Case Number 1305917/2020
Type V

EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**AND**	**Respondent**
Mrs D Clay		**Diocese of Coventry Multi-Academy Trust**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL
(RESERVED JUDGMENT)

HELD AT Birmingham **ON** 2 & 3 July 2021
22 July 2021 (Panel Only)

EMPLOYMENT JUDGE GASKELL

Representation
For the Claimant: **Mr D Gray-Jones (Counsel)**
For the Respondent: **Mr D Jones (Counsel)**

JUDGMENT

The Judgement of the tribunal is that:

The claimant was not dismissed by the respondent. Her claim for unfair dismissal is not well-founded and is dismissed.

REASONS

Introduction

1 The claimant in this case is Mrs Dawn Clay who was employed by the respondent, Diocese of Coventry Multi-Academy Trust, as a Level 2 Teaching Assistant, from 1 November 2004 until 28 February 2020 when she resigned.

2 By a claim form presenting to the tribunal on 22 May 2020, the claimant claims that she was unfairly and wrongfully constructively dismissed. She claims compensation for unfair dismissal and unpaid notice pay.

3 The claimant resisted: the respondent denies acting towards the claimant in a way which constitutes a fundamental breach of her employment contract. Including the implied term of mutual trust and confidence.

The Evidence

4 The claimant gave evidence on her own account she did not call any additional witnesses. The respondent relied on the evidence of Mrs Sharon Thorpe - Head Teacher at St Nicolas School; and Ms Zoe Marshall - HR Business Partner to the respondent and, specifically, HR adviser to the school.

5 In addition to the oral evidence, I was provided with a hearing bundle running to some 158 pages. I have considered the documents from within the bundle to which I was referred by the parties during the hearing.

6 I did not find the claimant to be a satisfactory witness. Contrary to what was asserted on her behalf by Mr Gray-Jones in closing submissions, her evidence was far from internally consistent; it was not consistent with contemporaneous documents; and the claimant made serious allegations against other individuals for which, in my judgement, there was no justification. The following are examples:

(a) In her claim form; and in her witness statement, when referring to a telephone conversation with Mrs Thorpe on 26 September 2019, the claimant accuses Mrs Thorpe of "*ignoring*" her GP fit note and instead "*relying on her own prognosis*". During cross-examination however, the claimant acknowledged that, prior to that telephone conversation, the only information which Mrs Thorpe had as to the nature of the claimant's injury was what had been reported to her by paramedics on 6 September 2019; and that the fit note from the claimant's GP contained no information as to the claimant's injury at all. The claimant acknowledged in cross-examination that Mrs Thorpe was entitled to make enquiries. In my judgement, there was no justification whatsoever for the accusation against Mrs Thorpe referred to above.

(b) In evidence, the claimant readily agreed that she had been told at an early stage that the information upon which Mrs Thorpe was relying was a verbal report from the paramedics who attended the scene of the claimant's accident. And yet, even at the commencement of the proceedings, in the claim form; and even later, in her witness statement, the claimant continues to make reference to the non-disclosure of that report and to "*a report which no one could prove existed*".

(c) In her claim form, the claimant complains that her formal grievance dated 10 January 2020 was "*disregarded*". But, in her witness statement the claimant asserts that her grievance was "*effectively determined*" by Mrs Camilla Salter on 20 February 2020. These statements are clearly inconsistent. And, in my judgement, on the face of the relevant documents the claimant is wrong on both counts. Her grievance was not disregarded; neither indeed was it determined by Mrs Salter.

7 By contrast, I found the evidence of Mrs Thorpe and Ms Marshall to be clear consistent and compelling. Their evidence did not vary internally; they were consistent with each other; and their evidence was consistent with contemporaneous documents.

8 Most of the facts of this case are not in dispute. The case largely centres around the correct interpretation of what happened. But, where there is a factual dispute between the evidence given by the claimant on the one hand, and that given by Mrs Thorpe and/or Ms Marshall on the other, I prefer the evidence of Mrs Thorpe and Ms Marshall. I have made my findings of fact accordingly.

