



EMPLOYMENT TRIBUNALS

Claimant: Miss Donna Haughton

Respondent: TJX UK

Heard at: London South via CVP

On: 9-10 February 2021, 6-7 April 2021. In chambers on the 28-9 June and the 12 July 2021

Before: Employment Judge Sage

Representation

Claimant: In person

Respondent: Ms Kight of Counsel

JUDGMENT

The Claimant's claim for unfair dismissal is well founded.

REASONS

1. In a claim form dated the 31st of October 2019 the Claimant claimed unfair dismissal. The Claimant was employed as a Store Manager "SM" for the Respondent from the 25th of April 2010 and ended on the 10th of August 2019. The Claimant claimed that she resigned due to a breakdown in the relationship with Mr. Young her district manager. The Claimant claimed that Mr. Young shouted at her and banged his fist on the table in front of her team and asked her team to write statements about her including issues in relation to her personal life. In the first midyear review he held with the Claimant it was already typed up and there were no mention of KPIs and nothing positive was said. When the Claimant resigned she claimed that Mr. Young said that it was "time to celebrate" and said that with her "going quietly" the door was always open to her to re-join the business if things did not work out. The Claimant stated in her claim form that she was looking for reinstatement or re engagement.
2. The Claimant amended her claim form after seeking advice from Citizens Advice. She stated that at the time she was going through a difficult time in

her personal life and Mr. Young had asked the staff whether it impacted on her performance.

3. In October 2018 the Claimant stated that Mr. Young banged his fists and shouted at her “ don't ever undermine me like that;” she said that he was aggressive and she was frightened. He admitted that on occasions he shouted at her (after the letter of grievance outcome written by Mr W. dated the 19th of January 2020) but he never apologised. The Claimant denied that Ms Knight her Assistant Manager resigned because of her and Mr. Young never raised with her what Ms Knight was alleged to have said about her.
4. The Respondent's response was that the Claimant had performance issues and Ms Knight had threatened to resign due to the Claimant's conduct. Mr. Young spoke to the Claimant and she told him that Ms Knight had resigned due to Mr. Young , however when he asked her about this she denied it. Ms Knight resigned in December 2018.
5. The Claimant was given a written performance warning on the 28th of May 2019 and did not appeal. On the 13th of June 2019 the Claimant asked to step down from her role as Store Manager. The Claimant had an interview at New Look on the 2nd of June 2019 and she then stated she wished to resign and her new job started on the 9 August 2019. The Claimant did not start her new job and the Respondent was looking for roles for the Claimant.

The issues

6. The issues were discussed at the commencement of the hearing and the heading at paragraphs a-d were agreed to be the outline issues. The subheadings (i) to (vi) were taken from the Respondent submissions:
 - a. has the Respondent committed a fundamental breach one that is calculated or likely to damage or destroy the duty of trust and confidence in the employment relationship. The Claimant relies on the following conduct:
 - i. Mr Young asking management team to write statements on the Claimant and to report to him;
 - ii. Mr Young being negative and awkward;
 - iii. Mr Young shouting at her and on one occasion shouting and banging his fists on the table;
 - iv. Mr Young penalised the Claimant and put her on a PIP for things that previous managers had not done;
 - v. In the August review Mr Young did not talk about KPIs, the review was already typed up and nothing positive was said
 - vi. Mr Young shouted at her and Ms Knight on many occasions and made them both feel incompetent and on one occasion reduced Ms Knight to tears.
 - b. Did the Claimant resign in response to the breach and in this case the Claimant relies on the final straw.
 - c. Has there been a dismissal?
 - d. Has the Respondent shown a potentially fair reason to dismiss and in this case the Respondent relies upon capability.

7. The Respondent in paragraph 6 of their submissions make the point that the Claimant did not refer to any complaints about Mr Young in her ET1s or in her statement for the period January to June 2019. The Respondent referred the Tribunal to the case of *Chandhok and anor v Tirkey (Race Discrimination)* [2014] UKEAT 0190/14/912. In that case the point is made of the primacy of proceedings. The Respondent submitted that it would be inappropriate to recast or redraft the issues to somehow suit the evidence.
8. It is accepted that the Tribunal should not depart from an agreed list of issues, save in exceptional circumstances. However in this case there was not an agreed list of issues. There was a discussion at the start of the hearing where the outline issues were agreed. Although the Respondent stated that the Claimant did not refer to the dates of January to June in her ET1, it is also true to state that she made no specific reference to times and dates in her claim forms, she only referred to the way she had been treated by Mr Young (page 8) and the way that he “made it very clear to me I am not a good Store Manager” (page 34). She then stated that she resigned as a result of the way she had been treated by him.
9. The Respondent did not indicate that they were unsure of the case they had to meet. There was no evidence that the Respondent was in difficulty responding to the complaints. Mr Young provided detailed evidence of how and why he managed the Claimant in the way he did from September 2018 to June 2019.
10. It is the duty of the Tribunal to hear the case before it, taking into account all the evidence. It is also the duty of the Tribunal to act in accordance with the overriding objective to level the playing field where one is legally represented and the other party is not. That is why in certain circumstances it is appropriate not to stick slavishly to a list of issues as in the case of *Saha v Capita* UKEAT/0800/18/DM. I considered whether the Respondent would suffer any prejudice by considering the evidence in relation to the incidents from January to June 2019 and I conclude that there was not. It was clear that, in any event that the Claimant complained about the decision to place her on a PIP from February which was referred to in her ET1, so it was really only the incidents after February that were in issue.
11. I conclude that no prejudice would be suffered by the Respondent and none has been referred to in their written submissions. The events that occurred in the referred to above timeframe was detailed in his notes and was referred to in evidence. The Respondent had not been taken by surprise as this was within the factual matrix that Mr Young had placed before the Tribunal. It is concluded therefore that these matters were before the Tribunal and should be considered in order to deal with all the evidence relevant to the issues in the case.

Additional Disclosure of document marked R1

12. The Respondent applied to disclose a document which was marked R1 at 11.35 on the last day of the hearing. It was decided that the document should be disclosed but the Claimant should be given time to read it. The

document was a number of text messages in relation to the discussion with Ms Knight on the 30 October and was relevant to the issue of the accuracy of Mr Young's notes.

13. At the same time as allowing disclosure of this additional document, Mr Young was ordered to provide a copy of the emails sent to Ms B and to Ms I referred to below regarding the Claimant's personal circumstances, but he told the Tribunal he was unable to find them.

Findings of fact

14. The findings of fact which were agreed all on the balance of probabilities are found to be as follows:

15. The Claimant joined the Respondent company on the 25th of April 2010 joining as an Associate, she remained in this role for three years. The Claimant then progressed to the role of Assistant Manager which is a role she held for a further four years working her way up to the role of Store Manager. The Claimant's first role as Store Manager was in the Camberley branch commencing on the 29 January 2017. There had been no concerns about the Claimant's performance at any time under various previous managers when performing any of her previous roles.

Improving Performance Policy

16. The Respondent had a number of policies and procedures. There was a grievance procedure at pages 50-57 which included an informal and formal process. There was also a policy called 'Improving Performance UK How We Treat Each other' at pages 58-67. Page 60 identified a number of procedures to follow when there were performance issues; the flowchart identified that the first procedure was to help improve performance informally by using a 'Let's Talk form'. The 'Let's Talk' form was explained in the procedure at page 61; it stated that the form recorded the concerns held by the manager and the steps identified to improve. It also recorded the discussions between the parties to show what has been discussed and agreed. This form is said to help the employee to "ask your manager questions if you're not clear about what or how you need to improve, and let them know if there's anything you need from them to help you both improve and drive your improvement journey". If this informal process does not show improvement it is only then that the employee will move to a PIP which the employee was encouraged to agree with the manager. A PIP will also be appropriate where a Clear Development Needs (CDN) rating is given.

17. The PIP should be in writing "with clear and preferably agreed SMART objectives (Specific, Measurable, Motivating, Achievable, Realistic, Trackable and Time specific). The employee was encouraged to "take ownership" of the PIP and to discuss it with the manager, if there was a difference of opinion, the manager would have the final word (page 62). Once a PIP is given there was to be a meeting every 4 weeks to review the process. Notes will be taken at each review (which are informal). At the end of the review process there were four likely outcomes; that the employee met the requirements, that the employee had met the requirements but the review period would be extended for a further 4

weeks, the employee was improved but hadn't met the requirements and the review period would be extended for four weeks and lastly that the employee failed to meet the standard and they would be invited to attend a formal meeting.

18. The invitation to the formal PIP meeting should provide at least 24 hours' notice and should include any relevant documents as well as the PIP. The process to be followed at the formal meeting was at pages 63-4 of the bundle. At the meeting it is expected that the employee puts forward their version of events and to raise any questions that they may have. It is also usual for a third employee to attend to take notes of what is discussed. It also stated that "you'll be given an opportunity to review the notes to make sure they're an accurate reflection of the meeting". The decision will usually be communicated orally the same or the following day if further investigations are required. The employee has a right to appeal.

The Review Process.

19. There was also a process for reviews to be conducted and this was within the Respondent's Developing Talent documents at pages 67A to W. This document provided for performance to be reviewed at half yearly and annual meetings. During these meetings KPIs and performance were discussed. At page 67C the document stated that the half yearly and annual reviews were an opportunity "for an open and honest discussion about your performance and development since the last review with your line manager". The document encouraged the employee to prepare for each review by looking at all aspects of their performance since their last review and this included asking for feedback from other colleagues and customers as well as other managers (page 67J). The employee attending a review was encouraged to provide evidence about what had been achieved and how and to present this at the review meeting. Page 67N provided detail about how the review should be conducted, it suggested that the employee should be doing most of the talking and should respond to 'open and challenging questions from your line manager'. It also stated in this document that the employee should provide evidence and examples to reinforce the points being made.
20. The review process should be conducted by way of discussion of how the year went, the business objectives and of developing the leadership and competency skills of the employee. The process envisaged that the employee and their manager should agree the results and rating and then discuss the up and coming year and set new objectives. It was only after the meeting that the result be input into the Talent Management System "TMS", the summary box is then completed and the employee should keep one copy of the form and then it should be signed. The document was stated to be an "accurate record of what was discussed" (page 67O). In the section dealing with the written record (page 67O) it confirmed that there were three stages to the process, the first being the employee's comments of each of the objectives, the line manager's comments and the overall comments and performance rating. The written record can either be captured electronically using the TMS or in a word document. In the

appendix to the document there was advice about how to conduct the review meeting (page 67T) and what to do after the review meeting (67U)

Taking Over the Crawley Store.

