



EMPLOYMENT TRIBUNALS

Claimant: Mrs L Sanderson

Respondent: Thorncliffe Care Limited

Heard: Remotely (by telephone) **On:** 16, 17 and 18 August 2021

Before: Employment Judge S Shore

Appearances

For the claimant: Mr G Shannon, Solicitor

For the respondent: Mr P Longmore, Director

REASONS

Background

1. By a Judgment dated 18 August 2021, which was sent to the parties on 3 September 2021, I dismissed the claimant's claims of unfair dismissal and breach of contract and gave oral reasons for my decision. The claimant initially asked for written reasons for the decision to be provided, but withdrew that request within a few minutes of the end of the hearing.
2. The respondent made a request for written reasons on 4 September 2021. I apologise for the delay in completing these Reasons.
3. The claimant was employed by the respondent (a provider of residential care) from 20 May 2005 to 4 May 2020 (the date in her ET1) as a Care Home Manager. The nature of the claimant's termination of employment was a matter of dispute.
4. The claimant began early conciliation with ACAS on 26 May 2020 and obtained an early conciliation certificate on 22 June 2020.

Claims

5. The claimant presented two claims:
 - 5.1. Unfair dismissal, contrary to section 94 of the Employment Rights Act 1996; and

- 5.2. Breach of contract (failure to pay notice pay), contrary to Article 3 of the Employment Tribunals Extension of Jurisdiction (England & Wales) Order 1994.

Issues

6. The issues in a case are the questions that a Tribunal has to find the answers to. The parties produced a list of issues that I did not find covered the matters that I had to deal with, so I drafted and sent my own list to the parties before the start of the first day of the hearing and asked them to be ready to discuss it when the hearing started.
7. The list was agreed as follows:

1. Unfair dismissal

1.1 Was the claimant dismissed?

1.1.1 Did the respondent breach the implied term of trust and confidence? The Tribunal will need to decide:

1.1.1.1 whether the respondent behaved in a way that was calculated or likely to destroy or seriously damage the trust and confidence between the claimant and the respondent; and

1.1.1.2 whether it had reasonable and proper cause for doing so.

1.1.2 Was the breach a fundamental one? The Tribunal will need to decide whether the breach was so serious that the claimant was entitled to treat the contract as being at an end.

1.1.3 Did the claimant resign in response to the breach? The Tribunal will need to decide whether the breach of contract was a reason for the claimant's resignation.

1.1.4 Did the claimant affirm the contract before resigning? The Tribunal will need to decide whether the claimant's words or actions showed that they chose to keep the contract alive even after the breach.

1.2 If the claimant was expressly dismissed, what was the reason or principal reason for dismissal?

1.3 If the claimant was constructively dismissed, what was the reason for the breach of contract?

1.4 Was it a potentially fair reason?

1.5 The respondent says the reason was conduct. The Tribunal will need to decide whether the respondent genuinely believed the claimant had committed misconduct.

- 1.6 If the reason was misconduct, did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant? The Tribunal will usually decide, in particular, whether:
 - 1.6.1 there were reasonable grounds for that belief;
 - 1.6.2 at the time the belief was formed the respondent had carried out a reasonable investigation;
 - 1.6.3 the respondent otherwise acted in a procedurally fair manner;
 - 1.6.4 dismissal was within the range of reasonable responses.
- 1.7 Is there a chance that the claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason?
- 1.8 If so, should the claimant's compensation be reduced? By how much?
- 1.9 If the claimant was unfairly dismissed, did she cause or contribute to dismissal by blameworthy conduct?
- 1.10 If so, would it be just and equitable to reduce the claimant's compensatory award? By what proportion?
- 1.11 Would it be just and equitable to reduce the basic award because of any conduct of the claimant before the dismissal? If so, to what extent?

2. Remedy for unfair dismissal

- 2.1 Does the claimant wish to be reinstated to their previous employment?
- 2.2 Does the claimant wish to be re-engaged to comparable employment or other suitable employment?
- 2.3 Should the Tribunal order reinstatement? The Tribunal will consider in particular whether reinstatement is practicable and, if the claimant caused or contributed to dismissal, whether it would be just.
- 2.4 Should the Tribunal order re-engagement? The Tribunal will consider in particular whether re-engagement is practicable and, if the claimant caused or contributed to dismissal, whether it would be just.
- 2.5 What should the terms of the re-engagement order be?
- 2.6 If there is a compensatory award, how much should it be? The Tribunal will decide:
 - 2.6.1 What financial losses has the dismissal caused the claimant?
 - 2.6.2 Has the claimant taken reasonable steps to replace their lost earnings, for example by looking for another job?
 - 2.6.3 If not, for what period of loss should the claimant be compensated?