The Facts

9 The respondent is a Multi-Academy Trust which operates 19 separate academies (schools) within the Diocese of Coventry. Although the academies have their own identity and each have their own name and dedicated staff, the academies are not legal entities. The only operative legal entity being the respondent Trust. The claimant was employed at the St Nicholas Church of England Academy (one of the 19 academies) - referred to hereafter as "the academy". Mrs Thorpe was the Head Teacher of the academy. In addition to the 19 separate academies, the respondent had a Central Team which provided central services to the academies on matters such as finance and HR. At all material times the Head of HR for the respondent was Mrs Camilla Salter. Ms Marshall was a member of the HR Team with specific responsibilities to provide HR advice and support to the academy.

10 On 1 November 2004, the claimant commenced employment at the academy. Initially, she was employed as a Mid-day Supervisor; but she progressed to become a Level 2 Teaching Assistant. Prior to the claimant suffering an accident on 6 September 2019, that had been no issues whatever regarding the claimant's employment. The respondent never had any disciplinary or performance concerns; and the claimant had no concerns with regard to her work and no occasion to raise a grievance. It is clear from the evidence that the claimant and Mrs Thorpe enjoyed a constructive professional relationship - and each held the other in high regard.

11 On Friday 6 September 2019, the claimant had an accident at work. It appears that she went to sit in a chair which had been moved by a colleague. The claimant fell and suffered injury. (It is clear that the claimant holds the respondent responsible for what happened and intends to pursue a personal injury claim. It is of course no part of the function of the Employment Tribunal to determine where liability for the accident lies; and I do not attempt to do so.) Mrs Thorpe provided initial assistance to the claimant and Paramedics from the

ambulance service attended. The Paramedics provided immediate first aid to the claimant who was then able to go home. It was unnecessary for the claimant to go to hospital for treatment. Mrs Thorpe clearly had the opportunity to observe the claimant's injuries for herself; and she received a verbal report from the Paramedics. On the basis of this report, Mrs Thorpe understood that the claimant's injuries were not serious and she therefore anticipated the claimant's early return to work. On the basis of this understanding on the day of the accident Mrs Thorpe completed an accident report form.

12 On the Sunday evening, 8 September 2019, the claimant informed the Deputy Head Teacher, Ms Sarah Davies, by text message that she would be unable to attend work the next day. Mrs Davies responded to this text message thanking the claimant for letting her know and expressing the hope that she would feel better soon. On 10 September 2019 the claimant again sent a text message to Mrs Davies explaining that she had been to see her GP who had given her a certificate of unfitness for work for two weeks; again, this message was promptly acknowledged by Mrs Davies. This on Sunday evening 22 September 2019 the claimant sent a further message to Mrs Davies stating that she would not be returning to work the following week provided an update after she had spoken to her GP on Tuesday 24th of September 2019 following consultation with her GP the claimant advised Mrs Davies she had been signed off sick for a further two weeks. The difficulty faced by Mrs Thorpe from this situation is that the fit note received from the claimant's GP on 10 September 2019 simply recorded the reason for the claimant's absence from work as "*injury at work*". Self-evidently, this provided no information to Mrs Thorpe as to the nature or severity of the claimant's injury. And the claimant's prolonged absence from work was inconsistent with the verbal report provided to Mrs Thorpe by Paramedics on the day of the accident. In these circumstances, Mrs Thorpe was duty-bound to investigate further.

