THE EMPLOYMENT TRIBUNALS

Claimant: **Mrs C Chatfield**

Respondent: **The Newcastle upon Tyne Hospitals NHS Foundation Trust**

Heard at: **Newcastle upon Tyne Hearing Centre (by CVP)**
On: **25th, 26th, 27th October, 30th November 2021**
Deliberations: **14th December 2021**

Before: **Employment Judge Martin**

Representation: **Mr A Lie**
Mr S Wykes

Claimant: **In Person**
Respondent: **Mr D Patel (Counsel)**

This case was heard by way of Cloud Video Platform (CVP) due to the ongoing Coronavirus pandemic. The parties agreed to the hearing proceeding by way of CVP.

RESERVED JUDGMENT

1. The claimant's complaint of a failure to permit the statutory right to be accompanied is well-founded. The claimant is awarded one week's wages being the sum of £353.07.

2. The claimant's complaint of breach of the flexible working provisions is not well-founded and is hereby dismissed.

3. The claimant's complaint of constructive automatic unfair dismissal is also not well-founded and is hereby dismissed.

REASONS

Introduction

1. The claimant gave evidence on her own behalf. Mrs Tracy Wood, the claimant's line manager, and Mr Gary Turner of financial management gave evidence on

behalf of the respondent. The tribunal was provided with an agreed bundle of documents marked Appendix 1.

The law

2. The law which the tribunal considered was as follows:

Section 10 (1) Employment Relations Act 1999. This section applies where a worker

(a) is required or invited by his employer to attend a ….. grievance hearing and

(b) reasonably requests to be accompanied at the hearing.

Section 11 (1) ERA 1999. A worker may present a complaint to an employment tribunal that his employer has failed, or threatened to fail to comply with Section 10.

Section 11 (3). Where a tribunal finds that a complaint under this section is well-founded, it shall order the employer to pay compensation to the worker of an amount not exceeding two weeks pay.

Section 80F (1) Employment Rights Act 1996. A qualifying employee may apply to his employer for a change in his terms and conditions of employment if:-

(a) the change relates to:-

(i) the hours he is required to work,

(ii) the times when he is required to work,

(iii) where, as between his home and a place of business of his employer, he is required to work or

(iv) such other aspect of his terms and conditions as the Secretary of State may specify by regulations.

Section 80F (2) ERA 1996. An application under this section must

(a) state that it is such an application;

(b) specify the change applied for and the date on which it is proposed the change should become effective and

(c) explain what effect, if any, the employee thinks making the change applied for would have on his employer and how in his opinion any such change might be dealt with.

Section 80F (4). If an employee has made an application under this section, he may not make a further application under this section to the same employer

before the end of the period of twelve months beginning with the date on which the previous application was made.

Section 80G (1) ERA 1996. "An employer to whom an application under Section 80F is made

(a) shall deal with the application in a reasonable manner

(aa) shall notify the employee of the decision on the application within the decision period and;

(b) shall only refuse the application because he considers that one or more of the following grounds applies:-

(i) the burden of additional costs

(ii) detrimental effect on ability to meet customer demand

(iii) inability to reorganise work among existing staff

(iv) inability to recruit additional staff

(v) detrimental impact on quality

(vi) detrimental impact on performance

(vii) insufficiency of work during the periods the employee proposes to work

(viii) planned structural changes and

(ix) such other grounds as the Secretary of State may specify by regulations.

Section 80G (1) B. For the purposes of subsection 1) (aa) the decision period applicable to an employee's application under Section 80F is:-

(a) the period of three months beginning with the date on which the application is made, or

(b) such longer period as may be agreed by the employer and the employee.

Section 80H (1) ERA 1996. "An employee who makes an application under Section 80F may present a complaint to an employment tribunal:-

(a) that his employer had failed in relation to the application to comply with Section 80G (1) or

(b) that a decision by his employer to reject the application was based on incorrect facts or

(c) that the employer's notification under Section 80G (1) D was given in circumstances that did not satisfy one of the requirements in Section 80G (1D) (a) and (b).

Section 95 (1) ERA 1996. An employee is dismissed by his employer 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.

Section 108 (1) ERA 1996. Section 94 does not apply to the dismissal of an employee unless he has been continuously employed for a period of not less than two years ending with the effective date of termination.

Section 108 (3) subsection 1 does not apply if:-

Section 104C applies

Section 104C ERA 1996. An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason or if more than one the principal reason for the dismissal is that the employee

(a) made or proposed to make an application under Section 80F

(d) alleged the existence of any circumstances which would constitute a ground for bringing such proceedings under Section 80H.

3. The tribunal was also referred to and considered a number of cases as follows:-

4. The case of **Omilaju v Waltham Forest London Borough Council [2005] ICR 481** which held that the only question to be decided is whether the final straw is the last in a series of acts or incidents which cumulatively amount to a repudiation of the contract by the employer. The last straw must contribute however slightly to the breach of the implied term of trust and confidence.

