The ET3 is not fully completed and does not disclose how many people across the country the respondent employs but it is a well-known and substantial supplier of childcare services. It clearly has a significant structure including regional directors and an operational director role.

30. The respondent has provided a helpful chronology of events which I treat as the starting point for my findings of fact. Where the claimant has not taken issue with the dates put forward by the respondent, I have largely accepted them whilst checking them against the bundle. Where the claimant has challenged the dates I have resolved those disputes as set out below.

31. The claimant started working for the respondent on the 19th of May 2003 in an unqualified role. On 19th January 2015, she was appointed as the joint nursery manager working three days per week. Although the respondent's chronology gives a later date, in her evidence, Ms Martin for the respondent accepted that the date of 19th January 2015 was correct.

32. In that role the claimant was carrying out a job share role with Kirsty Hastie. The claimant worked from Monday to Wednesday and Thursday and Friday were intended to be her non-working days.

33. In December 2017 the nursery received a good Ofsted report.

34. In 2018 it became apparent that Kirsty Hastie was to go on maternity leave. The respondent delayed in appointing a replacement and did not do so until late December 2018 when Sarah Meyers was appointed as the joint manager with the claimant.

35. On 3rd January 2019 a message was sent to Region 30 by Linda Sawyer. Region 30 was the region which the claimant was within. In response to that message Kirsty Hastie reply stating “I am a little disappointed that the decision for my manager position was only finalised a couple of weeks ago. I just feel I am leaving the nursery vulnerable, not because I'm going but it has meant that we have only just been able to advertise for other roles and I leave next Friday... this means that the toddler room at least two days a week when Sarah will have to be in the office have no room manager and no qualified practitioner. It also leaves the nursery without a deputy.... “ (bundle, page 68)

36. I find, as the claimant told me, that although Sarah Meyers had been appointed as joint manager from January 2019, the role that she was promoted from, namely toddler room manager, was not filled until April 2019. That meant that on Thursdays and Fridays, Sarah Meyers had to split her time between the toddler room and the office. There had not been time to induct her and therefore when the claimant was not working on Thursdays and Fridays she had to leave only simple jobs for Sarah Meyers to carry out.

37. It is clear that by February 2019 the claimant was under significant pressure. On 13th February 2019 she sent a lengthy email to Linda Sawyer stating “ I apologise in advance but have to email as I feel like I'm about to hit a wall. I am trying to keep up with things however they are gradually slipping and I really don't like the feeling!”

38. Linda Sawyer replied offering support and suggesting a telephone supervision, however that did not happen and no additional support was provided at that time.

39. Notwithstanding those pressures the claimant’s unchallenged evidence was that she received, in March 2019, a quarterly bonus reward for meeting and exceeding “targets in all areas including, budgets, performance, KPI's, Finance, Health and Safety, childcare and curriculum”.

40. Although a replacement for the toddler room role was put into place by April 2019, at the same time the assistant manager withdrew from her position which meant that the claimant was without sufficient support.

41. On 15th May 2019 the claimant emailed Tracey Stokes, who was by that time the regional director, and asked for supervision. She stated that she had not had a supervision meeting since 2017 and that she was experiencing difficult situations in her personal life. She stated “I usually keep things to myself but feel getting things off my chest will help me not become so “embarrassingly” emotional at every visit.”

42. A supervision report was then carried out on the 29th May 2019. The claimant raised the fact that staffing cover in respect of maternity leave had been very

last minute and ticked the box to state “I need support”. In the narrative section she wrote “I have been feeling overwhelmed recently with regards to the worklife / home life balance. It was difficult to try and make progress whilst only having a manager in the office for 3 days per week and not having time to induct Sarah - however this has improved now and I feel we can work through our action plan to bring the nursery up to the standard required”.

43. In the manager comments, Tracey Stokes suggested that a personal improvement plan could be implemented and the childcare advisor would visit one day a week. The claimant believed she did not need a personal improvement programme, the issue was not one of being told how to do the job, it was an issue with the level of support available. Having heard the claimant give evidence I consider that view to be reasonable.

44. The claimant told me, and I accept, that the childcare advisor did not meet with her, at that time, on a weekly basis. The advisor attended for a couple of weeks and then visits fizzled out to nothing. Moreover, even when she did attend, she effectively told the claimant what she was doing wrong without giving her help to get on top of the role.

45. On 17 June 2019, the claimant wrote to the respondent’s HR representative, Jodie Pascall, raising concerns about Tracey Stokes and her failure to speak to the claimant about matters. She wrote “I have already informed Tracey with much regret and was hard for me to admit that I currently am suffering from severe anxiety and depression and this really is not helping. I feel like we keep trying to hope everything is OK but then after today I do not know what else to do - the lack of support is disappointing. I have worked at this nursery for 17 years and this is the first time I have ever felt so snowed under. (p77)

46. On the same day Tracey Stokes wrote to the claimant and others a critical email, the tone of which was in no way supportive. Whilst it is, of course, perfectly proper for managers to raise with staff the areas in which they are failing, the tone of the email is surprising in the context of those matters which I have set out above.

47. The claimant replied, on behalf of herself and Sarah Meyers, on 19th June 2019 stating that she felt disheartened by the email and “I understand you couldn't stay long but hopefully we will be able to catch up longer next time”. The claimant’s response to the criticisms displayed a positive and helpful attitude. I find that she was neither a member of staff who was intransigent and unwilling to improve nor did she present herself as such.

48. On the same day Sarah Meyers, who was pregnant, unexpectedly had to attend hospital and then started her maternity leave. That was earlier than anticipated. The claimant sent an email to other managers in her region stating “I understand many are short staffed at the moment but Sarah has been admitted to hospital early with baby and our assistant manager is abroad - this means I have no cover for the office tomorrow and Friday. I urgently need a manager or assistant so this is my plea! For anyone that can help us out even for 1 day or anytime please do let me know” No additional help was forthcoming.