- 2.6.4 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?
 - 2.6.5 Did the respondent or the claimant unreasonably fail to comply with it?
 - 2.6.6 If so is it just and equitable to increase or decrease any award payable to the claimant? By what proportion, up to 25%?
 - 2.6.7 Does the statutory cap of fifty-two weeks' pay?
- 2.7 What basic award is payable to the claimant, if any?
3. **Wrongful dismissal / Notice Pay**
- 3.1 What was the claimant's notice period?
 - 3.2 Was the claimant paid for that notice period?
 - 3.3 If not, did the claimant do something so serious that the respondent was entitled to dismiss without notice?
8. As I dismissed both the claimant's claims, I did not have to deal with any matter between paragraphs 1.6 to 2.7 above, as these dealt with issues concerning remedy that are only live in the event that a claim of unfair dismissal is successful.

Law

9. For the purposes of the unfair dismissal claim, the relevant section of the Employment Rights Act 1996 is section 98.

"Section 98 Employment Rights Act 1996

(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.

(3) In subsection (2)(a)—

(a)“capability”, in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality, and

(b)“qualifications”, in relation to an employee, means any degree, diploma or other academic, technical or professional qualification relevant to the position which he held.

(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal was 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.”

10. Claims of breach of contract are based on the common law.

11. I was referred to a number of precedent cases by the representatives, which I have quoted in this decision where appropriate:

- 11.1. **Martin v MBS Fastenings (Glynwed) Distribution Ltd** [1983] ICR 511;
- 11.2. **International Computers Ltd v Kennedy** [1981] IRLR 28;
- 11.3. **Derby City Council v Marshall** [1979] ICR 731; and
- 11.4. **Polkey v AE Dayton Services Ltd** [1987] UKHL 8.

Housekeeping

12. The parties produced a joint bundle of 172 pages. If I refer to a page or pages in the bundle, I will record the page number(s) in square brackets (e.g. [34-35]).

13. The first two hours of the first morning of the hearing was reserved for me to read the documents and statements, which I completed by 12:00pm.

14. When the parties joined the hearing, I noted that whilst the claimant was represented by a solicitor, the respondent did not have professional representation. I therefore reminded everyone in the hearing that the Tribunal operates on a set of Rules. Rule 2 sets out the overriding objective of the Tribunal (its main purpose), which is to deal with cases justly and fairly. It is reproduced here:

The overriding objective of these Rules is to enable Employment Tribunals to deal with cases fairly and justly. Dealing with a case fairly and justly includes, so far as practicable —

- (a) ensuring that the parties are on an equal footing;*
- (b) dealing with cases in ways which are proportionate to the complexity and importance of the issues;*
- (c) avoiding unnecessary formality and seeking flexibility in the proceedings;*
- (d) avoiding delay, so far as compatible with proper consideration of the issues; and*
- (e) saving expense.*

A Tribunal shall seek to give effect to the overriding objective in interpreting, or exercising any power given to it by, these Rules. The parties and their representatives shall assist the Tribunal to further the overriding objective and in particular shall co-operate generally with each other and with the Tribunal.

15. I discussed the case in general terms with the parties. Mr Shannon confirmed that the claimant was claiming unfair dismissal and breach of contract. We agreed the list of issues (see above). Given the number of witnesses, I discussed how we might timetable the hearing to ensure that we did not overrun our time estimate, as the huge pressure on the Tribunal system may mean a long wait for further hearing days.
16. Mr Longmore asked permission to call Colleen Purvis as a witness to a telephone conversation that they had had. A document in the bundle [65-67] related to matters leading up to the phone call. I decided to consent to the witness being called and allow the document to be treated as a witness statement, as the document had been disclosed. I indicated that Mr Shannon could have additional time to take instructions on the document and to allow him to ask supplemental questions of the claimant to deal with any aspects of the document that she had not dealt with in her statement.
17. I Indicated that it was for the claimant to give evidence first as she was alleging constructive dismissal.
18. The claimant gave evidence in person and produced an undated witness statement that ran to 40 paragraphs.
19. Evidence was given in person on behalf of the respondent by a number of its employees:
 - 14.1. Kathryn Stewart, Senior Care Lead, whose unsigned and undated statement ran to 5 pages.
 - 14.2. Philip Longmore, the Director of the respondent, whose unsigned statement dated 9 October 2020 ran to 6 pages.
 - 14.3. Andrew Unsworth, Handyman for the respondent, whose “witness statement” was a handwritten grievance dated 1 May 2020 that ran to 8 pages.