21. On the 18th of April 2018 the Claimant moved to the Crawley store and on that date she picked up the keys. She met her Assistant Manager Sharon Knight who informed her that she had not received much in the way of training and had only worked in the store for about five months. At the time of her move to Crawley, Mr Taylor was the District Manager and he conducted two visits to the store, each of which took about 5 to 10 minutes. After the first two visits, Mr Young took over as District Manager.
22. The Crawley store is situated very close to the County Oak store and it was confirmed by Mr. Young that the situation of another store being geographically very close to another store had an adverse impact on the sales of each store, he described this as cannibalisation.
23. On joining the Crawley store the Claimant discovered that much of her team was inadequately trained, for example no team leaders had completed their training and her Assistant manager had also received no training for the role. It was also noted that although it was the accepted procedure that Associates would process deliveries, however in the Crawley branch a Team Leader and an Associate performed the task.
24. At the time of her move to the Crawley branch the Claimant had signed up to the Princes Trust project, this responsibility took her out of the branch for a couple of days a week. It was noted that Mr. Young was also managing the Prince's Trust project.

Mr Young's first visit to the store.

25. The Claimant told the Tribunal that when a new store manager took over the store there were a number of routine tasks that had to take place, including health and safety risk assessments covering a number of different risks. The Claimant discussed with Mr. Young on his first visit that many issues needed to be rectified within the Branch including the training of staff and tackling a number of performance issues. This meeting was also attended by Ms Knight who confirmed to him that she had not been informed of the fundamentals of her role.

The Mid-Year Review.

26. Mr. Young conducted the Claimant's Mid-Year review on the 24th of August 2018 and the document evidencing this was seen at pages 88 to 90 of the bundle. The Claimant stated that during the Mid-Year review meeting conducted by Mr. Young, he had already typed up his comments, she stated that he made it clear that the review document was staying as it was. The Claimant stated that the review lasted one to one and a half hours with Mr. Young doing most of the talking; she described this as him talking "at her" and not to her. It was put to the Claimant in cross examination that Mr Young tended to write down things in a detailed way and this is what he did in the review document. The Claimant complained specifically that Mr Young did not discuss with her the KPIs in this review.

In cross examination she said that she gave her notes she used in this meeting to Mr Young.

27. Mr Young's evidence in chief about how he conducted the Mid-Year review was at paragraphs 9-10 of his statement. He did not make any reference to the Claimant's input to the meeting, his statement specifically referred to him discussing his views and that the Claimant agreed with him but he made no reference to the Claimant expressing any views or what those views were. He also made no reference to the Claimant's notes handed over in this meeting. At paragraph 42.2 of his statement he stated that he conducted the review in partnership with the Claimant and at paragraph 42.3 Mr Young responded to the allegation that he had typed the review document in advance of the meeting without first discussing it with the Claimant. His statement recorded that the Claimant "was aware" of what was discussed and was "fully involved" in the process. He then stated "It is part of my role, however to complete these and whilst I deny that it was not discussed [with the Claimant] I did type it up to ensure it was completed in a timely manner". This appeared to suggest to the Tribunal that Mr Young had typed up the review document in advance prior to the review meeting taking place (as this was the allegation he was specifically responding to in his statement).
28. Mr Young accepted in answer to the Tribunal's questions that he made no reference in his statement to having a discussion with the Claimant and recording her views on the document.
29. Mr Young's evidence given in cross examination was quite different to the evidence that appeared in his statement. He said he attended the review meeting with a blank document and denied that it had been typed up in advance and denied that there were 'pre made notes'. He said that he had then populated the review document and included comments made by both but accepted that no comments from the Claimant had been included in the document. In cross examination he stated that the review was "done together but I took all comments and populated the review, if she chose not to add comments that is fine".
30. The Claimant also alleged in her statement at paragraph 18 that Mr. Young had no interest in discussing her KPIs or about any improvements that she had made in store during the review meeting. Although Mr Young said in his statement that he "covered all KPIs" there was no evidence to suggest that they were discussed and the reference to KPIs was in connection with what he identified as the Claimant's clear development needs. The August 2018 review was compared to a previous review conducted by the Claimant's district manager Mr Ede at page 84-87 of the bundle. In this document all KPIs were included and the notes reflected that they were discussed. It was also noted that the Claimant's comments were included in the document and she provided her summary comments at the end of the form. She also signed the document. This previous review appeared to document an approach that was consistent with the policy referred to above at paragraphs 19-20, which envisaged a collaborative approach during the meeting.
31. The Mid-Year review document produced by Mr Young provided no evidence to suggest that KPIs were discussed in detail and on this point the

Claimant's recollection of the meeting is preferred to that of Mr Young. The evidence of the Claimant was also preferred as to how the review was conducted, the document did not record or evidence that a two way discussion had taken place in the meeting and only Mr Young's comments were recorded on the form. The Claimant also did not sign and agree the contents and Mr Young accepted that it was not signed and he stated that he asked the Claimant to sign it but he commented that "there was no indication we were going down the wrong way". The Claimant in cross examination told the Tribunal that she only saw what he had written on her review document after the meeting and she was adamant in answers in cross examination that all reviews should be discussed together as it was a chance to discuss "what one is doing well and badly and how to improve".

32. Although Mr. Young denied in cross examination that he typed up the form before the meeting, in answers to the Tribunal's questions Mr Young accepted when taken to each box on the review form that he recorded no input from the Claimant, not even in the box headed "Associate comments". The Tribunal find as a fact and on the balance of probabilities that the Claimant's recollection is preferred to that of Mr Young. The Claimant's evidence was consistent, that he had attended with a form that was populated only with his comments. Mr Young also confirmed that none of the Claimant's comments appeared on the form which made it highly likely that he had prepopulated the form with what he wished to say and had not recorded any of the Claimant's comments. The Tribunal also find as a fact that the review did not appear to have been conducted in a manner consistent with the policy referred to above at paragraph 19-20 which required the review to be conducted together with the reviewee doing most of the talking.
33. Despite the above criticisms of the way the review was conducted, the Claimant conceded in cross examination however, that overall the midyear review was balanced and had identified some weaknesses that had also been raised by her previous manager. The Claimant also confirmed in cross examination that up to that review she had not felt undervalued or undermined.
34. The Claimant stated that after this review, Mr. Young visited the store every three to four days and she had been told by her staff in August or the beginning of September that Mr. Young had been talking about her to her management team and other Managers behind her back.

Observations about the documents provided by the Respondent

35. It was noted that in the bundle of documents for this hearing, there were no original emails or contemporaneous documents provided by the Respondent, save for the review documents and the grievance outcome provided after the employment had ended and the resignation and exit form. Mr Young disclosed what he described as his record of his "conversations and performance management with Donna in an informal word document so that I could refer back to it.." (paragraph 11 of his statement). This word document was of considerable size (pages 175-254) and not only included conversations with the Claimant but it also contained extracts of emails to and from others as well as conversations with others about the Claimant. In

respect of meeting notes with the Claimant, they were not agreed notes. It was noted that none of the original email strings were included in the bundle, for example Mr Young referred in his document to extracts of emails he sent to his manager Mr W. but did not produce the full email or the reply. When the Tribunal asked for the copies of specific emails to be produced Mr Young was unable to do so (see above at paragraph 14).

Incidents in September 2018

36. Mr Young's notes at page 175 of the bundle showed that on the 16 September 2018 he had phoned the Claimant's Assistant Manager Ms Knight after he recorded that during his visit to the store on the 15 September he found it to be in a "*poor state of execution*". and during this call he said that she "*elude[d] to Donna having some personal issues (stating with my integrity) that Donna could be subject to physical abuse at home!! Sharon referred to when Donna had a bad backand that this was due to abuse*". His note went on to say he would "*act with caution but get close to the situation in all ways*". It was noted that this record was not consistent with his statement at paragraph 42.5.1 where he stated that he would encourage her to speak with the Claimant directly, this was not the approach that he advocated in his email. Mr Young then recorded that he had been in contact with HR saying he had "*spoken to HR (Mel) and agreed an honest but open approach to review of performance – Mel stated we can mitigate/support/ but not fix abuse... but performance is a separate issue and still needed to be addressed...*".
37. The Claimant was asked in cross examination about the visit on the 16 September and particularly about his comment that the store was in a poor state of execution. She told the Tribunal that she had explained to Mr Young the challenges she faced with people going off sick, holidays and having only 23 people working in the store and because of this the store was struggling to cope. Although she accepted that it was her role to manage the store she was unable to do this without the right number of people in post. It was not disputed that at this time the store was short staffed and those in post were inadequately trained.
38. The Claimant asked Mr Young in cross examination about the written comment in his notes about physical abuse referred to above, she asked if he recalled that they had a conversation about her having a bad back and he agreed that they discussed this (and mentioned that he had undergone a back operation). The Claimant then asked Mr Young if Ms Knight had told him that her back problem was due to physical abuse and he replied that was what he had been told. The Claimant again put to him that during their conversation she had explained that her back problem was due to scoliosis not due to abuse and he replied "*I knew the back condition was separate, I only quote what Sharon had said for my own benefit and not to discuss with other people*". The Claimant asked Mr Young about his conversation with HR and he replied "*I spoke to Mel because I was concerned about your well-being, I spoke to members of the team, I was concerned about your welfare. I spoke to HR – started to see a pattern when performance was not good, I needed to provide you with the best support*". It was noted that Mr Young made no record of his conversation with the Claimant about her back problem and did not place this information in context when recording his discussion with Ms Knight in his notes. It was also noted that he accepted

in cross examination that he had spoken to members of the team and was looking to establish patterns. This seemed to corroborate the objectives in his note above that he would get close to the situation “in all ways”. These entries in his notes appeared to suggest that he was seeking to establish information about when the Claimant was suffering from abuse to see if there was a link to when her performance was also suffering.

39. Mr Young’s notes also recorded meetings with the Claimant on the 18 and 20 September 2018 (pages 176-7). In the first meeting he mentioned the “use and support of a PIP” and showed her the photographs he had taken of the store during his previous visit. He made it clear in the meeting on the 18 September that there were performance areas that had to be improved and said he would ‘re-visit on the 20 September – to see the progress’. On the 20 September he visited and recorded that there was a ‘slight improvement’ and left her 5 actions to be completed before his next visit.
40. In Mr Young's notes on page 177 he recorded a detailed conversation with the Claimant on the 25th of September 2018 about matters such as the location of ‘H’ racks and signage. In Mr Young's minutes he recorded that he had said that the store did not meet expectations and commented that this suggested the Claimant had development needs (page 179). The note showed that when he asked what the Claimant needed he recorded that she “*moaned about her TLs again*” and he stopped her to remind her of the support he had given. He told the Claimant that she should work on ‘*leading and managing appropriately*’. It was put to the Claimant in cross examination that in this meeting Mr Young recognised how hard she was working but the Claimant denied he said this to her replying that “*If he had I would have congratulated my team*”.
41. The Claimant stated that the lists that Mr Young left her to complete were unreasonable, she explained that the sales in store were good but they were short of staff. In cross examination Mr Young confirmed that the store was short staffed with a headcount of only 18 Associates. Mr Young confirmed that a headcount of 25 Associates would be adequate to allow for flexibility. Mr Young also accepted that they were moving into their busiest time.