49. On 20th June 2019 the claimant then wrote to Tracey Stokes again stating " I have to email - I'm sorry I simply cannot continue here with the way things are. I know you said if I was to be signed off then you would deal with it however I don't want it to get to that point. I'm asking now for some kind of support before it goes that way. I was advised to take a couple of days off after my biopsy - instead I have ended up working extra. I do this because I care about the nursery, probably a little too much ." She then set out the ways in which the work related difficulties were affecting her outside work and went on "I have run this nursery in difficult times before but it is now just me - for three days a week, my assistant does not have the knowledge of the office which I have explained before and expressed my concerns regarding this back when she was appointed. My teams are not strong at present however I am not getting chance to address this properly due to everything else that needs doing." (Supplemental bundle)

50. Again there is no evidence that any support of any kind was provided to the claimant in response to that email. There does not even appear to have been a response to it.

51. The respondent did, however, carry out a QPA. A QPA is a pre-inspection that conducts an audit in the same way that OFSTED would conduct inspections of the nursery. According to the Grounds of Resistance that was carried out in July 2019 and it lead to a Recovery Plan being put into place. At this point the respondent indicated that the nursery would be given assistance from the manager at the Plymouth nursery (Jodyann[1]). The Plymouth nursery had, however, also failed its QPA.

52. On 2nd July 2019 the claimed again wrote to Tracey Stokes stating "I just wanted to let you know I am not very well at the moment. I keep ignoring it like we do but today I have been extremely light headed it's making it very difficult to and staff have noticed I don't look well", she then set out various things about her personal life and went on "I am currently staying on most evenings to try and catch up and get things done, I have to cover in numbers, I am working my non work days and I am on the phone when I am not here. My boys have started to ask why I haven't been collecting them from school or why I'm not seeing them before bedtime. I wasn't here for 1.5 days last week and came in on Monday to 59 emails in the Managers account alone. It gets to the end of the day and I realise I have not eaten ... I just want to get jobs done to ensure we cannot fail our next QPA. Bearing in mind I am here three days per week the list of actions I need to complete are growing daily, it's like one step forward 2 steps back. Sarah having to leave early is having a knock on effect. Sam is going to cover the office -on these days for the foreseeable future but she does not know how to do any office jobs…I believe now we are going to get support from Jodyanne at Plymouth to help cover the days so that will be fantastic"

53. In fact, I am told and I accept, that Jodyann only visited twice.

[1] This person's name is spelt differently at different points. I adopt the spelling in the Chronology except when quoting documents.

54. On the 12th of July 2019 Tracey Stokes sent an email to the claimant and a colleague, Sam. The email appears at page 85 of the bundle and is written in a way which makes it difficult to extract particular points into these reasons. In essence it reiterates that the nursery is non-compliant and is critical in nature. It includes the statement " Becky I am aware it's your day off but you did say you would be contactable. The nursery tried to contact you regarding DBS information. Unfortunately your office is so disorganised they Jenny and Sam couldn't find what they were looking for." Whilst people do, on occasions, agree to be contactable on their days off, it seems to me this email supports the claimant's assertions that there was an expectation upon her that she was to work above and beyond her contracted hours.

55. The claimant replied by an email which is at page 84 of the bundle and again shows her taking a cooperative, indeed submissive, approach. She sets out her understanding of the processes. She writes " please do tell me if I am misunderstanding - I just want to get it right as I've been told different things".

56. On 19th July 2019, the claimant was told to take two weeks away from the nursery. The claimant says this was after she had told Tracey some days earlier that she felt like "topping herself". The respondent did, therefore, at this point take a step to support the claimant in her health. The respondent required the claimant to see a doctor in order to be signed off work but agreed to pay her whilst she was off work. It did not need to do so under the contract of employment. In this respect, I find that the respondent was supportive of the claimant.

57. However, unfortunately, when the claimant returned to work many of the tasks which needed to be done in that period had not been completed. The claimant told me, and I accept, that the person who had been covering her absence had not read any of the emails and so, in fact, things were just made worse. In telling me that, I did not get the impression that the claimant was doing anything other than giving me an honest account of what had happened. This was not a case of an employee who could not be pleased no matter what the employer does to support them.

58. They respondent did, by 1 August 2019, appoint an assistant manager. Whilst that would, of course, be of assistance, the claimant still remained without a joint manager following Sarah Meyers' maternity leave commencing unexpectedly.

59. The claimant returned to work on 12 August 2019. By this time a new regional director, Sarah Gibson, had replaced Tracey Stokes. The claimant requested a supervision session. A supervision meeting took place on 17th September 2019 which was the 2nd supervision session in 2019. The claimant filled out various forms and ticked the box that stated that she needed support but she was keen to learn. She stated "My work pattern is 24 hours per week, this worked perfectly opposite the other manager. Since she has been on maternity leave I have had to work a lot of unpaid extra days/ hours to try and ensure tasks are completed due to stuff maternity cover not having a full understanding & roles not being filled in good time thus having a knock on effect." She went, on later in the form, to state " I am feeling much more positive about things. I

love the nursery and my job - I just feel lack of [regional director]over the year or consistent [regional director] has made communication very difficult. I will always work as hard as possible to ensure the nursery is it's best. “

60. In September 2019 the respondent caused visits to be made to the nursery by Rachel Payne, a childcare adviser. As with the previous childcare adviser, Ms Payne’s role was not to assist the claimant in any hands-on way but, instead, to point out what was going wrong. The evidence before me suggested that the claimant knew what was going wrong; the issue was that she did not have the capacity to be able to correct it. As the claimant said in her evidence “[Rachel Payne] came in and checked what I had done and hadn’t done and gave me an action plan, which meant the next week I had three days to work through all of that as well as run the nursery”.

61. On 12 November 2019 a further QPA was carried out. The nursery failed again. It appears that the respondent held the claimant responsible for the failures as the nursery manager. It therefore decided to suspend her in accordance with the Disciplinary Policy whilst a full investigation took place. Linda Sawyer was appointed as the investigating officer.

62. On 21 November 2019 the claimant was suspended. During the meeting she asked if she could go out for a while and was told that she could not do so, which caused her to be further upset. The typed minutes of the meeting at page 136 of the bundle suggest that the claimant was not only suspended but, before being suspended, she was asked a series of questions. It is unusual for somebody to be investigated during the same meeting when they are being suspended and the way in which the respondent dealt with that meeting is, in my judgement, reflective of the way in which it had dealt with the claimant to that time. It was not particularly interested in the claimant or her welfare.