- 14.4. Janet Coxon, employee of the respondent, whose undated and unsigned statement ran to a single page.
 - 14.5. Lyndsay Charlton, employee of the respondent, whose handwritten, undated document ran to 3 pages.
 - 14.6. Katrina Carter, employee of the respondent, whose handwritten undated document ran to 2 pages.
 - 14.7. Colleen Purvis, Deputy Manager at Thorncliffe House, whose undated and unsigned document was included as a document in the bundle at pages 65 to 67.
 - 14.8. Amanda Howell, employee of the respondent, whose unsigned, undated handwritten document ran to 3 pages.
15. All witnesses were cross-examined by the other side. I asked most of the witnesses some questions.
 16. The respondent had submitted a witness statement from Margaret Stokell, who could not attend the hearing. I explained that I could give little weight to the evidence of a witness who did not attend because they could not be challenged in cross-examination. I did read the statement, but gave it little weight.
 17. At the end of the evidence, I heard closing submissions from Mr Longmire and Mr Shannon. I considered my decision and gave an oral judgment and reasons. I did not have the facility to record the oral judgment, so these written Reasons are made from my notes and may differ in some respects to the oral reasons I gave. These written Reasons are the Tribunal's formal determination.
 18. The hearing was conducted by video on the CVP application and ran intermittently, with some technical issues. I am grateful to all who attended the hearing for their patience and good humour in the face of the technical glitches.

Findings of Fact

19. All findings of fact were made on the balance of probabilities. If a matter was in dispute, I will set out the reasons why I decided to prefer one party's case over the other. If there was no dispute over a matter, I will either record that with the finding or make no comment as to the reason that a particular finding was made. I have not dealt with every single matter that was raised in evidence or the documents. I have only dealt with matters that I found to be relevant to the issues I have had to determine. No application was made by either side to adjourn this hearing in order to complete disclosure, obtain more documents, or call witnesses so I have dealt with the case on the basis of the documents produced to me. I make the following findings.
20. There were a number of facts that were either agreed or not disputed, or which I have taken "judicial knowledge" (information of which it is assumed that the Tribunal is aware) of:

- 20.1. The claimant began working for the respondent on 20 May 2013 and at all material times, she was employed as the Care Home Manager at the respondent's premises.
- 20.2. The respondent is a limited company that operates a residential care home called "Thornccliffe House", in Sunderland. It was agreed that at 4 May 2020, the care home employed 29 staff, including managers. I take judicial notice of the fact that the care home sector is highly regulated by the Care Quality Commission ("CQC").
- 20.3. Mr Longmore is one of the two current directors of the respondent listed at Companies House and is listed as the person with overall control of the company: he holds at least 75% of the shares in it. He is the 'responsible person' for the care home with the CQC.
- 20.4. The claimant entered into a contract of the employment with the respondent dated 8 August 2013 [68-75]. The statement of terms and conditions referenced [68] an Employee Handbook, which was said to be available in the main office, but no full copy was produced to this hearing. A copy of the respondent's disciplinary procedure, which was stated to have been last reviewed in April 2020, was produced [106-131], as was a copy of its grievance procedure, which had been last reviewed in July 2019 [132-152].
- 20.5. The claimant was directly responsible to Mr Longmore and was in day-to-day control of the running of the home.
- 20.6. There were references by both parties to allegations made by the respondent about the claimant's conduct towards colleagues in October 2019. The details are disputed, but have relevance to the termination of the claimant's employment.
- 20.7. The main events of this case took place during the period of the first national lockdown that started in March 2020. As the operator of a care home, the respondent was greatly affected by the pandemic and the steps imposed to try and mitigate its effects.
- 20.8. It was undisputed that, on 29 April 2020, Mr Longmore rang the claimant and asked her to meet him to discuss something he would explain when they met. They met in the car park of a B&Q store and had a discussion, the details of which are disputed.
- 20.9. It was agreed, however, that the result of the meeting was an instruction from Mr Longmore to the claimant that she should take time off work until 11 May 2020. It was later classed as a suspension, but there was no evidence to support such a contention.
- 20.10. A meeting was arranged for the claimant, Mr Longmore and Colleen Purvis for 11 May 2020 to "clear the air", but this never took place.
- 20.11. On 4 May 2020, Mr Longmore asked the claimant to meet him offsite. They met at a car park in Doxford Park. The details of the conversation are disputed. The claimant says she was given an ultimatum by Mr Longmore: she should resign in order to "save face" in the light of