Incidents in October

42. Mr. Young then attended on the 5th and the 8th of October 2018, the Claimant was not in store as they were her days off. The next meeting with the Claimant was held on the 9 October 2018 (page 182-3). Mr. Young recorded that the Claimant complained about him asking them to move the beauty stand twice, which she had said had slowed down the rest of the jobs. He again referred to comments made in previous visits and said the store had not moved forward and again suggested a PIP “*may well be the best way forward*” . This was the third time he had referred to placing her on a formal PIP since the mid-year review. It was also noted that Mr Young continued to leave long lists of tasks after his visits to be completed by the next visit despite being aware of staff shortages and the store moving into its busiest time.
43. At the end of the minutes taken on the 9 October, he acknowledged again that her Assistant Manager had been off for two weeks (page 183) and Ms

N and Ms A. were also off, leaving her management team depleted. The Claimant asked Mr Young in cross examination whether in the light of this evidence it was still a performance issue or whether it was due to lack of staff and he replied "*we are trying to find a solution to help you move forward. I offered support as you were off on the 15 and 16..*". Mr Young did not seem to answer the question. The Tribunal find as a fact that as he had accepted that the store was short of staff at this time and they were moving into their busiest period, this would inevitably impact upon the ability of the store to keep on top of all tasks. The Tribunal also conclude that Mr Young's practice of providing the Claimant with a long list of tasks to complete within a short time scale, put pressure on the Claimant running an already understaffed store and it was highly likely that some of those tasks may not be completed within the short time scale set and there would have to be prioritisation of tasks according to the needs of the store.

44. On the 10th of October the Tribunal saw in Mr Young's minutes on page 183 that he had made contact with HR to spend a day in store "*to see if anything comes out about ongoing comments around Donna undergoing domestic abuse (suspicions (sic) still lie)*". In addition to Mr Young contacting HR he spoke with Mr E., the Claimant's previous manager and his notes recorded the following: "*see if there was a history of abuse ...he said there wasn't...but she looked after a disabled worker in Camberley store and got attached to him (the disabled worker did under go abuse). Stu said...long shot...but could she still (sic) involved in this ex workers life...*". This evidence corroborated the Claimant's allegation that Mr. Young had spoken to her previous manager about her personal issues and specifically whether she was suffering from domestic abuse. Mr Young accepted that he did so with Mr E. and the Tribunal therefore conclude that his evidence in chief (at paragraph 42.9.1) where he denied talking to anyone about the Claimant's abuse, was therefore incorrect
45. It was not clear from Mr Young's notes what his objectives were in sharing his concerns with human resources. If it had been solely to get support and assistance for the Claimant on a personal level it was difficult to understand how this could have been achieved without the Claimant being in the loop. It was also unclear why he had asked Mr E. if he knew about a 'history of abuse'. The comment made in his notes to HR about it being suspicious and a lie suggested that he did not believe the reports were true.
46. The Claimant stated that Mr Young's many visits often resulted in him making negative comments or he interfered with the running of the store for example he would change rotas and also request that displays be changed (see above at paragraph 43 when he instructed them to move the beauty stand twice). A specific reference was made to his visit on the 10th of October 2018 when the store had just received a large delivery and only had one till working, the Claimant therefore had to put all Associates on tills to provide manual receipts to customers. The Claimant stated that the store was busy and Ms Knight was off and Ms N the Team Leader was on holiday. The Claimant said that Mr Young did not recognise the issues in store and his sole criticism was of the Claimant and her lack of management skills.
47. The Claimant said that on the 15th of October 2018 Mr. Young reprimanded her saying that a delivery had been there for days but the Claimant maintained that it had only arrived that morning. The Claimant put to Mr

Young in cross examination that he had told Ms Knight on the 14 October (Sunday) that he had cancelled the delivery due on Monday and Wednesday so they could catch up, he accepted that this note was incorrect because the Monday delivery turned up and he wasn't aware of this at the time. He accepted that he did not record in his note that this was the case. The Tribunal noted therefore that Mr Young's notes were not always accurate and on this occasion he had failed to record all the relevant facts.

48. The Claimant accepted that after she had worked through a night shift to get the store replaced with stock. She sent Mr Young pictures of how the store looked and he sent a text back to say 'well done looks good'. The Claimant accepted that on this occasion he had given her praise but said that it did not come often. It was also noted that prior to the meeting on the 17 October he called to say 'well done' on cleaning the process room (page 184). This entry in his notes was the only occasion where he recorded giving praise or encouragement to the Claimant.

The meeting of the 17 October 2018

49. On the 17th of October 2018 Mr. Young held a meeting with the Claimant and her Assistant Manager to discuss twilight shifts. It was in this meeting that the Claimant alleged that he banged his fists on the table and shouted at her. The Claimant said that when they discussed the Twilight shift she said she had no one to do them and she had recruited three people that day; who would be starting the following week. The Claimant said that when she told Mr Young this, he banged his fists on the table saying that this was not acceptable. The Claimant's version of events was that he then called her out of the meeting and said to her "*do not ever do that to me again*". Mr. Young denied shouting or banging his fists on the table and denied saying that to her. The Claimant denied being dismissive in this meeting and denied losing her temper or raising her voice, she explained "*I was trying to tell him and he kept shutting me down in front of the other two managers*". She denied that she was shouting when Mr Young started to raise his voice.

50. Mr Young's notes of that meeting were at page 185-6 of the bundle and he recorded that he was unhappy how this meeting went. He described the Claimant as "*too challenging*", "*negative*" and "*dismissive*" of his support and he felt her to be disrespectful towards him. The minutes made no reference to the Claimant shouting or losing her temper. It was noted that in his statement Mr Young confirmed that he told the Claimant that "*she should not talk to me in that manner again*". His notes again referred to putting the Claimant on a PIP in respect of her performance this was the fourth time he had told the Claimant this. There was no reference in his notes to the Claimant being aggressive towards him as suggested in his statement at paragraphs 42.10.1, to that extent his statement appeared to be inconsistent with his own notes.

51. The Claimant referred the Tribunal to a text from her Assistant Manager to her the day after the meeting at page 339 (on the 18th of October 2018 at 15.27) where Ms Knight asked if the Claimant was alright and she went on to state "*I didn't want to leave you . Wasn't he an **** ?*" The Claimant accepted in cross examination that this text did not make reference to Mr.

Young banging his fists on the table but she said that they all knew what that reference referred to. The Claimant asked Mr Young in cross examination why her staff would be worried about her in this meeting and he replied that *"I didn't act badly, I was trying to the balance the welfare issues and trying to take care of you without intruding"*. The Tribunal conclude that this text referred to Mr. Young in the meeting and the concern raised by Ms Knight showed that the meeting was difficult and heated and she was concerned for the Claimant's welfare. His notes were not corroborative of him 'balancing' the Claimant's welfare issues or that it was focussed on taking care of her. The Tribunal find as a fact that in this meeting Mr Young had taken offence at the Claimant's attitude towards him and of being 'dismissive' towards him. He therefore responded in a forceful manner by reprimanding the Claimant outside of the meeting telling her that she should never speak to him in that manner again. There was no suggestion of there being consideration of the Claimant's welfare in the way in which the meeting was conducted or in his notes made after the meeting.

52. The Tribunal also conclude having read the outcome of the Claimant's grievance at page 172 of the bundle, where Mr. W concluded that the complaint that Mr Young had shouted during this meeting was upheld as he concluded that *"Richard [Young] agrees you and he raised your voices as you were both disagreeing with the twilight support needed that week"* and Mr Young accepted that the voices could be heard in the adjacent staff lounge. Although it was found that both had shouted this was recognised as a learning point to address with Mr Young; it was not found that he had banged the desk as alleged by the Claimant. The grievance also found that Mr Young had raised his voice on one other occasion to another store manager.
53. There was a dispute of fact in relation to the reason Ms Knight resigned. Mr. Young in his notes at page 186 of the bundle dated the 23rd of October 2018 recorded that he was told that she wished to resign because of the Claimant's "leadership and communication". It was the Claimant's evidence that Ms. Knight wished to resign because of the conduct of Mr. Young. The evidence reflected that Mr Knight appeared to say one thing to the Claimant and another to Mr Young.
54. On the 24 October 2018 Mr Young emailed Ms Knight after she sent him some pictures of the work they had done in store. It was noted that he was effusive in his praise saying *"wow wow wow that's why you can't leave what a transformation"* (page 190). They were put to the Claimant in cross examination as being examples of him being supportive and encouraging, she replied that this was during a week when she was absent from the store. It was also noted that the praise given to Ms Knight was supportive and encouraging of her personally. This praise was far different from the 'well done' given to the Claimant for the completion of the lists of tasks assigned to her and for clearing the stock room after working through the night.
55. On the 29th of October 2018 the Claimant returned to work and Ms Knight resigned. The same week the Team Leader Ms. N had walked out. Mr. Young asked the Claimant for the reason that Ms Knight gave to her and she told him that Ms Knight had resigned because of him because *"he demotivated her and made her cry and was always negative to the store"*

and did not do anything to support the team". The Claimant also said that Ms Knight had told her that she was afraid of Mr. Young. It was not disputed that on one occasion Mr Young had made Ms Knight cry.

56. In Mr Young's notes of the 30 October 2018 he recorded that Ms. N had resigned that week and he had "a confidential chat" about the Claimant's welfare. He also recorded that another member of staff Ms. V had told him "*stuff was wrong with [the Claimant]*". Mr Young described these entries as unsolicited comments that staff made to him about the Claimant. Having considered the Claimant's consistent evidence on this point that her staff were telling her that he was asking them about her personal life, as compared to the unreliable evidence of Mr Young and his concession that he had spoken to Mr E. about the Claimant, it is found as a fact that this note was made as a result of Mr Young speaking with these employees and asking them direct questions. It was also consistent with his earlier note of wishing to 'get close to the situation' and of wishing to establish a link between her perceived poor performance and incidents of abuse. There was no evidence to suggest that by making notes of what he had been told by staff about the Claimant, that he was trying to support her.
57. On seeing the document in R1 and the long message that Ms Knight sent to Mr Young and the Claimant about her resignation she stated "*I said we are struggling for staff, my days often feel difficult and we never get much done...*" she went on to add that she had raised that the Claimant needed support too. Mr Young accepted that this was not reflected in his notes and he did not include in his notes that Ms Knight was not leaving due to anything the Claimant had done. She confirmed in her text that she was also not leaving due to the actions of Mr Young. Mr Young accepted that he did not conduct any further investigation into why Ms Knight was leaving as he felt it was essentially a matter of 'he said she said'. There was no evidence before the Tribunal to suggest that Ms Knight resigned due to the actions of the Claimant as stated in the ET3.
58. The Tribunal saw an email from Ms. B, the manager at the other Crawley store, to Mr Young. The email was headed '*The conversation Sam had with me was about operations, communication and about the ongoing Donna and abuse claims??*'. This extract was undated. The full email and the context within which it arose was not disclosed. The body of the email stated as follows: "*Part of the conversation you asked me to go over and speak with [Ms Knight], Ms. A and Ms. N and let them know that you were aware of the situation and how they felt and wanted me to show them some support and reassure them that things were being dealt with. I also told them how you had asked me to tell them that you felt they were doing a good job and to bare with you whilst things were in hand and that you didn't want to see any of them go as they are all valued members of the team*" (page 191). Mr Young was asked in cross examination why he asked Ms B. to do this and he replied "*I had heard different stories from September , I had no evidence, perhaps I didn't know how to address and offer you options*". Mr Young was asked why he did not talk to the Claimant direct and he stated that "*the allegation was in confidence, I didn't approach you until November but I continually asked what support you needed*". Mr Young also added that "*people were talking about concerns about abuse. I didn't instruct her, I said not to discuss it. I discussed nothing with her*". In reply to the Tribunal's

questions about this note he again said that the “*conversation was with me, I didn’t comment back. I wouldn’t have a conversation with someone at the same level as [the Claimant]*”. He confirmed that other managers knew of the abuse because they had seen bruising and the Claimant being upset.