63. When Ms Martin was asked why the claimant’s presence at the nursery led to safeguarding issues and the need for her to be suspended, she suggested that there were two reasons. Firstly, she said that 2 members of staff had not had DBS checks. However she accepted that those members of staff were on restrictions and could not come into contact with children whilst alone. When I asked her why, in those circumstances, there was a safeguarding risk she told me that she was not sure how to answer my question. The other reason she gave was that welfare was not being protected in the sense that children on SEND did not have paperwork completed, development summaries were not being shared with parents - “that kind of thing”.

64. This is not a case where it is suggested that the claimant was doing something which positively put children at risk. It is a case where her alleged inadequacies in managing the nursery meant that there were, according to the respondent, safeguarding and welfare issues. Upon the claimant being suspended Kelly Ashley was immediately placed into the nursery in a managerial capacity.

65. The respondent has not advanced any express reason as to why the claimant needed to be suspended, other than simply referring to welfare and safeguarding issues. However, it is relatively easy to see why a person in the position of the claimant who was being accused of failing as a manager would

be suspended in this situation. If a new manager was being brought in while investigations were carried out to deal with the welfare and safeguarding issues described by Ms Martin, the ongoing presence of someone in the position of the claimant might very well cause management issues if both people had the status of manager. For the claimant not to have status of manager would require her to be demoted. Thus I find that in order to enable the respondent to rectify those perceived failings in the management of the nursery and to investigate the position, it was reasonable to suspend the claimant while an investigation took place.

66. The claimant was then investigated under the Disciplinary Policy. The policy is at page 61 of the bundle and, in the introduction states "the policy does not apply to issues of poor performance… which should be dealt with in accordance with the Performance Management Policy…"

67. The respondent argues that it was appropriate to use the Disciplinary Policy in this case because the claimant was potentially guilty of gross misconduct under paragraph 12.2. In particular it says that she was potentially guilty of "Breach of professional standards, company policies i.e allergy and medical conditions policy and procedures". That is somewhat different to the letter of 13 December 2019 inviting the claimant to a disciplinary hearing where the allegations were "failure to safeguard the nursery or meet basic welfare requirements for the children and staff, and non-compliance and complete QPA fail" (Page 258).

68. Counsel for the respondent argues that it is inevitable that the matters set out in the disciplinary hearing invitation mean that there was a breach of professional standards and company policies. When I asked Ms Martin and counsel, however, which particular professional standards were alleged to have been breached and which particular aspects of company policies had been breached, I was not told. Those documents are not in the bundle.

69. I asked Ms Martin why the issue was being dealt with under the Disciplinary Policy rather than the Performance Management Policy and she told me that she could not tell me why. That is a matter of concern when she was the officer conducting the hearing.

70. I find that it was inappropriate for the issues around the claimant's performance to be pursued under the Disciplinary Policy. The issues were clearly ones of poor performance and on the basis of the Disciplinary Policy itself should have been dealt with in accordance with the Performance Management Policy. There was no suggestion that the claimant was behaving in any way deliberately and the evidence clearly establishes that this was an employee who was doing their best but was simply overwhelmed. Moreover she was overwhelmed in circumstances where the nursery was clearly understaffed from the point that Sarah Meyers had gone on early maternity leave and the claimant had been repeatedly asking for help. I find there was no basis for considering the claimant might be guilty of any kind of disciplinary issue, let alone gross misconduct.

71. The claimant received a voicemail on 3 December 2019 from Linda Sawyer, in the evening. She was required to attend an investigation meeting the following morning. However, on the next morning Linda Sawyer stated that she could not

attend due to having car problems and asked the claimant to travel to Salisbury. The claimant could not do so due to anxiety. The investigation meeting, instead, took place on 10 December 2019. Although the claimant complains that she was not given adequate notice of the meetings, I do not find that in circumstances where the meetings were of an investigatory nature the respondent's behaviour was particularly unusual or unreasonable.

72. The claimant was on sick leave between 21 December 2020 and 7 January 2021. She was only paid statutory sick pay during that period.

73. On 17 December 2019, the claimant emailed Julie Molton, a contact within the respondent stating that she had heard nothing and stating that things were making her ill. She asked for Ms Molton's help as to who to contact next. She sent an email to Sarah Gibson on 18 December 2019. On 18 December 2019 she was advised that a letter had been sent on 16 December directly to her house. The next day she received a letter dated 13 December 2019 inviting her to a disciplinary hearing on 23 December 2019. The letter stated that it included copies of the investigation report and supporting documentation and the claimant agreed that it had done so, at this hearing.

74. The claimant felt that she was not given enough notice of the disciplinary hearing and the respondent agreed to adjourn it. It was to take place on 15 January 2020 and did so.

75. The disciplinary hearing took place on 29 January 2020. It was conducted by Ms Martin.

76. I do not find that Ms Martin approached the hearing with a predetermination of how it would end. I find that she acted in good faith. The meeting lasted over four hours. Ms Martin concluded that the nursery had fallen behind on many of its internal procedures and there were a number of serious performance concerns in relation to it.

77. However, she went on to find that the claimant had been supported by a number of individuals - as she sets out in her witness statement.

78. Firstly she found that the claimant had been supported by Tracey Stokes. I do not think that is accurate. On the evidence which I have seen I do not find that Tracey Stokes gave any real support to the claimant. In that respect I note that, in her witness statement, Jenny Claydon states that there was a lack of support from Tracey Stokes (see paragraph 18.9) and in cross examination Ms Martin stated that she agreed there had been a lack of support but could not confirm the degree of it. The findings that Ms Martin made and are recited at paragraph 18.4 of her witness statement were wrong in my view.

79. Ms Martin also found that Linda Sawyer provided recruitment support. The evidence that I have heard suggests that finding is something of a gloss. Linda Sawyer conducted an interview for an assistant manager on behalf of the claimant because the claimant had previously interviewed the candidate. That is the extent of recruitment support which was provided.