allegations of bullying that he said had been made about her by staff at the care home.

20.12. Mr Longmore's account of the meeting on 4 May 2020 is that he presented the evidence the evidence of bullying in the form of statements from the staff, but the claimant refused to read them and, instead, offered her immediate resignation, which he accepted.

20.13. The events of the meeting on 4 May 2020 are the crux of this case.

20.14. There was continuing correspondence between the claimant and Mr Longmore concerning the allegations of bullying that had been made until Mr Longmore 's letter of 30 July 2020 [104-105].

Disputed Facts

October 2019

21. The claimant acknowledged in paragraph 15 of her witness statement that concerns regarding her performance or conduct were raised by the respondent in October 2019, whilst she was on leave. In paragraph 17 of her witness statement, the claimant said that she was advised that "certain members of staff had complained about me".

22. The claimant's evidence (§18 of her witness statement) was that she met with Mr Longmore in early November 2019. She says that the only criticisms of her were "the way I spoke to staff". The claimant says that she was told to "build bridges" and "work with what I had".

23. It is a feature of this case that does not reflect well on Mr Longmore that few notes of any important conversations between him and the claimant appear to have been made or kept. For example, no notes of the discussion in November 2019 were kept.

24. It is another unfortunate feature of this case that allegations were made about the claimant's conduct that go back "throughout 2019" in Mr Longmore's statement, but there was no evidence that the respondent did anything about them. These include being highly disrespectful to Colleen Purvis, the Deputy Manager, and Kathryn Stewart, the Senior Care Lead. The failure to act is despite the claimant's alleged undermining of Mrs Purvis to Mr Longmore himself.

25. Mr Longmore's statement also alleged that the claimant "...became extremely hostile to [almost every other member of staff] and bullied and harassed them whenever and wherever the opportunity allowed her to do so, essentially when I was not physically present on the premises." I find that statement to be internally inconsistent and implausible because Mr Longmore's witness statement then went on to state "When I did witness such outbursts first hand I would always take her to task and she would respond favourably to my management in the short term however she would always then revert to type soon afterwards." I find that Mr Longmore's evidence is that he was aware that the claimant was engaged in repeated bullying and harassment of most of the respondent's staff throughout 2019. He witnessed some of it and produced no notes whatsoever of any one to one

meeting with the claimant that documents the allegations or her responses or any document that records the outcome of those meetings.