13 On 26 September 2019, Mrs Thorpe spoke to the claimant on the telephone. She enquired as to the claimant's welfare and attempted to obtain further information as to the nature of the claimant's injuries. She made reference to the report she had received from paramedics on the day of the claimant's accident; and to the fact that it was difficult for her to reconcile what the paramedics had told her with the claimant's prolonged absence - particularly in the light of the lack of information which had since been provided by the claimant or her GP. I specifically find as a fact that Mrs Thorpe did not instruct the claimant that she was *required* to return to work; or indeed that she *should have* returned to work within two weeks of the accident. Mrs Thorpe simply conveyed to the claimant the information which had been provided by paramedics on the day. Far from ignoring the GP's fit note; and far from making her own diagnosis, Mrs Thorpe was seeking basic information which had not been provided to her either by the claimant or by her GP. Unbeknown to the claimant, Mrs Thorpe

conducted the telephone conversation on speakerphone and Mrs Lindsay Hooks, the Academy Administrator, with responsibility for its absence management policy, was present with Mrs Thorpe in the room and could hear the conversation.

14 The following day, the claimant sent an email to Mrs Camilla Salter, Head of HR for the respondent. In the email, the claimant made a number of complaints about the telephone conversation with Mrs Thorpe but the claimant made clear that she did not wish to raise a formal grievance. The claimant also requested a copy of the paramedics report. Mrs Salter passed the email to Ms Marshall who was a member of Mrs Salter's HR team and who had specific responsibility for HR matters at the academy. Ms Marshall decided that, as the claimant had been unhappy with the telephone conversation with Mrs Thorpe, henceforth wherever possible communication during the claimant sickness absence would be with her rather than with the academy. Ms Marshall clarified the position regarding the paramedics report advising the claimant in an email that it had been a verbal report only and there was no document available and thereafter Ms Marshall maintained contact with the claimant by telephone calls on a regular basis. Towards the end of November with the claimant still absent from work Ms Marshall arranged for an OH assessment.

15 The OH report, from Ms Kerry Black - Occupational Health Advisor, is dated 11 December 2019. It suggests that, although the claimant was not at that time physically fit to return to work, there should be no long-term obstacles to her return. Of greater concern, appeared to be the claimant's perception of how she had been treated during her absence. The respondent was urged to address these negative perceptions; and, subject to that, it appeared feasible that the claimant could return to work in January. The OH report made clear that the claimant was fit to attend meetings with management regarding her ongoing sickness absence and steps required to secure her return to work.

16 In furtherance of the OH advice, Ms Marshall arranged an informal meeting between the claimant and Mrs Thorpe at which Ms Marshall was present. The meeting took place on 9 January 2020: it was evident that the claimant and Mrs Thorpe had very different recollections of what had transpired during their telephone conversation on 26 September 2019. During the conversation on 9 January 2020, Mrs Thorpe disclosed that Ms Hooks had been listening to the conversation - clearly the implication being that she fully expected Ms Hooks would support her account rather than that given by the claimant. The meeting was unsuccessful in its intended purpose of resolving the differences between the claimant and Mrs Thorpe; if anything, it made matters worse because the claimant was outraged that Mrs Hawkes had been permitted to listen to the conversation on 26 September 2019 without the claimant's knowledge or consent. The claimant complains that Mrs Thorpe did not give the

meeting her proper attention and was continually looking at her watch. Mrs Thorpe agrees that, as would always be the case, she had a number of meetings to attend that day and only limited time available. But, both she and Ms Marshall gave evidence which I accept, that Mrs Thorpe's conduct of the meeting was entirely professional. Unfortunately, the claimant's sense of grievance prevented progress being made.

17 Ms Marshall took the opportunity to appraise the claimant of where she stood with regard to the respondents absence management policy. She was currently at Stage I; but if her absence continued with no prospect of an early return to work she might shortly move to Stage II. I reject the claimant's evidence that she was told that this was automatic; or that she was told that she would then move automatically to Stage III and instant dismissal.

18 The following day, 10 January 2020, the claimant raised a formal grievance - relating to the initial telephone call of the 26 September 2019; and to the meeting of 9 January 2020; and related matters such as having the telephone on speakerphone; and procuring a report from the paramedics without the claimant's authority. The grievance letter was sent to Mrs Thorpe with copies to Ms Marshall and to Ms Dawn Beasley the Chair of the Governing Body.