80. Ms Martin also relied upon the fact that Rachel Payne had carried out visits. As I have indicated I accept that she did so, but I do not find the support extended beyond telling the claimant where the shortcomings were in the nursery.

81. Whilst Sarah Gibson did start as a new Regional Director in September 2019 and make visits to the nursery there was only a short window between that and the QPA report which led to the claimant's suspension. Moreover any support that Sarah Gibson gave did not make up for the lack of a joint manager. I have not heard from Sarah Gibson but the claimant called evidence from Ms Fernie, the financial administrator based at Weymouth until April 2021. I found her evidence to be given honestly. She says, in her witness statement:

> 10. Rebecca was given two weeks leave and we were appointed a new reginal director Sarah Gibson who visited the nursery along with a curriculum advisor Cara Daniels and met with myself and the newly appointed assistant manager Juliet Upfold.
>
> ...
>
> 13. Rebecca returned to work, I was witness to Sarah issuing ultimatums to Rebecca that she needed to step up and work full time otherwise a full time manager would be recruited for.
> 14. At no point did Sarah show any concern for Rebecca's health and wellbeing. No words of encouragement or support were offered. It was made very clear that the company would not tolerate an underperforming nursery and this was their only priority.
> 15. Rebecca went from being refreshed from a short break to breaking point within a very short period of time.
> 16. The support visits by Sarah were not in any way supportive. Often myself and Rebecca were asked to leave the office so that Sarah could use the office for calls.
> 17. Sarah's visits resulted in leaving Rebecca in tears and Sarah walking out of the nursery to attend to other business

82. I accept that evidence.

83. Ms Martin's witness statement goes on to state that the claimant had been provided with some support by Julie Molton, the respondent's Divisional Business Partner and there is evidence of some email traffic between the two of them but that did not provide support in respect of the workload. She refers to the support of Jodyann Ratchford but as I have set out above, I do not consider that support was of significance and, finally, she refers to the fact that Juliette Upfold was appointed assistant manager on 1st August to assist Rebecca.

84. I find that the level of support which the claimant was given was considerably less than that which Ms Martin thought had been given.

85. Ms Martin decided to demote the claimant which was a sanction open to her under the Disciplinary Policy. No evidence has been presented as to whether that would have been a sanction under the Performance Management Policy. The claimant was also given a formal final written warning.

86. The claimant was demoted to an assistant centre director role but the only roles available were Battersea, Cardiff Gate, Godalming Binscombe, West Byfleet, Burchetts Green, Swindon and Tunbridge Wells. The unchallenged evidence of the claimant was that they were all over 100 miles from her home. She is a single parent with two young children. She was given an alternative of joining relief bank staff at the Weymouth nursery. She enquired as to what would happen if she accepted neither option and was told, on 6 February 2020, that she would have to seek alternative employment. She was then told that if she did not accept either alternative she would leave with immediate effect. If she joined the bank staff she would be on a zero hour contract.

87. The claimant did not appeal against the decision but instead, on 7 February 2020, wrote to the respondent stating "after giving almost 18 years to the nursery I am simply devastated but having considered the options that I have been given my decision is as follows…" She then explained why she could not move home or travel to any of the locations where there was an assistant director role and so would accept the position of acting as relief staff. She asked about accrued annual leave.

88. On 24 February 2020, the claimant wrote to the respondent saying that she was sad and disappointed in the way she had been treated by it, she referred to her anxiety and stated "…I understand at present I remain as relief staff but I have days where I don't know how I will ever feel strong enough to walk through those doors again as it's been three months since I was told to leave the premises with no warning. I will do it though as many of my years are invested in those walls! I accept what has happened to me but feel hurt that I never had any appreciation for the 18 years that I gave-I feel like a terrible criminal after trying so longer simply to be heard. I'm not expecting anything from this, just want to say my piece and would really appreciate it if my questions in the email I sent on 7th February could be clarified so I can then move on. " (p203)

89. A meeting took place between the claimant and Kelly Ashley, the new manager/ director (at least in an acting capacity) on 3 March 2020. The claimant says that she was made to feel extremely uncomfortable. The claimant wrote an email afterwards on 16 March 2020 which in my view was carefully written. In my judgement the claimant is somebody who seeks to avoid confrontation but, nevertheless, she did say in that letter, "to hear you told staff whilst I was still in the nursery that it was awkward with me there was upsetting. I am sorry you felt this way." She goes on later, "during my visit there was no mention of any return to work or supervision being carried out? I have not had a return to work completed after each time I have been signed off. Nor have I had a supervision since last September. Considering everything that I have been through and that that was one of the reasons for my demotion I am surprised by this. I was feeling better about things however due to the above I have been signed off again. I will post my signed relief staff contract."

90. Kelly Ashworth replied stating "it was lovely to see you, and I have no concerns about your professionalism, and in reference to the "Awkwardness" I was just mindful that it may have been a difficult situation for you". Thus, Ms Ashworth appears to accept that she had spoken to staff about the situation with the

claimant being awkward. I can find no justification for Ms Ashworth speaking to the staff about that matter. It can only have undermined the claimant's position.

91. The claimant's case that she was made to feel unwelcome is further supported by the evidence of Ms Fernie. In her witness statement she states that once the claimant was suspended and Kelly Ashworth was managing the nursery "Kelly and Sarah spent their time dissecting the nursery piece by piece while openly discussing what they deemed to be the poor management by Rebecca, dismissing my claims of how Busy Bees and their policies, procedures and systems had let her down continually"

92. I find that at the meeting in March with Kelly Ashworth the claimant was made to feel unwelcome.

93. The claimant was then signed off work from 6 March 2020 to 3 April 2020 due to anxiety. She was signed off again from 4 April 2020 to 4 May 2020.

94. On 12 April 2020 the claimant raised a grievance, she referred to her suspension and demotion and also to the fact that she had been seeking help over a period of months, she raised various matters in relation to the disciplinary process and set out the effect that matters had had upon her. She stated "I understand you might have other ideas about this but I have sought advice, thought about the possible solutions and believe I should be entitled to compensation for the damage that has been caused."