59. The email from Ms B. reflected that there had been discussions with the Claimant’s staff and Mr. Young as he had explicitly asked Ms B. to have a conversation with named individuals about ‘the situation and how they felt’, ‘the situation’ in this context was presumed to refer to the Claimant’s obvious signs of domestic abuse, there being no other reason referred to in this email. It seemed to be a reasonable inference from the context of this communication that Mr Young had discussed the Claimant with others in the store, especially taking into account that he had asked for them to be told that he was ‘aware of the situation and how they felt’. It appeared to be common knowledge amongst the team that the Claimant was suffering domestic abuse. The Claimant’s staff had informed her that Mr Young was asking them about her private life and whether it impacted on her performance. Although this was denied by Mr Young, it was more than a mere coincidence that he had made numerous notes about conversations he had with the Claimant’s staff, her peers and a previous manager about domestic abuse. Although Mr Young denied that he instigated these conversations and he denied that he breached the Claimant’s confidentiality, the Tribunal find as a fact that the only logical explanation for the evidence contained within his own notes was that this information was secured by him as a result of him making enquiries. The Tribunal also find as a fact that the reason he made enquiries of her team was to establish a correlation with poor performance.
60. It was also noted that in the same email Ms B wrote to Mr Young to confirm that she had told Ms N, Ms A and Ms Knight that he thought that they were doing a good job and he ‘valued them’ and did not want them to leave. This was again praise that went over and above that given to the Claimant, there was no record of Mr Young ever telling the Claimant she was valued or that she had done a good job. The consistent communications with the Claimant recorded Mr Young’s ongoing dissatisfaction with her performance.

Store Visit to Waterlooville

61. Ms. I the manager of the Waterlooville store emailed Mr. Young on the 7th of November 2018 (page 197 of the bundle) after the Claimant had visited the store. This was a visit that was suggested by Mr Young. Mr Young’s notes stated “(I asked Ms. I to support and see if I could learn any more about Donna – by means of supporting her)”. The communication from Ms. I was headed “As discussed”. In her email she stated as follows: “*I have also asked her if she has any personal issues at home that impact her performance. She assured me that there isn’t but she has been having problems with her partner and two months ago her granddad and uncle died in the space of a week*”. This evidence appeared again to corroborate the Claimant’s evidence that Mr. Young had asked this manager to make enquiries about her personal life and report the findings back to him. The words taken from his email above in parenthesis corroborated that he had asked Ms. I to gather information from the Claimant and to share it with him. The focus of the enquiries (from the wording of this communication) appeared to be whether her personal problems adversely impacted her

work performance; this again appeared to corroborate the Claimant's evidence that he had asked others about her performance and her personal life.

62. Mr Young denied that he had asked anyone to report back to him and denied that there was any "direct gathering of information". Mr Young's evidence appeared to be contrary to the wording of the email which was headed 'as discussed', which strongly suggested they had talked about what she should ask the Claimant. The Tribunal therefore find as a fact that Mr Young had asked Ms. I to ask direct questions about the Claimant's personal and domestic life and whether it impacted on her performance and he was keeping notes of what he was told.
63. The Claimant told the Tribunal that the first incident of domestic abuse was on the 17th of September 2018 but Mr. Young did not discuss this with her at the time, he raised it with her staff and other managers (Mr E.) behind her back. The first time he spoke to her about domestic abuse was on the 8th of November 2018. The Claimant did not agree that Mr Young was trying to understand and help her as at no time from September to November did he go to welfare to raise the issue of her safety.
64. Ms. Knight confirmed in her email sent to the Claimant on the 12th October 2019 (after the termination of the Claimant's employment) at pages 348-9 that Mr. Young had asked her about the Claimant's personal life and how much it impacted the way the store is managed. Although this witness did not give evidence to the Tribunal and had been seen above to provide contradictory evidence to both the Claimant and Mr Young, this document provided corroboration that Mr. Young had spoken to her about the Claimant's personal life and how those conversations arose. It was no mere coincidence that the same evidence was provided by Managers from two different stores (who did not work day to day with the Claimant) to Mr Young.

The meeting of the 8th of November 2018.

65. The Tribunal saw Mr. Young's personal notes of this meeting at page 198-199 of the bundle. He attended the store to meet the Claimant together with a member of Human Resources and his note showed that "*we approached the concerns raised over the last couple of months on domestic abuse (carefully)*". The note showed that they asked the Claimant directly about domestic abuse but the Claimant explained when asked that she had suffered abuse in the past but the black eye she had one month before was due to a playfight. The Claimant was recorded to have said in the meeting that "*nothing was wrong now*". The Claimant accepted that in this meeting they talked about domestic violence. Mr Young told the Tribunal in cross examination that he could not let the issue go on any longer as he had been made aware of it, he stated that he "*wanted to come with support*".
66. On the 16th of November the Claimant informed Mr. Young that her mother had been diagnosed with cancer (this was recorded in his notes on page 199). The Claimant also added that her Assistant Manager had agreed to stay.
67. On the 18 November 2018 the Claimant informed Mr Young she had been interviewing for new staff (page 201).

68. Mr. Young had a conference call with the Claimant on the 20th of November 2018 (page 201) and he then conducted a store visit. During that visit he noted that deliveries had stacked up so he postponed deliveries for the following two days. He carried out a positive walk of the floor and then gave 5 matters to be completed by the following Friday and two in the back of the store.
69. Mr Young's notes showed that he called HR and Mr W. on the 20 November (page 202 the bundle). In this communication Mr. Young voiced his concern that the Claimant would not be able to take the store through their peak time which was Christmas. He also considered moving the Claimant to a store nearer her mother to reduce stress and then agree a plan to return the Claimant to the store in January or February with a coach or on a PIP. He added in this note that he had a plan for a "*potential AM to hold the store for six weeks*". This email reflected that Mr. Young was working on moving the Claimant out of the store on a PIP and this had been the subject of ongoing discussions with the Claimant since his meeting with her in August 2018.
70. At the end of this note he stated that "*R. agreed with the forward view and plans*", however there was no email or written record from his line manager to suggest that this was anything more than an initial discussion. The Claimant asked Mr Young about this in cross examination, he stated that he was being "*really transparent, I was concerned on a number of factors. You have all this going on with your family and well-being issues, I was trying to find a solution. Do you have time out of the store? That was all I was doing*". Although Mr Young stated that he was being transparent this was not a communication that was copied to the Claimant and she had not been informed that he was suggesting removing her from the store for peak time and replacing her with someone he already had in mind.
71. Mr. Young returned to the store on Friday the 23rd of November 2018 and the minutes were at page 202 to 203 of the bundle and he went through all the items on his list. His notes showed that three items had been completed and other items were in the process of completion and it was confirmed that one item would be completed by the following Monday. At the end of this visit Mr. Young set another five tasks on top of the completion of the items that had been sent from the previous visit.
72. Mr. Young visited the store on the 28th of November 2018 and in his notes he recorded "*Sharon the AM was back*" and his notes reflected that she was committed to staying (page 206). The items previously set for completion in the meeting of the 23rd of November had all been completed save for one of the five additional tasks.
73. Mr. Young made a note on the 28th of November saying that he would not remove the Claimant for "*welfare and performance related issues/ concerns- will continue to see if progress day to day*". at the end of that meeting Mr. Young left five actions to complete by the 30th of November.
74. Following Mr. Young's visit on the 30 November, he emailed HR and Mr. W which was seen at page 209 of the bundle saying "*actions I left Wednesday- were done - so good effort !!!:) - so she is trying*". He then said in his email

“just looks too much for her to manage...” “look ... on last effort for Monday can we get back to Wednesday at least? If not... Think I have to pull the plug for peak (with your support as discussed)” . The original email was not produced as this was only an extract. It was unclear what if any discussions had taken place with others about removing the Claimant from the store and what evidence Mr. Young had provided to support his decision. None of these communications had been copied into the Claimant and it was outside any informal or formal performance management procedures that were in place. It was again apparent that Mr Young had expressed negative opinions about the Claimant’s performance to others, despite the store being short staffed and during their peak time.

75. The Claimant was not removed from her role. It was put to Mr Young in cross examination that there had already been talk about someone else taking over her position as Store Manager. The Claimant referred the Tribunal to the document at page 205 which was a text message from another staff member congratulating SM on her promotion to the Claimant’s store. SM replied that *“nothing had been confirmed yet”*. The Claimant told the Tribunal that this was evidence that showed that he had already got her successor lined up. Mr Young denied this, he stated that the preferred successor was Mr. T. The Tribunal find as a fact that this corroborated that Mr Young had lined up a successor to take over from the Claimant were she removed from her role, this was also consistent with his notes.
76. On the 6th of December 2018 Mr. Young spoke to the Claimant about moving her out of the store and closer to home but to move her back in store in January. The note showed that he reassured the Claimant there was *“no ulterior motive”*. He recorded that the Claimant cried and his observations was that the Claimant was *“humble in her recognition in the conversation”*. He asked the Claimant to sleep on their conversation (page 210). In this meeting he informed the Claimant that Mr. T would be appointed as the Assistant Manager to work directly with her. In this meeting Mr Young set a further 5 tasks to be completed.
77. At page 211 of his notes Mr Young recorded that there had been two visits to the store that week and Mr. T was in but the Claimant was not. It was noted that during this week no detailed notes were made and no tasks were set. The Claimant took Mr Young in cross examination to an email from Mr. T to him which stated they had lost 25-30 hours and she asked what impact this would have in store and he agreed that it would have an impact at this time in December, which was the busiest time and due to being low on staff.
78. Ms Knight resigned on the 16th of December 2018 and her letter of resignation was seen at page 129. There was no evidence to suggest that she had resigned due to either the Claimant or Mr Young. In the letter of resignation Ms. Knight thanked the Claimant for *“showing me the basics of an AM role”* she explained that she had only stayed on longer to support the Claimant. Mr Young recorded in his notes that he *“reassured (Mr. T) that it wasn’t anything to do with him and his support to the store”* (page 213). Again this was an example of Mr Young providing personal support to others and giving reassurance to those around the Claimant that their performance was valued but not providing that reassurance and support to the Claimant, despite her being the manager of the store.