19 Ms Marshall responded to the letter of grievance asking the claimant for details of her trade union representative and for available dates in order for grievance meeting to be convened. The claimant's response was that she did not feel well enough to attend a meeting wanted the grievance to be considered in writing and responded to. Mrs Salter was concerned that the claimant's reluctance to attend a meeting - as clearly, the grievance could only be properly considered if the claimant was present to discuss and expand upon her concerns. Accordingly, Mrs Salter emailed the claimant asking whether she would be willing to attend a meeting with her rather than Ms Marshall. The claimant's response to Mrs Salter, which is dated 8 February 2020, was to give her a full timeline of all events since the accident on 6 September 2019 and essentially ask for an opinion as to the validity or otherwise of the grievance. Mrs Salter responded on 24 February 2020 reviewing all of the events and expressing her opinion that the claimant's concerns were misplaced. In my judgement, the letter makes clear that she was not dealing with the grievance - but was simply responding to the claimant's request for an opinion. (In accordance with the respondents grievance policy the grievance would actually be determined not by HR but by the head teacher of another academy within the respondent trust.)

20 By letter dated 3 February 2020, the claimant had been invited to a grievance meeting scheduled for 12 February 2020 to be conducted by Mrs Hannah Carvell - Headteacher of Queens Church of England Academy. That

meeting did not take place because of the claimant's reluctance to attend. On 25 February 2020, Ms Marshall wrote to the claimant offering a rescheduled grievance meeting for 3 March 2020; this time to be conducted by Ms Lindsay Nash - Head of Education, Harris Church of England Academy. This is a clear demonstration that the letter of the previous day from Mrs Salter was not a determination of the grievance.

21 In the meantime, by letter dated 4 February 2020, the claimant was invited to a Stage II formal meeting under the sickness absence policy. The letter informed the claimant that the meeting would be conducted by Mrs Davies. The claimant was unwilling to attend the meeting; and expressly requested that it should proceed in her absence.

22 The Stage II meeting went ahead in the claimant's absence on 11 February 2020. On 13 February 2020, Mrs Davies wrote to the claimant advising of the outcome. The claimant had been moved to Stage II; the respondent would be obtaining a further OH report. The situation would be reviewed at a meeting scheduled for 6 March 2020. The claimant was told of the possibility that, following such review, she would be invited to a Stage III meeting at which the termination of her employment was a possibility. The letter made clear however that the respondent wished to avoid such an outcome and urged the claimant to engage with the process. On 25 February 2020, the claimant was advised that an OH appointment had been arranged for 2 March 2020.

23 By 25 February 2020, the claimant was aware of scheduled meetings for 3 March 2020 to consider her grievance; and for 6 March 2020 consider her ongoing sickness absence and the possibility of her return to work. Both of these meetings were to be conducted by managers against whom the claimant has raised no complaint - Mrs Nash on 3 March 2020; and Mrs Davies on 6 March 2020.

24 By a letter dated 28 February 2020, the claimant tendered her resignation with immediate effect.

25 On 3 March 2020, Mrs Nash nevertheless considered the claimant's grievance. The grievance was not upheld and a detailed explanation of Mrs Nash's findings was sent to the claimant in a letter from Mrs Salter dated 5 March 2020. In that same letter, the claimant's resignation was acknowledged - but the opportunity was offered for her to reconsider the position and withdraw her resignation. If the claimant wished to do this, she was invited to contact Mrs Salter or Ms Marshall within seven days.

The Law

26 **The Employment Rights Act 1996 (ERA)**

Section 94 - The right [not to be unfairly dismissed]

(1) An employee has the right not to be unfairly dismissed by his employer.

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)—

(a) the contract under which he is employed is terminated by the employer (whether with or without notice) - *Direct dismissal,*
(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 - *Constructive dismissal.*

Section 98 - General Fairness

(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—

(a) the reason (or, if more than one, the principal reason) for the dismissal, and
(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it—

(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,
(b) relates to the conduct of the employee,
(c) is that the employee was redundant, or
(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.