95. The claimant's case was that the grievance was not acknowledged sufficiently quickly and that was "the final straw" which caused her to resign. However, as I have indicated, I have agreed with the respondent that it would be unfair to allow the claimant to amend the list of issues to rely upon that allegation for the purposes of her claim. I accept, however, the respondent's witnesses evidence, which was that any delay was caused by the start of the coronavirus pandemic when all of its staff suddenly had to work from home and the systems were not set up for that. I do not consider there was any unreasonable delay between 12 April 2020 and when the claimant resigned on 26 April 2020, but if there had been, it would have been reasonable in the circumstances

96. The claimant resigned with immediate effect on the 26 April 2020. At the point when the claimant resigned, I find that she was resigning because of the totality of the things which had happened to her over the last few months, including her the perceived delay in responding to the grievance, being made to feel unwelcome by Kelly Ashworth, being demoted, being subjected to a disciplinary process which she felt was unfair, both in implementation and in the way it was conducted, being suspended and not being given proper support in her role.

97. Having regard to the list of issues, it may be helpful for me to clarify or supplement some of my findings of fact set out above as follows.

98. I find that there was a lack of support for the claimant whilst she was at work. The most significant aspect was that for a large amount of time in 2019 she was required to carry the full managerial role despite the fact that she was only

employed for three days a week. That led to her getting behind on the tasks necessary to keep the nursery running properly.

99. There was a lack of supervision meetings- only 2 happened in 2019.

100. I find that there was an expectation that the claimant should work on her non- working days. There was no other way in which the claimant could hope to get on top of all of the work. The respondent knew that the claimant was having to work on her non-working days and not only did nothing to stop it but, on occasion, required it.

101. I accept that there were no return to work interviews after the claimant returned from sickness.

102. I do not find, however, on the balance of possibilities and on the evidence which I have heard, that the claimant was threatened that if she did not increase her hours a full-time manager would be appointed. I accept that discussions about increasing the claimant's hours took place, but it is not particularly surprising that the respondent would ask the claimant whether she could increase her hours. That does not mean that there was a threat to replace her.

103. I am not satisfied, on the evidence that I have heard, that the respondent told the claimant's colleagues that she had been suspended. It seems to be equally likely that because the claimant was distressed after her suspension she mentioned it to colleagues.

104. In my judgment the way in which the disciplinary procedure was conducted was adequate. There were some delays and, perhaps, some inaccuracies in minutes and the timeline. However I am not satisfied that there was any sinister reason for that; it is not unusual in disciplinary processes for there to be some failings. Having said that I remain of the view, as set out above, that the use of the disciplinary process was inappropriate.

105. There is no evidence that the respondent did not allow the claimant to be accompanied at the disciplinary hearing. Even if it told the claimant's colleague that she did not have to attend if she did not want to do so, that would not mean that the respondent was preventing the claimant having a colleague. It is a statement of truth that the claimant's colleagues did not have to attend on behalf of the claimant if they did not want to.

106. On the question of whether the claimant was paid incorrectly from April 2019, the claimant's contract carried the statement "entirely at the company's discretion, your salary will be reviewed annually. However, a salary review will not necessarily result in a salary increase." The claimant's evidence is simply that, in previous years, staff had been given an increase if they had met targets. However the claimant is not able to say whether other members of staff were given an increase on that basis in April 2019 and from the evidence I have heard I accept that they were not. I do not find that there was any clear custom that staff were always given a specific pay increase if they hit their targets, and there is no real evidence that any increase was always of a certain amount. Even the claimant puts it at "between 3 and 4%".

107. On the question of sick pay the claimant's contract provides as follows

> In cases where an employee is absent due to sickness, after three months service, at the discretion of a line manager, the company may provide additional benefits over and above any entitlement to Statutory Sick Pay.
>
> This will be the payment of normal salary for the following number of days between January – December each year according to the number of days worked per week as follows:
>
> - 4 – 5 days per week - payment of normal salary for 6 days in total
> - 3 days per week - payment of normal salary for 4 days in total
> - 1 or 2 days per week - payment of normal salary for 2 days in total
>
> In managing sickness absence this is monitored over a rolling 12 months in line with the Absence Management Policy.

108. The claimant was paid in full while she was signed off sick for two weeks during July 2019 but not paid during her later absences.

The law

109. In respect of the relevant legal principles which I must apply, counsel for the respondent agreed that, to the extent to which it was necessary for me to consider legal principles in respect of which she had not provided authorities, I should direct myself by reference to what is set out in Harvey. Where appropriate, the legal principles set out below do that.

110. A termination of the contract by the employee will constitute a dismissal within the ERA 1996 if he or she is entitled to so terminate it because of the employer's conduct. The Court of Appeal made clear in *Western Excavating (ECC) Ltd v Sharp [1978] IRLR 27,* it is not enough for the employee to leave merely because the employer has acted unreasonably; its conduct must amount to a breach of the contract of employment.

111. Harvey on Industrial Relations helpfully summarises the law as follows[2]:

> In order for the employee to be able to claim constructive dismissal, four conditions must be met:
>
> (1) There must be a breach of contract by the employer. This may be either an actual breach or an anticipatory breach.
>
> (2) That breach must be sufficiently important to justify the employee resigning, or else it must be the last in a series of incidents which justify his leaving. Possibly a genuine, albeit erroneous, interpretation of the

[2] Division D1, para 401

> contract by the employer will not be capable of constituting a repudiation in law.
>
> (3) He must leave in response to the breach and not for some other, unconnected reason.
>
> (4) He must not delay too long in terminating the contract in response to the employer's breach, otherwise he may be deemed to have waived the breach and agreed to vary the contract.

112. In this case the claimant, in respect of the breach of contract, relies upon a breach of the implied term of trust and confidence.

113. In *Malik v Bank of Credit and Commerce International SA* [1997] IRLR 462, the term was held to be as follows: “The employer shall not without reasonable and proper cause conduct itself in a manner calculated and likely to destroy or seriously damage the relationship of confidence and trust between employer and employee."