79. Mr. Young visited the store on the 28th of December which was the Claimant's day off. He did the store walk with Mr. T. During this visit he stated that Mr. T "*wanted to make me aware of some concerns on welfare*". Mr. Young recorded that Mr. T had told him that "*Donna had said her boyfriend thinks she is having an affair with T*" and "*the boyfriend was threatening to T in that he will beat him up if he goes near Donna*". Mr Young recorded in his notes that the Claimant had a "*cut eye and bruises on her arm*". Mr. Young recorded in his notes that he told Mr. T to "*leave this all with me, keep an eye and I will pick up with HR and Donna NYE – as and if needed*". After making these detailed notes he recorded that "*we needed to allow [the Claimant] space*" (page 219). There was no evidence to suggest that he contacted HR or spoke with the Claimant.
80. Mr Young contacted Ms Knight after receiving her resignation and tried to convince her to stay. He offered her a range of options (page 216-7) including working out of a different store. As Mr Young confirmed in his statement he went to great lengths to convince her to stay and felt that she was an asset to the business. This is not how he described the Claimant at any stage of his management of her and not even when she tendered her resignation.
81. On the 4th of January 2019 Mr. Young conducted a store visit with the Claimant and he set her 16 tasks to complete, he then attended on the 9th of January and recorded during his visit, 13 tasks from the list had been completed with a further 3 to complete (page 220). At the end of that visit he set a further 8 tasks. It appeared that Mr Young placed pressure on the Claimant to complete a number of specific tasks during a short timescale. There was no evidence to suggest that he left similar lists of tasks to Mr T to complete.
82. On the 18th of January 2019 Mr. Young made an unannounced visit to the store and recorded in his notes at page 222 that he had a conversation with the Claimant where he told her that she would be put on a performance improvement plan. In his notes he recorded that he told the Claimant "*I don't think this will be a major shock as we have spoken about it numerous times since August 2018*". The notes recorded that he informed the Claimant that she needed to work on "*leadership styles communication, organisation ...*" and to balance "*leading, managing and doing*". He also told her she needed to be "*humble and responsible for the pip*". It was noted that Mr Young indicated that he had discussed with the Claimant the use of a PIP on numerous occasions and the Tribunal have found as a fact that this started after the Mid-Year review and he had at least five conversations about this.
83. Mr Young noted in the minutes of the 18 January 2019 that the Claimant had a black eye and recorded that she told him she had fallen down the stairs (page 224). That was the extent of his conversation with the Claimant about her obvious injuries. Mr Young did not share with the Claimant what he had discussed Mr. T weeks before and there was no evidence that he discussed what action (if any) he should take with the help of HR to support her. This was surprising in the light of his conversation with Mr. T, when he said he would discuss this with HR.
84. Mr. Young in his notes dated the 21st January 2019 recorded a conversation again with Mr. T about the Claimant's black eye. The note

stated that he told Mr. Young that “*some of the staff had approached him*”. Mr. Young told Mr. T of his conversation with the Claimant on the 18th of January and shared with him that the Claimant had told him that she had fallen down the stairs. Mr. Young told Mr. T that “*he and everyone should feel comfortable asking questions and making inquiries if they wanted*” about the Claimant’s personal circumstances. Mr. Young recorded in his notes that Mr. T allegedly expressed the view that “*clearly [the Claimant’s] outside issues were effecting (sic) the job and leading the team*”(page 224).

85. Mr Young was asked by the Tribunal whether he had asked the Claimant whether she would be happy with the approach he adopted with Mr. T (to encourage him and others to ask her questions) and he replied he did not speak to the Claimant or Mr. T but he “*wanted to be able to help the team*”. Mr Young appeared to accept that his focus was on providing support to the team, not to providing support to the Claimant. This was similar to the help that he had asked Ms B to provide to other staff on a previous occasion. Mr Young denied that he had asked Mr. T to report back to him on the Claimant’s personal issues and the impact that it had on performance however this is precisely what he reported back to Mr Young. The Tribunal therefore find as a fact and on the balance of probabilities that Mr Young had asked Mr. T to report back to him on the Claimant’s abuse and whether it impacted on her performance as he had done previously with Ms. I. There was also evidence in this note that he had breached confidentiality by telling Mr. T of his conversation with the Claimant about how she got a black eye.

End of Year Review Meeting.

86. Mr. Young held the end of year review with the Claimant on the 28th of January 2019 (page 225). This form had again been pre written and in his notes of the meeting he stated “*I pre wrote to help her understand exactly what it is against her goals and objectives as a SM she needed to work on*”. In cross examination Mr Young explained that he pre wrote the review document to “*show the journey we had been on and the corporate review*” however he added that this was not the final document. The Claimant said the end of year document contained all negatives and no positives, the document was seen at pages 131 to 133 of the bundle. In cross examination the Claimant conceded that the End of Year review included some positive comments including that she had “*willingness and determination*” and on KPIs she had met expectations (although the KPIs were not included on the form at that stage). It also recognised that on budget she had shown “*great performance*” and she was “*supportive of helping others*” (page 132).
87. It was noted that the document provided by Mr Young in the meeting did not include the KPIs, which should be included in the document, Mr. Young in cross examination accepted this. The document he produced was therefore inaccurate and failed to provide a full overview of the performance of the store which is the measure used to assess the performance of Store Managers (see paragraph 7 of his witness statement). He agreed to amend the document and add the KPIs. In the document under the heading “*Champion our Culture*” Mr. Young recorded that the Claimant “*will need to develop respect and humility to what are clear development needs*” (page 132), he also recorded that she “*needs to be completely honest and act with integrity through the PIP*”. At the same time as conducting the end of year review, he showed the Claimant the PIP.

88. The PIP was to be in place for a period of 12 weeks and was due to start on the 10 February 2019. It was noted that part of the PIP was to improve the headcount of Associates to a minimum of 26 heads (page 137) and this was at the quietest time of the year and reflected that the store was still short staffed despite the Claimant recruiting a number of associates.
89. The Claimant requested a face to face meeting with Mr Young to discuss the end of year review. The meeting took place on the 9 February 2019 and Mr Young's notes of the discussion were on pages 227-8. In the meeting Claimant objected to some of the points on the PIP and the end of year review; he therefore agreed to sit down with the Claimant on the 12 February 2019 and review them both.

The meeting of the 12 February 2019

90. In the meeting on the 12 February 2019 the Claimant voiced concern that until he took over management of her she had always been rated as Meets or Exceeds Expectation and within 8 months in the new store with a team that needed development and a new AM and she was on a PIP. She stated that she felt deflated and upset with his conclusions on her performance (especially with her personal issues). Mr Young disagreed with her views and said his decision would not change, he said that he was shocked by some of the things that she had said "*given the amount of conversations about performance/PIP/CDN as well as all the support applied additionally..*". Mr Young told the Tribunal that the PIP was to try and help the Claimant be successful and he felt that it was 'consistent and collaborative'. The Claimant also stated in the meeting that she was upset and she would have liked to have some input the EOY review. Mr Young recorded that he 'acknowledged this' but then went on to state that the document reviewed and captured her journey of the previous 6 months. However it was noted by the Tribunal that this only captured the journey from the perception of Mr Young, not from the Claimant's point of view. To that extent the End of Year Review did not seem to reflect a collaborative approach as envisaged in the policy documents referred to above at paragraphs 19-20.
91. Mr Young agreed to amend the Claimant's end of year review and this was in the bundle at pages 350 to 352. The KPIs were added and showed that the store was "+20% budget" showing that she had made a better profit than expected. Her damages were at 0.28% which was recorded to be a better result than for the District. Her EPC was at 0.11% which was in line with the District. Her service was rated at 91 and her mark for Treasure (which was the conversion rate for signing up people on the loyalty card scheme) was 1:117 and showed that the store was ranked number 2 in the District. Mr Young also recorded on the amended End of Year Review that the Claimant's employee Ms. L was stepping up to a TL after being on the Team Leader Development Programme, for this he recorded a 'well done'.
92. It was noted that the KPIs recorded that the Claimant had achieved good results which were consistent with those she had achieved in a previous EOY review conducted by Mr E (see pages 84-6). The KPIs indicated that the Claimant was meeting expectations. The Tribunal noted that Mr Young made no comment about the KPIs. Mr Young's approach taken to the

Claimant in respect of her performance was consistent with a comment made by Ms Knight in her email at page 349 where she stated “sales in the store were meeting or exceeding their budgets, the KPIs were being achieved yet none of this was ever mentioned or praised”.

93. The Claimant asked Mr Young in cross examination what her figures were and it was put to him that the store took £4 million which was up 19% which he did not disagree with. Mr Young also agreed that the KPIs included matters such as payroll, service and people development as shown in the details recorded by Mr E in the review at pages 84-6. It was not suggested that the Claimant had not met the KPIs and on page 227 he informed her that she had met measure on EPC for the year to date but with the caveat that “*more could be found on intel.*” but did not state what this intelligence was and why the measurement could not be relied upon. This was an example of Mr Young failing to recognise objective measurements of performance. He confirmed that the matters he was concerned with were leadership and engagement and the time taken on door to floor (the time it took to get stock from delivery on to the shop floor) and he wanted this down to 4-5 hours (page 135). However it was noted that in his statement he had stated that Store Managers’ performance was reviewed against KPIs and had not disputed that the Claimant had performed well as compared against other stores but despite the good store results he had concluded that she should be rated CDN and face a PIP.
94. On the 20 February 2019 Mr Young sent the Claimant a list of a total of 19 items to achieve over a period of two weeks. This was in addition to the Claimant having to work on the PIP. On the 24 February 2019 the Claimant provided the actions taken on those items, it was noted that many of the items were completed but Mr Young only replied with a ‘well done’ on one of the matters but this was not an unqualified well done, it was subject to further negative comments (see pages 231-3). This again reflected a lack of support and positive encouragement to the Claimant.
95. On the 1 March the Claimant was off sick and then she was on annual leave from the 2-10 March 2019.
96. On the 13 March 2019 the Claimant was involved in a car crash. (page 237).
97. On the 14 March 2019 Ms SM (the new Assistant Manager) emailed Mr Young informing him that the Claimant was “*bruised all around her eyes and was in pain*” (page 238), she asked him for advice on the best way to approach this as she stated that “*Team Leaders and Team Members said it does happen often and it is not the first time*”. She specifically asked how she could support the Claimant. Mr Young in his notes stated that “*we have asked out right*” but unless the Claimant opened up they could not help. He indicated to Ms SM that he would contact HR but there was no evidence in his notes that he did so or that he took any other action.
98. On the 17 March 2019 the Claimant’s mother became very ill and had to be placed in a coma (pages 237-8) and she spoke to Mr Young because she needed to take time off and had to have the 4 week review date pushed back. The notes made by Mr Young showed that he discussed the Claimant’s mother and her car accident but no specific mention was made about her domestic situation apart from him saying “*please feel super*

supported with us” and he said that she should reach out if she needed any support. He agreed to move her 4 week review meeting under the PIP to the 2 April 2019.