26. Mr Longmore's evidence was that six staff members approached him on 31 October 2020 to complain about the claimant's behaviour. His witness statement did not name any of them and only gave the initials of one of the complainants "JC". Under cross examination, Mr Longmore confirmed that five of the complainants were John Porter, Lyndsay Charlton, Kathryn Stewart, Jan Coxon and Katrina Pennock. He thought the sixth was Andrew Unsworth. He accepted that he met the staff concerned and asked them for witness statements as Mr Longmore was considering potential disciplinary action. Mr Longmore described the statements as "extremely harrowing". I find it very surprising that Mr Longmore took no copies of the witness statements he says were provided. His evidence that the originals were torn up in front of the claimant at their meeting on 4 November is implausible. I prefer Ms Sanderson's evidence on that point.
27. I am also surprised that when Mr Longmore supplied further details of the respondent's case in his letter to the claimant's solicitors dated 23 September 2020 [31-35], there are numerous matters that did not make it into his witness statement.
28. I find Mr Longmore's evidence to be inconsistent on this matter. If he was supplied with the sort of allegations that he alleged in the letter of 23 September 2020, that he says were "harrowing", then it is inconsistent for him to have failed to record any detail of any part of the investigation or supporting documents, have failed to progress the matter to a formal disciplinary hearing, performance improvement plan or formal observation of the claimant's work over a period, and for him to have destroyed the only copies of the witness statements supplied by staff.
29. My finding is supported by Mr Longmore's letter to the claimant of 30 July 2020 in response to her request for further information and documents. Mr Longmore stated that he was unable to "lay his hands" on the documents individual staff statements, but that he remembered they were presented to the claimant on 4 November 2019. There was no mention of the statements being ripped up in front of the claimant by Mr Longmore, which I find to be a glaring omission.
30. I find the claimant's account of the meeting on 4 November 2019 to be more credible than Mr Longmore's because it is more logical and reflects the known circumstances. I find that the claimant was told to build bridges and work with what she had.
31. The only contemporaneous document that assisted me in making my decision on this aspect of the case was the exchange between the CQC and the respondent (Mr Longmore and Ms Sanderson) between 19 and 21 November 2019 [53-55]. I find that the lack of any complaint about the claimant's behaviour amongst the six specific complaints made about Thorncliffe House suggests that her behaviour was not as bad as Mr Longmore suggested that it was in these proceedings. The complainant to the CQC clearly had inside knowledge of respondent's practices, but chose not to highlight the claimant's actions, which, if I found Mr Longmore's account to be credible, were egregious enough to have resulted in a mention of her in the complaint to the CQC.

32. My finding is supported by Mr Longmore's admission in oral evidence that following the meeting on 4 November 2019, there was no performance improvement plan put in place and there was no monitoring of the claimant's performance.
33. There was oral evidence that there were one or two briefing meetings with staff after Mr Longmore's meeting with the claimant on 4 November 2019. The claimant didn't challenge the evidence, so I find that she was aware of the complaints of colleagues and that she committed to mend her ways.

April and May 2020

34. I am mindful of the fact that the events of April and May 2020 were in the midst of the first lockdown and took place in a residential care home. I therefore take judicial knowledge that everyone working at the respondent's premises will have been under a great deal of stress.
35. I find that Thorncliffe House was not a happy workplace throughout 2019 and 2020. I make that finding because it was the unanimous evidence of every witness that gave evidence in this case. It is not relevant to my decision in this case to attribute blame for how those circumstances arose.
36. I find that there was little love lost between the claimant on the one side and Mrs Purvis and Ms Stewart on the other. I make that finding because of their respective witness statements and their oral evidence.
37. I find the document produced by Mrs Purvis [65-67] and her supporting oral evidence to be credible. I make that finding because:
 - 37.1. I found her answers to questions to be honest. If she did not know the answer to a question, she frankly admitted as much;
 - 37.2. I find that the document was created at the request of Mr Longmore between 29 April and 4 May, as it was not disputed that they had a had a telephone conversation on the earlier date and it was agreed that Mr Longmore met the claimant on 1 May and 4 May;
 - 37.3. I found the document itself to be written by Mrs Purvis, rather than by Mr Longmore, as his prose style is very different to hers;
 - 37.4. The allegations listed as happening in April 2020 reflect (but do not exactly mirror) the evidence of the complainants who gave evidence at this hearing; and
 - 37.5. Mrs Purvis' decision to contact Mr Longmore on 29 April seems to be an action of last resort, as she could not resolve the complaints that were made.
38. I find that Mrs Purvis spoke to Mr Longmore on 29 April 2020 by telephone. I make that finding because Mrs Purvis' evidence on the point was unchallenged. I have already found that her note of the events leading up to the telephone conversation were credible.