114. In *Buckland v Bournemouth University Higher Education Corporation* it was reiterated that at the stage when the tribunal is considering whether there has been a repudiatory breach of contract it is not to apply the range of reasonable responses test.

115. In *Omilaju v Waltham [2005] ICR 481* Dyson LJ said:

> 14 The following basic propositions of law can be derived from the authorities.
>
> 1. The test for constructive dismissal is whether the employer's actions or conduct amounted to a repudiatory breach of the contract of employment: *Western Excavating (ECC) Ltd v Sharp* [1978] ICR 221.
>
> 2. It is an implied term of any contract of employment that the 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: see, for example, *Mahmud v Bank of Credit and Commerce International SA* [1997] ICR 606, 610 e– 611a (Lord Nicholls of Birkenhead), 620 h– 622c (Lord Steyn). I shall refer to this as “the implied term of trust and confidence”.
>
> 3. Any breach of the implied term of trust and confidence will amount to a repudiation of the contract: see, for example, per Browne-Wilkinson J in *Woods v W M Car Services (Peterborough) Ltd* [1981] ICR 666, 672 a. The very essence of the breach of the implied term is that it is calculated or likely to *destroy or seriously damage* the relationship.

4. The test of whether there has been a breach of the implied term of trust and confidence is objective. As Lord Nicholls said in *Mahmud* , at p 610 h, the conduct relied on as constituting the breach must

"impinge on the relationship in the sense that, looked at *objectively* , it is likely to destroy or seriously damage the degree of trust and confidence the employee is reasonably entitled to have in his employer" (emphasis added).

5. A relatively minor act may be sufficient to entitle the employee to resign and leave his employment if it is the last straw in a series of incidents. It is well put in *Harvey on Industrial Relations and Employment Law* , para DI [480]:

"Many of the constructive dismissal cases which arise from the undermining of trust and confidence will involve the employee leaving in response to a course of conduct carried on over a period of time. The particular incident which causes the employee to leave may in itself be insufficient to justify his taking that action, but when viewed against a background of such incidents it may be considered sufficient by the courts to warrant their treating the resignation as a constructive dismissal. It may be the 'last straw' which causes the employee to terminate a deteriorating relationship."

…

19 The question specifically raised by this appeal is: what is the necessary quality of a final straw if it is to be successfully relied on by the employee as a repudiation of the contract? When Glidewell LJ said that it need not itself be a breach of contract, he must have had in mind, amongst others, the kind of case mentioned in the Woods case at p 671 f– g where Browne-Wilkinson J referred to the employer who, stopping short of a breach of contract, "squeezes out" an employee by making the employee's life so uncomfortable that he resigns. A final straw, not itself a breach of contract, may result in a breach of the implied term of trust and confidence. The quality that the final straw must have is that it should be an act in a series whose cumulative effect is to amount to a breach of the implied term. I do not use the phrase "an act in a series" in a precise or technical sense. The act does not have to be of the same character as the earlier acts. Its essential quality is that, when taken in conjunction with the earlier acts on which the employee relies, it amounts to a breach of the implied term of trust and confidence. It must contribute something to that breach, although what it adds may be relatively insignificant.

20 I see no need to characterise the final straw as "unreasonable" or "blameworthy" conduct. It may be true that an act which is the last in a series of acts which, taken together, amounts to a breach of the

implied term of trust and confidence will usually be unreasonable and, perhaps, even blameworthy. But, viewed in isolation, the final straw may not always be unreasonable, still less blameworthy. Nor do I see any reason why it should be. The only question is whether the final straw is the last in a series of acts or incidents which cumulatively amount to a repudiation of the contract by the employer. The last straw must contribute, however slightly, to the breach of the implied term of trust and confidence. Some unreasonable behaviour may be so unrelated to the obligation of trust and confidence that it lacks the essential quality to which I have referred.

21 If the final straw is not capable of contributing to a series of earlier acts which cumulatively amount to a breach of the implied term of trust and confidence, there is no need to examine the earlier history to see whether the alleged final straw does in fact have that effect. Suppose that an employer has committed a series of acts which amount to a breach of the implied term of trust and confidence, but the employee does not resign his employment. Instead, he soldiers on and affirms the contract. He cannot subsequently rely on these acts to justify a constructive dismissal unless he can point to a later act which enables him to do so. If the later act on which he seeks to rely is entirely innocuous, it is not necessary to examine the earlier conduct in order to determine that the later act does not permit the employee to invoke the final straw principle.

22 Moreover, an entirely innocuous act on the part of the employer cannot be a final straw, even if the employee genuinely, but mistakenly, interprets the act as hurtful and destructive of his trust and confidence in his employer. The test of whether the employee's trust and confidence has been undermined is objective (see the fourth proposition in para 14 above).

116. In *Kaur v Leeds Teaching Hospitals* [2019] ICR 1, Underhill LJ gave the following guidance at paragraph 55:

> In the normal case where an employee claims to have been constructively dismissed it is sufficient for a tribunal to ask itself the following questions:
>
> (1) 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?
>
> (2) Has he or she affirmed the contract since that act?
>
> (3) If not, was that act (or omission) by itself a repudiatory breach of contract?
>
> (4) If not, was it nevertheless a part (applying the approach explained in *Omilaju* [2005] ICR 481) of a course of conduct comprising several acts

and omissions which, viewed cumulatively, amounted to a (repudiatory) breach of the *Malik* term? (If it was, there is no need for any separate consideration of a possible previous affirmation, for the reason given at the end of para 45 above.)

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

117. I accept the submissions of the respondent that in deciding whether the employee resigned in response or partly in response to the breach the question is whether the repudiatory breach played a substantial part in the reasons for resigning (*Wright v North Ayreshire Council* [2014] ICR 77, *United First Partners Research v Carreras* [2018] EWCA Civ 323).