(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
(b) shall be determined in accordance with equity and the substantial merits of the case.

27 **Decided Cases**

There are many decided cases which provide guidance to employment tribunals with regard to the law of dismissal and of constructive dismissal. We found the following to be particularly relevant when considering the facts of this case:-

Western Excavating (ECC) Ltd, -v - Sharpe **[1978] IRLR 27 (CA)**
An employee is entitled to treat himself as constructively dismissed if the employer is guilty of conduct which is a significant breach going to the root of the contract of employment; or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract. The employee in those circumstances is entitled to leave without notice or to give notice, but the conduct in either case must be sufficiently serious to entitle him to leave at once. The employee must make up his mind to leave soon after the conduct of which he complains if he continues the any length of time without leaving, he will be regarded as having elected to affirm the contract and will lose his right to treat himself as discharged.

Garner -v- Grange Furnishing Ltd. **[1977] IRLR 206 (EAT)**
Conduct amounting to a repudiation can be a series of small incidents over a period of time. If the conduct of the employer is making it impossible for the employee to go on working that is plainly a repudiation of the contract of employment.

Woods -v- WM Car Services (Peterborough) Ltd. **[1981] IRLR 347 (EAT)**
It is clearly established that there is implied in a contract of employment a term that employers will not, without reasonable and proper cause, conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee. Any breach of this implied term is a fundamental breach amounting to repudiation since it necessarily goes to the root of the contract. To constitute a breach of this implied term, it is not necessary to show that the employer intended any repudiation of the contract. The employment tribunal's function is to look at the employer's conduct as a whole and determine whether it is such that it's cumulative effect, judged reasonably and sensibly, is such that an employee cannot be expected to put up with it.

WE Cox Toner (International) Ltd. –v- Crook **[1981] IRLR 443 (EAT)**The general principles of contract law applicable to a repudiation of contract are that if one party commits a repudiatory breach of the contract the other party can choose either to affirm the contract and insist on its further performance or he can accept the repudiation in which case the contract is at an end. The innocent party must at some stage elect between those two possible courses. If he once affirms the contract his right to accept the repudiation is at an end, but he is not bound to elect within a reasonable or any other time. Mere delay by itself (unaccompanied by any express or implied affirmation of the contract) does not constitute affirmation of the contract, but if it is prolonged, it may be evidence of an implied affirmation. Affirmation of the contract can be implied if the innocent party calls on the guilty party for further performance of the contract since his conduct is only consistent with the continued existence of the contractual obligations.

Malik –v- BCCI **[1997] IRLR 462 (HL)**
The obligation (to observe the implied contractual term of mutual trust and confidence), extends to any conduct by the employer likely to destroy or seriously damage the relationship of trust and confidence between employer and employee. If conduct, objectively considered, is likely to cause damage to the relationship between employer and employee a breach of the implied obligation may arise. The motives of the employer cannot be determinative or even relevant.

Waltons & Morse –v- Dorrington **[1997] IRLR 488 (EAT)**
It is an implied term of every contract of employment that the employer will provide and monitor for employees, so far as is reasonably practicable, a working environment which is reasonably suitable for the performance by them of their contractual duties.

BCCI –v- Ali (No.3) **[1999] IRLR 508 (HC)**
The conduct must impinge on the relationship of employer and employee in the sense that, looked at objectively, it is likely to destroy or seriously damage the degree of trust and confidence the employee is entitled to have in his employer. The term "likely" requires a higher degree of certainty than a reasonable prospect or indeed a 51% probability.

Nottinghamshire County Council –v- Meikle **[2004] IRLR 703 (CA)**
Once the repudiation of the contract by the employer has been established, the proper approach is to ask whether the employee has accepted the repudiation by treating the contract of employment as at an end. It is enough that the employee resigned in response, at least in part, to fundamental breaches by the employer.

GAB Robins (UK) Ltd. –v- Gillian Triggs **[2007] UKEAT/0111/07RN**
The question to be addressed is whether, taken alone or cumulatively, the respondent's actions amount to a breach of any express and/or implied terms of the claimant's contract of employment amounting to a repudiation of that contract.