99. There was a formal performance meeting on the 3 April 2019 (page 240). The Claimant told the Tribunal in answers to cross examination that she tried to complain about having to attend this meeting but was told she had to attend. The Claimant accepted that some positive comments were made in this meeting as it again recognised her determination and resilience.
100. On the 14 May 2019 the Claimant attended the 8 week review of her PIP (page 243) and Mr Young informed her that she had only met part of the expectations in the PIP. His note recorded that he discussed areas that needed improvement and areas which had improved but not met expectation.
101. Mr Young met with the Claimant on the 17 May (page 243-4) and informed her that the PIP would be suspended and the Claimant would proceed to a first stage disciplinary on the 22 May 2019. In his notes he recorded that the Claimant was in tears. He recorded his reasons for going to a disciplinary stage at page 157 of the PIP which was that she “*failed to reach the required improvements*”. Mr Young did not provide any reason to the Tribunal as to why he decided to stop the PIP at the eight week stage rather than letting it run the full twelve weeks. He said in response to the Tribunal’s questions that he stopped it because “*it was fair to stop it, he would re-measure when they recommenced*”. He advised the Claimant in this meeting to “*think about all the option[s]*”. Although it was not set out in the minutes the Tribunal find as a fact that this was a reference to Mr Young suggesting that she step down from her role, as he introduced this into their conversations a few weeks later.
102. Although the Claimant put to Mr Young in cross examination that a number of the items included on the PIP were minor things like holiday planners, notice boards and placing snacks in the Associates room which were in place (she put to him that her holiday planner was in a diary and the boards had been done) he replied that the notice boards were about leadership, management and communication and the correct way of doing things and following company guidelines (taking into account the rhythm and routine of the business). It was unclear why the way in which the Claimant had actioned these points were contrary to company policy. It was noted that the Claimant had failed on ‘developing the team’ because some of the staff training folders were not in store and some did not have names on. However the EOY review had recognised that the Claimant had trained a member of staff in the TL programme (see above at paragraph 91) which confirmed that the Claimant was engaged in successfully developing her staff.

Formal Performance Meeting

103. The Claimant attended the performance meeting on the 22 May 2019 although no notes were seen of this meeting. The first written warning was sent to the Claimant by a letter dated the 28 May 2019, lasting for 12 months, she did not appeal this as she felt that there was no point (page 161). The Claimant explained that the way Mr Young treated her over the

year he was her manager was like a “no win battle”, she said that within 3 months of Mr Young taking over he told her that she was no good at her job and said that this defeated her. She explained “*I felt with my manager by my side – I could have coped – it is about support*”. She told the Tribunal that “*I tried to challenge him at the beginning but he said “never challenge me”, I had it from him and my partner (at home)*”.

104. It was noted that at the formal performance meeting, there was no independent notetaker present as required in the procedures. There were also no minutes taken by Mr Young however he wrote in his notes that “*there was no challenge or push back – Donna acknowledged 100% and had no argument*” (page 244). This comment was consistent with the evidence given by the Claimant about how she felt she was treated by Mr Young, she felt that she was in a no win battle and there was no longer any point in trying to challenge him.

105. Mr Young attended the store on the 11 June 2019 (Mr Young’s notes were at page 247-8) and he again recorded that he told the Claimant he was “*concerned again on performance*” and he raised three possible options, that she would fail the PIP or pass the PIP or “*potential consideration given to another role (more suited i.e. Assistant Manager)*”. He recorded in his personal notes that the Claimant “*broke down in tears*” and said that she was “*fed up and couldn’t cope*” and stated that she felt that Mr Young was not supporting her and was making her demotivated. This corroborated the Claimant’s evidence of feeling like she was engaged in a no win battle. However in reply Mr Young stated that he felt he had gone over and above to support her. In these notes he said that he would have to come to the right outcome and recorded “*we don’t see a business misfit and maybe this store and role is too much to connect to..*”. This note was consistent with what he had told his manager in November, that he thought that the Claimant was unable to cope and she should be moved out and he suggested this to her in December (see above at paragraphs 69, 74 and 76). Mr Young also recorded in his notes that she said that she “*wanted to resign*” however the Claimant denied that she said this, she stated that this was at the suggestion of Mr Young. As this evidence was disputed the Tribunal must make a finding as to which recollection is preferred. On this point the Claimant’s evidence is preferred, that the suggestion that she resign was made by Mr Young. His notes showed a consistent view that he had formed of the Claimant, that her performance was not good enough and he wanted her to move (or be moved) out of the store, this was evident from November 2018. It was also consistent with his comment recorded in his notes that she should think about all options, most would understand that to mean that their position was at risk or that they should consider stepping down. It almost certainly would not have been viewed in a positive light, especially after being given a first warning for performance.

106. On the 13 June 2019 (page 250) the Claimant met with Mr Young at the County Oak Shopping Centre and asked for 1 weeks holiday, to spend time with her sick mother, he agreed to this. In Mr Young’s meeting notes he recorded that the Claimant had told him that she was “*virtually certain she wanted to step down from her role as SM...*”. However this was not consistent with Mr Young’s witness statement at paragraph 34 where he stated that in this meeting the Claimant “*explained that she wanted to step*

down from her role as Store manager”. There was no evidence to suggest that the Claimant indicated at any time that she wanted to step down from her role. Mr Young asked the Claimant to confirm her decision to step down in writing, something she never did which was another indication that this was not a suggestion made by the Claimant.

107. The Claimant in cross examination denied that she said she wanted to step down. She stated that this was at Mr Young’s suggestion; Mr Young denied this. The Tribunal on the balance of probabilities prefer the evidence of the Claimant on this point to that of the Respondent. There was no evidence in any of the communications from the Claimant to Mr Young that suggested she wished to be considered for a demotion. All the evidence showed that the Claimant was committed to her role and to meeting the objectives set by Mr Young. She accepted however that after he made the suggestion she said she would discuss it with her father, a further indication that the suggestion had been made by Mr Young and had not come from the Claimant. Had the Claimant decided to step down she would not have needed to discuss this with others. The Tribunal also took into account the fact that Mr Young had expressed to his line manager back in November that the Claimant was not up to the role.

108. The Claimant then took annual leave until the 24 June 2019.

The Final Straw.

109. The last store visit before the Claimant resigned was on the 24 June 2019 (page 250 in Mr Young’s notes). The Claimant said that during this visit her Assistant Manager commented that *“I don’t understand Donna, we all worked so hard, everything is amazing. I’ve seen [him] much happier with store visits to other stores that aren’t as good as this”*. The Claimant confirmed in cross examination that Mr Young had moaned about the state of the shop floor. The Assistant Manager had worked with Mr Young for years and the Claimant concluded that if she could not understand the reason for Mr Young’s dissatisfaction, then she never would. The Claimant in her statement stated that she realised that if she was taken out of the equation, Mr Young would have been happy with the work they had done in store. She reached the conclusion that he would be pleased if she was not the Store Manager.

110. In the notes of the meeting on the 24 June 2019 taken by Mr Young, he recorded that he said to the Claimant that *“Donna and I met to chat through her pre Holiday chat we had Donna suggested she had made a decision – one to leave or 2 to step down but having an interview Thursday 27th June with New Look. I stated she needed to make the considered choice, but stepping down would be a preferred option to protect her heritage as well as full recognition of her service to the business and length of service. I also reminded her that being in a role (AM) that was more suited at this stage of her career would be less stressful than a new adventure considering her personal circumstances”*. The Tribunal find as a fact that Mr Young’s notes above expressed the view that stepping down to a lesser role was his preferred option. This made it obvious to the Claimant that Mr Young did not consider that she was good enough to continue in her role as Store Manager.

111. The Claimant accepted in cross examination that a reference in the ET1 to a store visit on the 1-2 July was incorrect and that the visit she was referring to as the final straw was on the 24 June. The Claimant confirmed that this store visit was the final straw and she recalled saying that she had had enough. It was put to the Claimant in cross examination that the real reason she resigned was because she had secured another job at New Look but she denied this saying that New Look had been after her for 2 years but after one and a half years of working for Mr Young, he "*clearly didn't think I was good enough*" and this was why she decided to leave. In the Claimant's first ET1 she stated that she intended to stay at the Respondent company until retirement but felt that after Mr Young had treated her in this way, she had no option other than to resign.
112. The Tribunal saw the Claimant's letter of resignation on page 163 of the bundle dated the 2 July 2019. It was noted that although she did not specifically state that she was leaving due to Mr Young bullying her. She stated that "*I would like to thank TK Maxx and my previous managers for the great opportunities I have had over my 9 years in the business*". The Claimant told the Tribunal that her thanks did not extend to Mr Young hence her specific reference to 'previous' managers. She went on to state that her feelings had changed last year and she stated that "*I feel that I can no longer continue*". It was put to the Claimant in cross examination that she did not resign due to bullying but because she had another job to go to and the fact that she gave notice showed she did not resign due to a fundamental breach. The Claimant disagreed with this saying that as she was a single mother she could not afford to leave any sooner.
113. Mr Young did not try and convince her to stay in her role as he had done with Ms Knight. The Claimant told the Tribunal that Mr W told her that she was welcome to come back but she was not encouraged to stay. Mr Young met with the Claimant on the 3 July and in his notes at page 251 he recorded "*I said it's a shame she is leaving, and re iterated her cultural fit and personality 100% was aligned ot (sic) TJX and that I was as ever committed to helping her in a step down situation ...but also I respected her outcome. I said we would always have her back (right position – if it were available) in the future*". The Tribunal noted that in all the communications from 11 June onwards Mr Young only spoke about the Claimant continuing in post if she stepped down from her Store Manager role. He did not try to convince her to stay and did not offer her options as he had done with Ms Knight. It was evident that Mr Young did not consider that the Claimant was up to the job of Store Manager and all his conversations were focussed on a demoted role.
114. Ms SM was appointed the Store Manager. It was put to Mr Young in cross examination that this was the same person who was erroneously congratulated on getting promotion to the Claimant's role in November 2018 (page 205 of the bundle). Mr Young denied this. However from the text messages shown above conversations in November (see above paragraph 75), it appeared that others in the organisation had concluded otherwise.
115. On the exit form the Claimant explained her reason for leaving which was "*I haven't been happy for the last year due to continuous issues that*

felt out of my control, this has affected my morale, confidence and the passion that I have always had for working in TK Maxx. I am sad to be leaving but being in this situation feels like the right thing to do”.