118. In respect of affirmation, the EAT in *WE Cox Toner (International) Ltd v Crook* [1981] ICR 823 held as follows

13

…If one party ('the guilty party') commits a repudiatory breach of the contract, the other party ('the innocent party') can choose one of two courses: he can affirm the contract and insist on its further performance or he can accept the repudiation, in which case the contract is at an end. The innocent party must at some stage elect between these two possible courses: if he once affirms the contract, his right to accept the repudiation is at an end. But he is not bound to elect within a reasonable or any other time. Mere delay by itself (unaccompanied by any express or implied affirmation of the contract) does not constitute affirmation of the contract; but if it is prolonged it may be evidence of an implied affirmation: Allen v Robles (1969) 1 WLR 1193. Affirmation of the contract can be implied. Thus, if the innocent party calls on the guilty party for further performance of the contract, he will normally be taken to have affirmed the contract since his conduct is only consistent with the continued existence of the contractual obligation. Moreover, if the innocent party himself does acts which are only consistent with the continued existence of the contract, such acts will normally show affirmation of the contract. However, if the innocent party further performs the contract to a limited extent but at the same time makes it clear that he is reserving his rights to accept the repudiation or is only continuing so as to allow the guilty party to remedy the breach, such further performance does not prejudice his right subsequently to accept the repudiation: Farnworth Finance Facilities Ltd v Attryde (1970) 1 WLR 1053.

14

It is against this background that one has to read the short summary of the law given by Lord Denning MR in the Western Excavating [1978] IRLR 27 case. The passage 'moreover, he 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' is not, and was not intended to be, a comprehensive statement of the whole law. As it seems to us, Lord Denning was referring to an obvious difference between a contract of employment and most other contracts. An employee faced with a repudiation by his employer is in a very difficult position. If he goes to work the next day, he will himself be doing an act which, in one sense, is only consistent with the continued existence of the contract, he might be said to be affirming the contract. Certainly, when he accepts his next pay packet (ie, further performance of the contract by the guilty party) the risk of being held to affirm the contract is very great: see Saunders v Paladin Coachworks Ltd (1968) 3 ITR 51. Therefore, if the ordinary principles of contract law were to apply to a contract of employment, delay might be very serious, not in its own right but because any delay normally involves further performance of the contract by both parties. It is not the delay which may be fatal but what happens during the period of the delay: see Bashir v Brillo Manufacturing Company [1979] IRLR 295.

15

Although we were not referred to the case, we think Lord Denning's remarks in the Western Excavating [1978] IRLR 27 case are a reflection of the earlier decision of the Court of Appeal in Marriott v Oxford Co-operative Society (1970) 1 QB 196. In that case, the employer repudiated the contract by seeking to change the status of the employee and to reduce his wages. The employee protested at this conduct but continued to work and receive payment at the reduced rate of pay for a further month, during which he was looking for other employment. The Court of Appeal (of which Lord Denning was a member) held that he had not thereby lost his right to claim that he was dismissed (in the Western Excavating [1978] IRLR 27 case at p.30 Lord Denning explains that the case would now be treated as one of constructive dismissal). This decision to our mind establishes that, provided the employee makes clear his objection to what is being done, he is not to be taken to have affirmed the contract by continuing to work and draw pay for a limited period of time, even if his purpose is merely to enable him to find another job.

119. Generally a party cannot seek to imply a term into a contract which is inconsistent with or contradicts an express term. Harvey on Industrial Relations (Division AII para 37.01) states “The second problem is the extent to which custom and practice can be relied on where the other side argues that the matter is already covered by an express term with which the alleged custom is inconsistent. Short of arguing that the 'custom' in fact constituted or was evidence of a formal variation of the original express term, the starting point in orthodox contract law is that the express term must take precedence. If however, it can be shown that the express term is ambiguous there may well be a proper role for custom in interpreting it, in which case it may well be the custom that in fact prevails.”

120. Where a breach of contract claim requires the Tribunal to consider the exercise of discretion in the payment of a bonus, Harvey gives the following summary of the law

> Firstly, the bar is still set very high for potential claimants. Merely contesting that the exercise of the employer's discretion is unreasonable from the employee's standpoint will be insufficient to show a breach of the trust and confidence term. Equally, although the employee's reasonable expectations may be a relevant factor, they will not be determinative. As the court put it in *IBM v Dalgleish* at [229]: '…to elevate [reasonable expectations] to a status in which they [have] overriding significance over and above other relevant factors [is] erroneous in law'. As a result, the statement of Moses LJ in *Commerzbank AG v Keen*, that the mere fact that the employee had received higher bonus awards in previous years did not assist 'in any way' with the assessment whether a later award was irrational, should now be treated with caution. The failure to honour reasonable expectations may well need to be taken into account but only as one factor in the decision.
>
> Secondly, whilst the bar remains high, the decisions in *Braganza* and *IBM v Dalgleish* do throw something of a lifeline to would-be claimants. This is because, as noted above, they appear to import *both* limbs of *Wednesbury* into the relevant test. So although the employee may be unable to show that the bonus decision was one that no reasonable employer could have reached, he may be able to demonstrate, for example, that relevant factors have been disregarded.
>
> (Division B1 [34.05])

121. In *Associated Tyre Specialists (Eastern) Ltd. v. Waterhouse [1977] ICR 218* the EAT accepted that an employee is entitled to their employer's support although the facts of this case are somewhat different to that one.

Conclusions

122. In respect of the claim of constructive dismissal, initially, I set out my conclusions by reference to the guidance in *Kaur*.

123. I find that the most recent act which triggered the claimant's resignation was her perception that her grievance had not been acknowledged sufficiently quickly. That, however, is not an allegation of repudiatory breach which I can consider for the reasons set out above. If it had been, in any event, I would not have been of the view that the slight delays in acknowledging the grievance in the context of the coronavirus pandemic would be any kind of breach of contract.

124. However, the resignation was also triggered by other matters including, most closely connected in terms of time, the way the claimant was made to feel unwelcome by Ms Ashworth. The claimant had not affirmed the contract since that act. At most she had (after objecting to the way she had been treated) said

that she would send in her signed new contract, but she did not do so and was quickly signed off sick. I do not find that she did any acts which were only consistent with the ongoing performance of the contract. Given that the claimant's domestic situation she was bound to take some time to consider her options.

125. I do not find that the actions of Kelly Ashworth, by themselves, amounted to a repudiatory breach of contract. They were unpleasant and unimpressive in terms of management style but I do not think that they were so bad that they amounted to a breach of the implied term of trust and confidence.