Bournemouth University Higher Education Corporation –v- Buckland **[2010] IRLR 445 (CA)**
The conduct of an employer, who is said to have committed a repudiatory breach of the contract of employment, is to be judged by an objective test rather than a range of reasonable responses test. Reasonableness may be one factor in the employment tribunal's analysis as to whether or not there has been a fundamental breach but it is not a legal requirement. Once there has been a repudiatory breach, it is not open to the employer to cure the breach by making amends, and thereby preclude the employee from accepting the breach as terminating the contract. What the employer can do is to invite affirmation, by making or offering amends.

Tullet Prebon PLC & Others -v- BCG Brokers LP & Others **[2011] IRLR 420 (CA)**
A repudiatory breach of contract; conduct likely to damage the relationship of trust and confidence must be so serious that looking at all the circumstances objectively, that is from the perspective of a reasonable person in the position of the putative innocent party, the contract breaker has clearly shown an intention to abandon and altogether refuse to perform the contract.

Waltham Forest LBC -v- Omilaju **[2005] IRLR 35 (CA)**
This case clarified the position where a complainant was relying on the "final straw" principle: if the final straw is not capable of contributing to a series of earlier acts which may cumulatively amount to a breach of the implied term of trust and confidence, then there is no need to examine the earlier history. If an employer has committed a series of acts which amount to a breach of the implied term; but the employee does not resign his employment In response thereto; he cannot subsequently rely on those acts to justify a constructive dismissal in the absence of a later act which enables him to do so. If the later act is entirely innocuous It is entirely unnecessary to examine the earlier conduct as the later act will not permit the employee to invoke the final straw principal. An entirely innocuous act on the part of the employer cannot be a final straw.

Wisniewski -v- Central Manchester Health Authority **[1998] EWCA Civ 596**
(1) In certain circumstances a court may be entitled to draw adverse inferences from the absence or silence of a witness who might be expected to have material evidence to give on an issue in an action.

(2) If a court is willing to draw such inferences they may go to strengthen the evidence adduced on that issue by the other party or to weaken the evidence, if any, adduced by the party who might reasonably have been expected to call the witness.
(3) There must, however, have been some evidence, however weak, adduced by the former on the matter in question before the court is entitled to draw the desired inference: in other words, there must be a case to answer on that issue.
(4) If the reason for the witness's absence or silence satisfies the court then no such adverse inference may be drawn. If, on the other hand, there is some credible explanation given, even if it is not wholly satisfactory, the potentially detrimental effect of his/her absence or silence may be reduced or nullified.

The Claimant's Case

28 It is the claimant's pleaded case that the following conduct on the part of the respondent, taken either individually or cumulatively, amounts to a repudiatory breach of her employment contract entitling her to resign in response: -

(a) Acting with disinterest, cynicism and unilateral disregard of the claimant's illness and welfare.
(b) Disregard of the claimant's genuine grievance.
(c) The respondent's handling of the sickness absence policy.

29 Expanding on those points, in his closing submissions, Mr Gray-Jones explained: -

(a) Is a reference to the telephone call on 26 September 2019 when the claimant alleges that Mrs Thorpe disregarded her GP's fit note substituted her own diagnosis and effectively demanded the claimant's immediate return to work. This was followed by the disclosure that Mrs Thorpe had allowed Mrs Hooks to overhear the conversation and Mrs Thorpe's impatience at the meeting on 9 January 2020.
(b) Is a reference to the grievance lodged by the claimant on 10 January 2020.
(c) Is a reference to the movement of the claimant from Stage I to Stage II of the sickness absence policy following the meeting on 11 February 2020. Mr Gray-Jones submits that this should not have happened as the policy permits the movement to Stage II where "*there is no realistic prospect of a return to work in the foreseeable future*". The claimant's case is that this position had not been reached on 11 February 2020.