116. It was put to the Claimant in cross examination that she had been prone to misinterpret things due to being a victim of abuse and she was unduly sensitive due to what was happening in her home life; the Claimant disagreed with this. The Claimant claimed that Mr Young had bullied her.
117. Post resignation the Claimant raised a grievance after receiving an email from Ms. Knight dated the 12 October 2019 (see page 347-9) and referred to above. In as far as the outcome was relevant to the issues in the case they have been referred to above.
118. The Claimant was due to start at New Look on the 9 August 2019 but she suffered a serious assault by her violent partner and was unable to start. Since then she has suffered acute stress and depression and has been unable to work since. After the assault the Claimant had to get rid of her mobile phone and had therefore lost all her text communications sent during her employment (save for the store WhatsApp messages).

The Law

Employment Rights Act 1996

Section 95 Circumstances in which an employee is dismissed

(1) For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2) ..., only if)—

(c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct.

Submissions

These were in writing and exchanged 21 days after the hearing and replies were exchanged 7 days thereafter.

They will not be replicated in this decision but will be referred to in the decision as appropriate.

Cases referred to by the Respondent.

Western Excavating (ECC) Ltd v Sharp [1978] ICR 221 CA

Malik v BCCI (in compulsory liquidation) 1997 ICR 606 HL

Tullett Prebon plc and ors v BGC Brokers LP and ors 2011 IRLR 420 CA

London Borough of Waltham Forest v Omilaju [2005] IRLR 35

Kaur v Leeds Teaching Hospital NHS Trust [2018] EWCA Civ 978

Williams v The Governing Body of Alderman Davies Church in Wales
Primary School 2020 IRLR 589 Auerbach HHJ
Wright v North Ayreshire Council [2014] IRLR 4
Steen v ASP Packaging Ltd 2-14 ICR 56 EAT

Decision.

119. The Tribunal would first like to comment on the issue in relation to the documents. It was recorded in the findings of fact above at paragraph 35 that there were few original emails, what was produced was extracts. Although the Tribunal asked for disclosure of some documents referred to above at paragraph 13, Mr Young indicated that he could not find them. The absence of original documentation or of few agreed documents made findings of fact in this matter difficult as the conduct of many of the meetings was disputed. The unrepresented Claimant was also at a disadvantage as she had no access to documentation in the early stages of the preparation for this hearing for the reasons stated above at paragraph 118.
120. As to the issues in relation to the credibility of witnesses, the Respondent stated in submissions that the Claimant's evidence lacked credibility in relation to the times and dates of incidents relied upon. This certainly was the case in relation to the date of the final straw however the Claimant was clear in her description that it was the last visit Mr Young made to the store and could recall the comments made by her Assistant Manager. Her evidence remained consistent but her recollection of dates was at times inaccurate. It was also suggested in the Respondent's submission at paragraph 39 that the Claimant's recollection of the fist banging incident at the meeting of the 17 October was inaccurate, the Tribunal has found as a fact on that matter that the raised voices occurred but did not find as a fact that Mr Young banged his fist on the table due to the lack of corroborative evidence.
121. Turning to the credibility of Mr Young, it was noted that his evidence in relation to the procedure he followed in the mid-year review was inconsistent. His statement suggested that he put his comments on the form prior to the meeting and there was no evidence to suggest in his evidence in chief that he attended a meeting with a blank form. In his oral evidence he gave a different account of what he did at this meeting. He stated that he attended with a blank form and populated the form in discussion with the Claimant.
122. This is to be contrasted with the Claimant's evidence on this point which was that he attended the meeting having already completed the form and he spent the meeting talking 'at her'. The Tribunal took into account Mr Young's inconsistent evidence in relation to the steps he took to prepare for the meeting compared to the Claimant's consistent evidence. The Tribunal considered that the form included none of the Claimant's input which strongly suggested that the meeting proceeded in the way that the Claimant suggested. It was because of these factors that the Tribunal concluded that the Claimant's evidence should be preferred. Mr Young kept detailed notes of all his discussions with or about the Claimant and none of those minutes recorded detailed discussions in the mid-year review. His evidence on this

issue was considered to be unreliable and the findings of fact above at paragraph 26-32 are relied upon.

Did the Respondent make enquiries of the Claimant's staff, colleagues and managers about abuse and about her performance

123. The Tribunal has found as a fact above that Mr Young made enquiries of a number of managers, including Mr E, Ms B and Ms I. He also recorded a number of conversations that took place with Ms Knight, Mr T and with others in the Claimant's store about her personal issues. Those conversations were focussed on abuse and on her performance. The Claimant's evidence was that she had been told about these conversations by her staff and felt that her manager was talking behind her back and undermining her. Although Mr Young told the Tribunal that he did not instigate these conversations, the Tribunal on balance rejected this explanation. He also denied that he breached confidentiality but on at least two occasions it was found as a fact that he had done so (see above at paragraphs 44 about the conversation with Mr E and paragraphs 84-85 in relation to the conversation with Mr T).

124. Although in the Respondent's closing submissions at paragraphs 33-34 it stated that he had a 'genuine desire to try and support' the Claimant and he was trying to arrange support for her, this was not supported by the evidence. Save for the meeting on the 8 November, there was no evidence that Mr Young sought advice from HR or from any other departments on how to assist and support the Claimant and no evidence that he considered this, even though he had told the Claimant's staff that he was doing so.

125. In conclusion therefore the Respondent made enquiries of the Claimant's staff and other managers about abuse and how it impacted on her performance. Mr Young also breached the Claimant's confidentiality.

Did Mr Young pre write her August review and fail to talk about her KPIs.

126. It has been found as a fact that Mr Young pre wrote both mid and end of year reviews. It was also conceded by Mr Young that the August review only reflected his comments and none of the Claimant's, therefore it was concluded that this had been prewritten by him as suggested in his statement. The Tribunal has already commented on Mr Young's evidence about this point above in the findings of fact at paragraphs 26-32 and in the decision at paragraphs 121-2. Although the Claimant conceded in cross examination that there were some positive comments recorded on this document, it did not focus on areas where the Claimant had done well.

127. There was no evidence to suggest that in the August review Mr Young talked about the Claimant's KPIs, even though they were the measure by which a manager's performance was assessed. The findings of fact dealt with this point at paragraph 30-31 where the evidence of the Claimant was preferred to that of Mr Young. It is concluded that the Mr Young had prewritten the review and failed to discuss with her the KPIs.

Mr Young was negative and awkward/ he shouted at the Claimant and made her feel incompetent

128. The Tribunal can deal with these two areas together as they cover similar evidence and findings of fact. It has been found as a fact by the Tribunal that from the mid-year review, Mr Young informed the Claimant on a number of occasions that, in his view, her performance was unsatisfactory and advised her that he felt she should be placed on a PIP. He informed the Claimant of this on at least five occasions from September to November.
129. There were no instances where Mr Young gave the Claimant praise or encouragement. He did not tell the Claimant that she was valued or that she had done a good job. This can be contrasted with the fulsome praise he gave to others both directly and indirectly (via Ms B see above at paragraph 58). One example of his enthusiastic praise was that given to Ms Knight seen above at paragraph 54 after she had sent him photographs of the work she had done in store. He was also seen to provide reassurance to others around the Claimant for example above in the findings of fact at paragraph 78 where he was seen to reassure Mr T that he was not to blame for a member of staff leaving however this was never said to the Claimant. His comments could be contrasted with his feedback given to the Claimant after she had worked a night shift to get the store looking good and his reply was simply 'well done' (see above at paragraph 48). There were few examples of Mr Young being positive in his discussions with the Claimant when he spoke of her performance or achievements. This again suggested that Mr Young failed to provide support for the Claimant instead focussing on negative issues of what she had failed to achieve.
130. The Claimant has also suggested that Mr Young made her feel incompetent. There was evidence that supported this as shown in the regular reminders of the PIP and his constant criticism of her performance on each visit which were aimed predominantly at pointing out her failings. Mr Young accepted that the store was very short of staff and those working in the store were poorly trained. However despite this he provided the Claimant with long lists of task to complete at short notice, often at times when some of her management team were absent or off sick. Findings of fact have been made about this above at paragraph 39-41 where he concluded that her failure to complete tasks was a performance issue. At paragraph 40 above the Claimant tried to explain why some of the tasks set had not been completed and in his notes he recorded that the Claimant 'moaned' about her Team Leader. This was evidence of him being negative and dismissive of her views and input. Similarly in the findings of fact above at paragraph 43 Mr Young did not answer a direct question as to whether the failure to complete tasks could have been due to a shortage of staff and the absence of key staff, rather than due to her poor performance alone. The Tribunal found as a fact that his practice of setting her long lists of tasks, knowing that she was short staffed was setting her up to fail and was done to corroborate his view that she was underperforming.
131. Mr Young set the Claimant impossible tasks to complete from September right through until the PIP was put in place. It was found as a fact that on the 17 October Mr Young had attended the store and the Claimant was recruiting staff to work on the twilight hours shifts. When she told him they were to start the following week an argument ensued and he raised his voice. It has been found as a fact that in this meeting the Claimant tried to explain her position to him but he did not want to listen. In the grievance outcome it was accepted that voices were raised. Mr Young took

exception to the Claimant challenging him and he recorded this in his notes as he described her as being “dismissive” and “too challenging”. There was no evidence that he was prepared to listen to the Claimant’s point of view. He also told the Claimant that she was never to talk to him in that manner again, the detailed findings of fact are above at paragraphs 49-52. This was another example of Mr Young failing to listen to the Claimant and being negative towards her, despite her long length of service and up to August 2018, her successful career within the Company.

The Tribunal has rejected Mr Young’s evidence that the Claimant was aggressive in the meeting as this was not recorded in his notes.

132. It was noted that in January he again started setting the Claimant impossible tasks, for example on the 4 January 2019 he set her 16 tasks to complete (paragraph 81). On the 18 January 2019 in an unannounced visit to the store he told the Claimant that she was going on a PIP and referred to the many references he had made to this previously (paragraph 82). After she was put on a PIP the lists continued to be given for example on the 20 February he set her a list of 19 tasks to complete (paragraph 94 above). Setting the Claimant PIP objectives together with having to complete the list of tasks made her feel incompetent and useless at her job and led to more negative feedback from Mr Young.

133. The Tribunal has found as a fact that Mr Young in the formal performance meeting on the 17 May 2019 (above at paragraph 101) advised the Claimant to think about her options, there was no positive way in which that statement could be interpreted. Mr Young had constantly undermined the Claimant and informed her that, in his view, she was failing in her role. This comment could not be interpreted as positive, it was a strong steer to suggest that an alternative role or career should be considered. The Claimant in paragraph 103 of the findings of fact said that at that stage she had ‘had it from him and her partner’. The Claimant described the behaviour of Mr Young as bullying. It was considered whether Mr Young’s note of this meeting could have a more positive meaning but this was discounted when read with his notes after that date. The objective impression of this meeting was that he had made it clear that in his view, she was not capable of performing the role of Store Manager and she should consider an alternative role or career. This viewed objectively would have made the Claimant feel incompetent.