39. I have already found that Mr Longmore told the claimant to take some time off work on 29 April 2020. This was not in dispute. The only logical explanation for the suspension was the allegations that Mrs Purvis passed to Mr Longmore regarding the claimant.
40. Mr Longmore was taken to the respondent's disciplinary procedures [106-131] and said in oral evidence that the claimant was responsible for disciplinary matters and he was there if she struggled. I find that as the claimant was the subject of the disciplinary process, Mr Longmore was responsible for carrying out the procedure. He said he "would have" asked Mrs Purvis to investigate and that he would have made the decision on dismissal.
41. Mr Longmore suggested that Mrs Purvis was asked to "organise" witness statements. I find that not to be credible, as Mrs Purvis provided no corroboratory evidence on the point. She was specifically asked if she was asked to speak to individuals about statements. Her response was that she was asked to reassure staff. This evidence is credible because it is consistent with the claimant's evidence (§7) that she and Mrs Purvis spoke on 2 May 2020 and that Mrs Purvis told her she had been asked to arrange a meeting on Ms Sanderson's return to work on 11 May.
42. The quality of the respondent's investigation into the allegations against the claimant in October 2019 and April 2020 were wholly inadequate. They fell well short of the respondent's own procedure, which appears to have been ignored, and well short of the standard required by the ACAS Code of Practice 1 – the code on disciplinary and grievance procedures (2015).
43. I find that Mrs Purvis handed Mr Longmore witness statements from staff who complained about the claimant.
44. I find that on 4 May 2020, at the meeting between Mr Longmore and the claimant:
- 44.1. Mr Longmore attended the meeting with the intention of presenting the claimant with the evidence against her and offering her the opportunity to resign as an alternative to going through a disciplinary process.
 - 44.2. He handed the claimant the statements of complaint that had been submitted by staff. I make that finding because:
 - 44.2.1. The only purpose of the meeting from Mr Longmore's perspective was to advise the claimant of the allegations; and
 - 44.2.2. In response to Mr Longmore's email to her of 5 May 2020 at 07:14am, in which he stated "Following receipt of 8 witness statements the contents of which were totally damning..." the claimant did not reply to rebut the suggestion that she had been given the statements.
 - 44.3. The claimant made vague allegations that she had been the victim of bullying and harassment by staff herself. I make that finding because, although it is absent from the claimant's witness statement, Mr Longmore raised it in his email to the claimant dated 5 May 2020 at

15:00pm and asked her to provide a detailed statement. The claimant did not respond by denying that she had made the allegations and she maintained the allegations in this hearing.

- 44.4. I find that Mr Longmore offered the claimant the opportunity to resign to save face. I make that finding because both parties were agreed that he used those words.
- 44.5. I find the claimant's written evidence (§9) that she told Mr Longmore that she had no questions unless the statements were read out not to be credible.
- 44.6. I find that Mr Longmore told the claimant that she would not be able to return and that her position was untenable because that was his evidence of what was said.
- 44.7. I find that the claimant tendered her immediate resignation on 4 May 2020. I make that finding because I find Mr Longmore's evidence more credible than the claimants on the point because:

- 44.7.1. The first communication recorded after the meeting on 4 May was the claimant's email of 5 May 2020 at 6:32am. That email is, unfortunately, worded ambiguously. She stated "This email is to advise you I will not be resigning like I said yesterday its not about saving face. Even more so now I believe I am a victim of harassment and bullying." I find that the most likely interpretation of the claimant's first sentence is an attempt to revoke her resignation, not to confirm that she was not going to resign in the future. I make that finding on my interpretation of the words used; the absence of any allegation by the claimant that she had been dismissed the previous day; and that her evidence (§9) did not suggest that she had been expressly dismissed.

- 44.7.2. I find the claimant's allegation of harassment and bullying to be an unfortunate knee-jerk reaction to the allegations that had been made against her. I make that finding because the claimant brought no claims of bullying or harassment as a head of claim in these proceedings and her oral evidence on the subject was weak.

- 44.7.3. The claimant had been informed of the concerns of some of her colleagues about behaviours in November 2019 and agreed that she had promised to med her ways, so it cannot have been a surprise to her when the new allegations were made.

- 44.7.4. Mr Longmore's email of 5 May at 7:04am is a robust assertion of the respondent's case as it has remained throughout.

- 44.7.5. I do not find that Mr Longmore's text message of 7 May 2020 has a great deal of significance, other than being a further assertion of the respondent's case that appears to have gone unanswered by the claimant.
- 44.7.6. I find that it is relevant to note that in her email dated 18 May 2020 to Mr Longmore, the claimant confirmed that "At no point was I told that The Company was proposing disciplinary action against me."
- 44.7.7. In the same email, the claimant stated "I believe I have been unfairly dismissed from my employment on 4th May constituted an enforced resignation/termination of my employment. The claimant sought to appeal her dismissal.
- 44.7.8. In Mr Longmore's response to the claimant dated 23 May 2020 [63-64], he effectively drew a line under the matter and the question of an appeal.