30 The following further points were advanced by Mr Gray-Jones in his closing submissions: -

(a) That it was a gross breach of trust, and a clear breach of the implied term of mutual trust and confidence, for Mrs Thorpe to have the telephone on speakerphone on 26 September 2020 without the claimant's knowledge or consent.
(b) That, applying the principles set out in ***Wisniewski***, the tribunal should draw an adverse inference from the respondent's failure to call Mrs Hooks as a witness as to what transpired in that telephone conversation.

The Respondent's Case

31 The respondent's case is that nothing untoward occurred at the meeting on 26 September 2019 or in the meeting on 9 January 2020. In each case, Mrs Thorpe was exercising proper and routine management functions: she was entitled to seek information which had not otherwise been available to her as to the nature of the claimant's injuries; the reasons for her continued absence; and the prospects of her return to work. The respondent's case is that the claimant simply failed to engage reasonably with that process and became preoccupied with other matters such as the report from the paramedics.

32 With regard to Mrs Thorpe's decision to involve Mrs Hooks in the telephone call, Mrs Thorpe readily agreed in evidence that, with the benefit of hindsight, she ought to have informed the claimant of the position. She accepted that her failure in this regard could be seen as discourteous. But, she did not accept that this amounted to a serious breach of trust as it would be within her management authority to require the claimant to participate in a meeting with Mrs Hooks in attendance; it was part of Mrs Hooks' duty to deal with sickness absence; and accordingly there can be no serious suggestion that matters were discussed in that call which ought not properly to have been shared with Mrs Hooks - in evidence, the claimant acknowledged this latter point.

33 It is the respondent's case that, when the claimant had been absent from work for more than four months, it was entirely proper to move the case from Stage I to Stage II of the absence management procedure. And again, the difficulties created in the operation of the procedure were caused entirely by the claimant's failure to engage.

34 It is the respondent's case that it is clear on the face of Mrs Salter's letter that she wasn't not purporting to determine the claimant's grievance. By the date of that letter, the claimant had received an invitation to a grievance meeting to be conducted by Mrs Carvell; and shortly afterwards, she received a further invitation to a grievance meeting to be conducted by Mrs Nash.

35 It is the respondent's case that there cannot be any suggestion of a breach of contract arising either from the operation of the absence management policy or by Mrs Salter's letter. On this basis, and applying ***Omilaju***, the respondent's case is that, even if the sharing of the telephone call with Mrs Hooks could be said to amount to a breach of trust, the claimant became aware of it on 9 January 2020; she did not resign in response to it; and those later events simply cannot conceivably be accepted as "last straw" events.

Discussion & Conclusions

36 I will set out in turn my findings with regard to those matters about which the claimant complains: -

26 September 2019

(a) Having heard the evidence of both the claimant and Mrs Thorpe, I prefer the evidence of Mrs Thorpe. I found the claimant's evidence to be inconsistent as set out in Paragraph 6(a) above. In my judgement, Mrs Thorpe conducted a proper meeting within the scope of her management responsibilities. It is regrettable that the claimant could not see that the information so far provided to Mrs Thorpe was inadequate and attempt to engage with her. Instead, the claimant became defensive; believing that her credibility was under question; when this was clearly not the case.

(b) With regard to Mrs Thorpe's decision to involve Mrs Hooks in the call by placing the telephone on speaker, as Mrs Thorpe acknowledges, best practice would have been to inform the claimant of the position. But, in my judgement, a failure to do so does not amount to a serious breach of trust as suggested by Mr Gray-Jones. If the meeting had taken place in the academy, it would have been perfectly legitimate for Mrs Thorpe to insist on Mrs Hooks' presence. Likewise, the telephone call: it would have been legitimate for Mrs Thorpe to insist on Mrs Hooks' participation. This did not depend on the claimant's consent. Further, the claimant acknowledged that Mrs Hooks had a legitimate interest in what was said in the telephone call as it was her responsibility to deal with the absence management policy. The position would have been different if Mrs Thorpe had carelessly left the telephone on speaker or gratuitously permitted those with no legitimate interest to hear the conversation - but I am satisfied that such is not this case.