134. There was further evidence of Mr Young informing the Claimant that in his view, she was incompetent. The Tribunal refers to paragraph 105 above about the meeting on the 11 June where Mr Young suggested a demotion or that the Claimant resign. The Tribunal found as a fact that these suggestions were made by Mr Young not by the Claimant as they were consistent with the views expressed in his communications with others as well as his recorded discussions with the Claimant. The Claimant described her feeling in this meeting as if she were in a ‘no win battle’ which left her feeling demotivated. On the 13 June Mr Young again met with the Claimant and he recorded that she was ‘virtually certain’ she wanted to resign (paragraph 106). Again the Tribunal found as a fact that this was a suggestion made by Mr Young. Although the Claimant did not refer to the suggestions made by Mr Young that she should resign in her evidence, it was considered within the matrix of all the facts before the Tribunal. Those suggestions were consistent with the documentation provided by Mr Young

in his communications with his manager and reflected his negative views about the Claimant's abilities and performance which he shared with her on a regular basis.

135. It is concluded therefore that the evidence showed that Mr Young had informed the Claimant regularly from September 2018 of his negative views of her performance. From May 2019 Mr Young then suggested that she should consider alternative roles or employment. This evidence viewed objectively would have made the Claimant feel incompetent and unsupported.

Mr Young penalised the Claimant and put her on a PIP for things that were not installed by previous managers

136. It has been found as a fact that the store had been failing when the Claimant took over. It was also seen that the store continued to have problems with recruiting and retaining staff as despite a number of recruitment rounds the store was still short of staff. The Claimant saw the PIP as being an attempt to penalise her. It was found as a fact above at paragraphs 86-89 that in her end of year review she had met expectations and was over budget. One of her objective performance figures ranked her store second in the district. Although the Claimant referred to these figures in the meeting on the 12 February 2019 and put it to Mr Young that this showed that she had met expectations, he again suggested that this was not the complete picture (paragraphs 91-3 above), this was a further example of his dismissive approach towards the Claimant and her achievements. Despite her good KPIs she was placed on a PIP.

137. The Claimant stated that the PIP was imposed to penalise her. It is difficult to decide whether that was the objective of Mr Young. However the Claimant said in the meeting on the 12 February (paragraph 90) that she was feeling deflated and upset. It was inevitable that the imposition of time driven tasks under the PIP in addition to the lists of tasks provided by Mr Young on his store visits, would lead to the Claimant failing the PIP. Although the Claimant made no specific complaints about the PIP or the warning given, she challenged Mr Young in cross examination about the tasks she had completed under the PIP and his reply again showed that although she had completed certain tasks assigned to her, in his view she had not carried them out in the way that he perceived was compliant with company policy (paragraph 102). This was another example of him being negative about the Claimant's performance and dismissing her achievements, there was therefore some overlap between this section of and the facts relevant to the allegation that Mr Young made the Claimant feel incompetent.

Did the above acts breach the implied duty of trust and confidence?

138. Turning to the authorities referred to above, reference was first made to *Western Excavating (ECC) Ltd v Sharp [1978] 2 WLR 344 CA* where constructive dismissal was defined as follows: "*If the employee is guilty of conduct which is a significant breach going to the root of the contract of employment; or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract; then the employee is entitled to treat himself as discharged from any further*

performance. If he does so, then he terminates the contract by reason of the employer's conduct. He is constructively dismissed".

139. The Tribunal also considered the case of *Malik v BCCI (in compulsory liquidation) 1997 ICR 606 HL* where it stated that an employer shall not "...without reasonable and proper cause, conduct itself in a manner calculated (or) likely to destroy or seriously damage the relationship of trust and confidence between employer and employee".
140. It is for the Tribunal to decide whether the Respondent's conduct viewed objectively could be said to be calculated or likely to seriously damage trust and confidence between the employer and the employee
141. The Claimant's evidence was that she resigned due to a series of events that occurred from September 2018 until July 2019 and the final straw was on the 24 June 2019.
142. The findings of fact and conclusions reached above show that the above acts cumulatively viewed objectively breached the duty of trust and confidence. There are many reasons for reaching that conclusion. Firstly Mr Young talking to others behind the Claimant's back about her suffering domestic abuse and whether it impacted on her ability to manage the store. The Claimant had been informed by her staff that these conversations were taking place. It has been concluded that these conversations took place and on two occasions Mr Young breached the Claimant's confidentiality. This was conduct that was likely to damage or destroy trust and confidence, when viewed objectively.
143. The second category of facts were those relating to his oppressive and negative management of the Claimant. The detailed findings of fact and conclusions showed that Mr Young regularly reminded the Claimant that he felt that her performance was poor and unless she improved she would face a PIP. He failed to provide her with praise or encouragement. His communications with the Claimant were based primarily on informing her of her failings. His communication with others was markedly different, he provided others with praise both directly and indirectly. It was clear therefore that this was not just his management style, he was encouraging and supportive of those around the Claimant but singled her out for criticism. He provided her with an impossible workload despite accepting that at the relevant time that the store was short staffed. When she was on the PIP he continued to provide her with long tasks to complete and when she failed to meet expectations set by the PIP he stopped the process early, at the 8 week stage and gave her a warning. It was in the warning meeting that he suggested that she consider her options. In the meetings in June 2019 he suggested resigning or considering demotion. This is conduct that cumulatively crosses the Malik threshold. It is conduct that was calculated to damage the relationship of trust and confidence.
144. The final straw was that on his final visit to the store he was again critical of the Claimant's efforts. The comment made by her assistant manager was that she could not understand why he was not happy with what they had done. This led the Claimant to conclude that Mr Young would never be satisfied with her performance, whatever she did. This last act was not an entirely innocuous act. This last act tipped the Claimant into resigning but

in fact it is the combination of the earlier conduct that together with the final straw caused the Claimant to resign.

Did the Respondent act with reasonable and proper cause?

145. The Respondent stated in their submissions at paragraphs 25-28 that Mr Young acted with reasonable and proper cause because in his view the store was failing. However it has been found as a fact that managers' performance is reviewed against the KPIs, this was also referred to in Mr Young's evidence in chief at paragraph 7. The KPIs for the Claimant's store showed that the end of year figures were good. Although the Respondent in their submissions at paragraph 26 identified that there were problems with getting stock out on the floor from the store room, that was one task that Mr Young focussed on, but there was no evidence to suggest that the store, as a whole was 'failing'.

146. It was also stated at paragraph 27.3 in the Respondent's submissions that the Claimant was "reluctant to accept support and listen to [Mr Young]". The evidence before the Tribunal was not consistent with this submission. The evidence showed that the Claimant not only listened to Mr Young, she acted on every instruction he gave to her and stopped challenging him after the meeting on the 17 October 2018. The only time the Claimant was seen to challenge a decision made by Mr Young after this date was when she asked for a meeting to discuss the end of year review and the PIP, this was to raise a legitimate complaint that her end of year review did not include the KPI figures. There was no evidence to suggest that the Claimant was reluctant to accept support.

147. The Tribunal conclude on the evidence that the Respondent did not act with reasonable and proper cause for the reasons stated above.

Did the Claimant waive the breaches?

148. The Tribunal has been referred to the cases of *Kaur v Leeds Teaching Hospital NHS Trust [2019] ICR 1* and the case of *Omilaju v Waltham Forest London Borough Council [2005] ICR 481*. I have been referred to paragraph 21 of the Omilaju case and to paragraph 21 which sets out the position in respect of the final straw: "... 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 enabled 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". The guidance given in the later case of *Kaur* at the Court of Appeal confirmed that if there has been conduct that crossed the Malik threshold, followed by affirmation, but then there is further conduct which does not, by itself, cross that threshold, but would be capable of contributing to a breach of the Malik term, the employee can then treat the conduct, taken with the earlier conduct, as terminating the contract of employment (*HHJ Auerbach in the case of Williams v Governors of Alderman Davies Church in Wales 2020 at paragraphs 31-32*).

149. It has been concluded that the final straw relied on by the Claimant was not an innocuous act. It contributed to the breach of the Malik term as it was a further criticism and negative feedback given by Mr Young to the Claimant. It was conduct that, viewed objectively, added to the breach. The Respondent has stated in paragraphs 51-54 of their submissions that the Claimant acquiesced and cannot therefore rely on the conduct that occurred before February 2019. They state the Claimant failed to identify any specific facts between February to June 2019. The Respondent therefore contends that the Claimant delayed and affirmed the breach and is no longer able to rely on it. However the Tribunal has concluded that the last straw was sufficient to add to the breach. The final straw together with the earlier conduct can therefore be relied upon by the Claimant as conduct that terminated the contract of employment.

Did the Claimant resign in response to the breach?

150. The Claimant resigned on the 2 July 2019. It has been put to the Tribunal in the Respondent's submissions at paragraphs 52 and 55 that she resigned in order to move to a new job and not in response to the breach. The Claimant's evidence was that she had to find another job before resigning from her position. However the breach does not have to be the sole reason for resigning but it must have materially contributed to the employee's decision to resign. The Claimant's evidence was clear that she had wished to remain with the Respondent until retirement but after working with Mr Young she felt defeated and it was clear that nothing she did would ever be good enough for him. She concluded that she had no option but to resign and treat herself as dismissed. The facts therefore show that the actions of the Respondent materially contributed to the Claimant's decision to resign and she resigned in response to the breach. The Claimant has therefore been constructively dismissed.

151. Although the Respondent also pointed to the fact that the Claimant resigned giving notice which they stated was not the actions of someone who accepted a fundamental breach, the statutory provision states that a dismissal can occur when someone resigns 'with or without notice' but in circumstances where they were entitled to terminate without notice. The factual circumstances relied on by the Claimant were sufficiently serious for her to resign without notice therefore the resignation amounts to a dismissal under section 95(1)(c).

Did the Respondent show a potentially fair reason to dismiss?

152. The Respondent stated that if it was concluded that the Claimant was dismissed, they will argue that she was dismissed on the grounds of capability. The evidence showed that there was no consistent evidence that supported the Respondent's case that the Claimant lacked capability in her role as Store Manager. Her history with the Company showed that she had been a consistently good performer and this was true until Mr Young took over. His evidence in relation to her poor performance was formed on the basis of his oppressive management of her. The most objective measure of her performance as a Store Manager was reflected in her end of year KPIs which showed that the store was performing well against measurable and objective criteria. The evidence of Mr Young had to be seen against a backdrop of his negative and at times hostile management of the Claimant

which did not reflect a full or objective picture of her performance or of her capability. It is concluded that on all the evidence before the Tribunal, that although the Respondent has relied upon capability as a fair reason for dismissing the Claimant, that decision was unfair.

153. Taking into account all the evidence before the Tribunal it is concluded that the dismissal was unfair.

154. The parties are encouraged to see if the matter can be resolved without the need for a further hearing and are given 28 days to see if a resolution can be reached. If that is not the case, the matter will be listed for a remedy hearing for 1 day. The primary remedy to be considered will be reinstatement or re-engagement. The Respondent is to come prepared to the hearing to consider these options.

Employment Judge **Sage**

Date: 9 August 2021