Events after 23 May 2020

45. The claimant instructed solicitors, who engaged in correspondence with Mr Longmore.
46. The claimant's claim form [15] expressed her claim as "an enforced resignation or, alternatively, amounted to words of dismissal...".

Allegations against the claimant

47. Unusually in this sort of case, the Tribunal heard evidence from those who allege that the claimant acted in a bullying and harassing manner against them.
48. I particularly found the evidence of Andrew Unsworth to be compelling and credible. I find that he wrote his statement of 1 May 2020 himself, because that was his unchallenged evidence. I do not find it necessary to set out every instance of behaviour on the part of the claimant that fell below the standard that any employee is entitled to expect. I suffice it to say that his evidence contained a number of allegations that were not challenged to any material degree in cross-examination (my notes of the cross-examination consist of just 3 sides of an A4 pad). I find on the balance of probabilities that Mr Unsworth's allegations were true and that he had not brought them to the respondent's attention previously because he was scared of the claimant.
49. I find that a reasonable investigation into Mr Unsworth's allegations would have had a very high percentage chance of resulting in a fair dismissal when judged under the terms of section 98(4) of the Employment Rights Act 1996.
50. I also found the allegations made by some of the other employees of the respondent were credible and serious, but I find little would be gained by listing them here.

51. Over the course of the hearing, I heard and read a great deal more evidence than I have referred to in these Reasons, but I have limited these reasons to matters that I found material to the issues I had to determine.

Applying the Findings of Fact to the Law and the Issues

52. On behalf of the claimant, Mr Shannon referred me to the case of **Martin v MBS Fastenings (Glynwed) Distribution Ltd** [1983] ICR 511, in which Sir John Donaldson MR said:

“Whatever the respective actions of the employer and employee at the time when the contract of employment is terminated, at the end of the day the question always remains the same, ‘Who really terminated the contract of employment?’”

Mr Shannon submitted that Mr Longmore’s email of 5 May showed that this was a case where the employer had dismissed the claimant.

53. I was also referred to the case of **Derby City Council v Marshall** [1979] ICR 731, which is authority for the principle that if an employer does not attempt to show a potentially fair reason in a constructive dismissal case relying on an argument that there was no dismissal, a tribunal is under no obligation to investigate the reason for the dismissal itself. The dismissal will be unfair because the employer has failed to show a potentially fair reason for it.

54. In order to constitute a notice of dismissal the employer giving notice must specify a particular ascertainable date. Where the employer merely gives an advanced warning of dismissal to occur at some future date, this does not constitute a notice of dismissal.

55. The EAT decision on redundancy, **International Computers Ltd v Kennedy** [1981] IRLR 28, indicates that even where the employer makes it clear that the employee will not be retained beyond a future specified date, this will still be insufficient to constitute a notice of dismissal.

56. I am mindful that a respondent who is found to have given the ultimatum 'resign or be sacked' constitutes a dismissal because, as Waterhouse J recognised in **International Computers Ltd v Kennedy**, it clearly implies that the employee will be dismissed at an ascertainable date, i.e. forthwith, if he refuses to resign.

57. I find that the facts in this case do not support a finding that the claimant was given the “resign or be sacked” ultimatum, as she accepted in her email of 18 May 2020 that at no time had the respondent even suggested that disciplinary proceedings would be taken.

58. Applying my findings and considering all the circumstances of the case, I find that the claimant knew, or ought to have known, that her behaviours were unacceptable and could lead to dismissal if pursued by the respondent and chose resignation. She knew of the history of concerns about her behaviour and should have known what had happened. She saw the allegations that were made at the end of April 2020 and

could see the writing on the wall. I find that there was no breach of the implied duty of trust and confidence on the part of the respondent. The claimant was not dismissed. I do not need to make any further findings on the issues in the unfair dismissal case.

59. On the breach of contract claim, I find that the claimant's notice period was 6 weeks. I find that she was paid no notice, but I find that the claimant did something so serious (her conduct towards colleagues) that the respondent was entitled to dismiss without notice.

60. In the alternative, had I found that the claimant had been unfairly dismissed, I would have made a substantial reduction for contributory conduct and Polkey.

Note: This has been a remote hearing. The parties did not object to the case being heard remotely. It was not practicable to hold a face to face hearing because of the Covid19 pandemic.

Employment Judge Shore
22 November 2021

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