126. I do find, however, that the actions of Kelly Ashworth, when taken in conjunction with the earlier acts on which the claimant relies, amounted to a breach of the implied term of trust and confidence. In my judgment the behaviour of the respondent in not providing adequate support for the claimant when she was crying out for it and then subjecting the claimant to an inappropriate disciplinary process because standards in the nursery fell was a breach of the implied term of trust and confidence. It was conduct which was likely to destroy or seriously damage the relationship of confidence and trust between employer and employee. The subsequent act of demoting the claimant under the disciplinary process only served to make matters worse, particularly in circumstances where she had not been warned that if she did not improve she was likely to face a sanction of that nature.

127. I also find that the employee resigned in response to that breach. Counsel for the respondent sought to argue that the claimant really resigned in order to pursue a claim of compensation. She relies upon the reference to compensation in the grievance. I do not think that is accurate. The claimant, as I have indicated, was a good and loyal worker for a long period of time. She strained to cooperate with the respondent during 2019. She had a difficult domestic situation, being a single mother to 2 young children and would not lightly give up paid work in order to bring a speculative compensation claim. It was the breach of contract of the respondent which was operating on the claimant's mind when she resigned.

128. In respect of the unfair dismissal claim I must go on to consider whether I should reduce or increase compensation.

129. The list of issues requires me to consider whether there should be a reduction "pursuant to the principle in *Polkey v AE Dayton Services Ltd* [1987] ICR 142". In that respect I must consider what I think would have happened if the claimant had not been unfairly dismissed.

130. This question requires some speculation on my part and I have not found it easy. On the one hand the claimant was a long serving, good and loyal employee who, when given adequate support up until 2019, was able to secure a "good" OFSTED report for the nursery (although I accept that the claimant would not have been the only person working to achieve that score, but she was the joint manager). She was also given a bonus payment in February 2019 for meeting all of her targets. Thus if she had been given adequate support through 2019 there is a good argument that she would have carried on being a

good and loyal employee and the employment relationship would have continued.

131. On the other hand there is evidence from the claimant's own correspondence that she was having domestic difficulties during 2019 and, whilst I consider the claimant did have a lack of support from the respondent, the reality is that it would have taken the respondent some time to recruit a new joint manager when Sarah Meyers went on unexpected maternity leave earlier than intended. Thus it is possible that, in any event, the claimant would have suffered performance issues in 2019. I must then speculate as to what would have happened if the claimant had been managed supportively under the Performance Management Policy rather than the Disciplinary Policy . That is particularly difficult speculation given that I have not even seen that policy.

132. Doing the best I can, I assess the likelihood that the claimant would have left employment by April 2020 even if she had not been unfairly dismissed at 15%.

133. I must next consider whether the claimant contributed to her dismissal by her conduct. I do not find that she did. Although she struggled to manage the nursery, I do not find that there was no culpable or blameworthy conduct on the part of the claimant.

134. I also reject the respondent's argument that compensation should be reduced because the claimant failed to follow the ACAS code of practice on disciplinary and grievance procedures. The allegation is that the claimant failed to appeal the disciplinary decision (see paragraph 10.5 of the list of issues). In my judgment that misunderstands the correct legal analysis. The claimant's dismissal was when she resigned because of the breach of the implied term of trust and confidence by the respondent. There is no ACAS code which applies in those situations.

135. Moreover even if I was wrong in that respect, given the way in which matters were dealt with by the respondent it seems to me to be neither surprising nor unreasonable for the claimant not to have any faith in the disciplinary process and so not to appeal the decision to demote her. Even if I were to consider reducing the claimant's award I would not consider it just and equitable to do so in the circumstances of this case.

136. I must then consider, according to the list of issues, whether the respondent behaved unreasonably in failing to follow the ACAS codes and I should increase compensation. In this respect I do not consider that I should. It seems to me that the appropriate code to consider would be that in respect of the grievance which the claimant raised. The respondent behaved reasonably in relation to the grievance and there is no basis for increasing the award.

Wrongful Dismissal

137. I turn then to the claim of wrongful dismissal. Counsel for the respondent sensibly suggested that the claim in this respect goes hand-in-hand with the claim of constructive dismissal. The parties are agreed that the claimant was

entitled to be paid 12 weeks' notice and given my findings that the respondent was in repudiatory breach of contract, the claimant was entitled to resign without notice, but has suffered loss in respect of the notice period.

Unlawful Deduction Of Wages

138. I do not accept that the claimant was contractually entitled to a pay rise of 3 or 4% in April 2019. The claimant could not succeed in an argument that there was an implied right to a pay rise given the express terms of the contract. The terms, however, were that that the company's discretion the claimant's salary would be reviewed annually.

139. I have seen no evidence which would suggest that the respondent behaved unreasonably, much less capriciously, in respect of the pay rise. I have seen no evidence that it failed to take into account relevant factors or took into account irrelevant ones.

140. In any event at the point of her dismissal the claimant was not entitled to be paid on the basis of a higher pay rise since it had been given. Thus the claimant was not paid less than the amount to which she was entitled on any occasion and this claim must fail.

Sick Pay

141. In relation to the claim of sick pay the respondent paid the claimant full pay during her absence in July 2019. She was signed off sick during that period and, therefore, under the terms of her contract was entitled to payment for four days. She was paid that. The next time that the claimant went on sick leave she was not entitled to be paid on the basis of her salary but only on the basis of statutory sick pay. The claimant was paid that. In those circumstances the claim in relation to sick pay also fails..

Employment Judge Dawson
Date: 18 June 2021

Judgment & Reasons sent to parties: 25 June 2021

FOR THE TRIBUNAL OFFICE

Notes

Public access to employment tribunal decisions
Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.

CVP
The hearing was conducted by the parties attending by Cloud Video Platform. It was held in public in accordance with the Employment Tribunal Rules. It was conducted in that manner because a face to face hearing was not appropriate in light of the restrictions required by the coronavirus pandemic and the Government Guidance and it was in accordance with the overriding objective to do so.