(c) I considered Mr Gray Jones submission that an adverse inference should be drawn from the respondent's failure to call Mrs Hooks as a witness. I have concluded that no such inference is available for two reasons: -

    (i) I fully accept Mrs Thorpe's evidence.

(ii) In any event, an explanation was given for Mrs Hooks' absence. Following ill-health during 2020, she had taken early retirement she was no longer employed by the respondent. Mrs Thorpe was unsure as to her ability to have given evidence at the tribunal.

(d) Following the claimant's letter of complaint dated 27 September 2019 (which was expressly not to be dealt with as a grievance), it was entirely reasonable and proper for the respondent to ensure that communication with the claimant came through Ms Marshall rather than from Ms Thorpe or her staff at the academy.

9 January 2020

(e) I accept the evidence of Mrs Thorpe and Ms Marshall that this meeting was conducted in a professional manner; exploring matters which were of legitimate concern to the respondent. Again, it is clear that the claimant simply failed to properly engage. She was preoccupied by relatively unimportant matters such as the paramedics report (which by now she well knew was a purely verbal report). In my judgement, the claimant also overreacted to the disclosure that Mrs Hooks had heard the telephone conversation on 26 September 2019.

The Claimant's Grievance

(f) As explained at Paragraph 6(c) above, it is quite untrue to suggest that the claimant's grievance was disregarded; and equally untrue to suggest that it was determined prematurely by Mrs Salter. In my judgement, the grievance was dealt with in an entirely proper manner. It was to be determined by managers who were entirely independent of Mrs Thorpe or of the academy. In the first instance, the claimant was invited to a meeting with Mrs Carvell; the meeting did not take place because of the claimant's refusal to engage. Quite properly, Mrs Salter then sought to procure the claimant's involvement. On 24 February 2020, Mrs Salter wrote to the claimant dealing directly with the claimant's request for her views. The following day, the claimant received a further invitation to grievance meeting this time to be conducted by Mrs Nash. The claimant resigned before attending the grievance meeting. It went ahead in her absence, and she was provided with a reasoned response to each of her complaints. In my judgement, it is totally without merit to suggest that the grievance was disregarded.

The absence management policy

(g) Mr Gray-Jones submits that Stage II of the absence management policy had not been reached because it had not been established that there would not be a return to work within the foreseeable future. In my judgement, this submission is tortuous because of the double negative which has to be applied. A more logical approach simply to ask was there basis to conclude that there would be a return to work within the foreseeable future? The answer to this is clearly no. The OH report in December had suggested that a return to work in January was feasible but that had not happened and no alternative date had been put forward by the claimant or her GP. It follows that there was no expected return within the foreseeable future - the movement to Stage II was correct. Of course, the claimant's position was not assisted by her failure to engage with the meeting to which she had been invited on 11 February 2020 (OH having advised that she was fit to attend such meetings). If there was a serious prospect of a return to work within the foreseeable future, it was of course open to the claimant to provide the necessary information. Furthermore, having moved to Stage II, the respondent made clear that there would be a further OH report before any further decisions were made and that the position would be reviewed at a meeting on 4 March 2020 at which, again, the claimant had the opportunity to engage. If the claimant believed this to be the case, she could then provide a basis to conclude that a return to work could happen within the foreseeable future. The claimant chose not to engage with the process; she resigned before the OH appointment; and before the review meeting.

37 Accordingly, I find that either individually or cumulatively the matters about which the claimant complains do not amount to breaches of her employment contract. My judgement is that she has a totally unjustified sense of grievance. If there is no breach of contract, then there can be no constructive dismissal; and, if the claimant was not dismissed, then her claim for unfair dismissal must inevitably fail.

38 My conclusion is that the claimant was not dismissed. Accordingly, her claim for unfair dismissal is not well founded and is dismissed.

Employment Judge Gaskell
On 24 September 2021