5. The case of **Western Excavating (ECC) Limited v Sharpe [1978] ICR 221,** the leading case on the test for constructive dismissal, which held that the tribunal had to consider whether the employer's actions or conduct amounted to a repudiatory breach of contract which entitled the employee to resign and whether the employee then resigned in response to that breach of contract and had not waived any such alleged breach. The tribunal was also referred to paragraph 22 of that decision.

6. The case of **Malik v Bank of Credit and Commerce International SA [1997] IRLR 462** where it was held that an employee must show in a case of constructive unfair dismissal where he/she relies upon a breach of the implied term of trust and confidence show that the employer acted without reasonable and proper cause in a way that was calculated or likely to destroy or seriously damage the relationship of trust and confidence between employer and employee.

7. The case of **Tullett Prebon Plc and Others v BGC Brokers LP & Others [2011] IRLR 420.** The Court of Appeal held that question of whether the employer acted in such a way in a case of constructive unfair dismissal is an objective question, determined from the perspective of a reasonable person in the employee's position.

8. The case of **Abbycars v Ford EAT0472/07** where the EAT held that the crucial question is whether the repudiatory breach played a part in the dismissal.

9. The tribunal was also referred to the case of **Fereday v South Staffs NHS Primary Care Trust UKEAT/0513/ZT** in particular paragraphs 45 and 46.

10. The case of **Berriman v Delabole Slate Limited [1985] ICR 546** where the Court of Appeal held that the reason for dismissal in a constructive unfair dismissal was the reason for which the employer breached the contract of employment, namely the way that the statutory requirements can be made to fit a case of constructive is requiring the employer to show the reason for their conduct which entitled the employee to terminate the contract by giving rise to a deemed dismissal by the employer. The tribunal has to ask itself what was the reason or principal reason for dismissing the employee…it is the employer's reasons for their conduct not the employee's reaction to that conduct which is important.

11. The case of **Price v Surrey County Council and another UKEAT/0450/10** - the tribunal was referred to paragraphs 51 and 52. In that case the court considered the approach to be adopted in that case for the protection of whistle blowers. That court held that it was the making of the protected disclosure which is the focus of attention and which must be the principal reason for the dismissal or for the other detrimental action or inaction. In that case, is was held that the forced resignation came about not because of the making of the complaint as such, but because of the inadequacy in one important respect of the authority's response to it.

12. The case of **Wightman v CPS Interiors Limited and Others EAT2601103/15** which looked at the question of reasonableness in relation to a complaint of flexible working and concluded that the reasonableness in that context referred to the decision making process rather than the substance of the decision. It held that employers must follow a reasonable procedure, must act in good faith, must give some real thought to the employee's request. The tribunal also held that it is not for the tribunal to access the substance of the employer's decision or to decide whether it fell within the band of reasonable responses. On the contrary what matters was the employer's subjective views.

13. The case of **Massimetti v Intel Corporation (UK) Limited ET case no 3323960/16** where the tribunal accepted that Section 80 (1) (g) "detrimental impact on performance" incorporated the argument that sales people work better in the workplace where they are able to bounce off each other's expertise than at home.

14. The **ACAS Code of Practice on handling flexible working requests** which indicates that employers should discuss requests with the employee, consider the

request, and deal with it promptly and within the time period indicated in the statute.

15. The case of **Smith v Hayle Town Council [1978] ICR 996** where the EAT held that the burden lies with the claimant to prove on the balance of probabilities the reason for the dismissal was an automatically unfair reason.

16. The case of **Sinclair v Trackwork Limited UKEAT/0129/20** considered the suggestion there was an unbroken causal link between any breaches of contract and the final straw.

17. The case of **Mehaffy v Dunnes Stores (UK) Limited ET case no 1308076/03** which considered the question of the company's mind set in considering whether managers had to be full time and whether they were effectively paying lip service to working through the flexible working provisions without any genuine commitment to considering the employee's proposals in that case.

18. The case of **Holder v Mammas and Pappas Limited ET case no 1100916/10** where the employment tribunal was satisfied that the employer's refusal stemmed from an established and entrenched opposition to part-time working or job sharing.

19. The case of **Bournemouth University v Buckland 2010 EWCA CIV 21** where it was held that a breach of the implied term of trust and confidence cannot in the legal sense be remedied. In a practical sense Lord Justice Sedley held that if the employee's concerns are remedied via an employer's grievance procedure they are far less likely to want to resign.

20. The claimant also referred to the case of **Talon Engineering Limited v Smith UKEAT/0236/17** which the case referred to a disciplinary hearing and not a grievance hearing and the right to be accompanied in that regard. It was held by the EAT that the right to be accompanied at a disciplinary hearing will almost always result in a finding of unfair dismissal.

21. The case of **Kaur v Leeds Teaching Hospital NHS Trust 2018 EWCA CIV 978** where the EAT held that "if the most recent conduct was not capable of contributing something to a breach of the **Malik** term, then the tribunal may need to go on to consider whether the earlier conduct itself entailed a breach of the **Malik** term, has not been affirmed and contributed to the decision to dismiss" thus so long as there has been conduct which amounts to a fundamental breach, the right to resign in response to it has not been lost if the employee does resign at least partly in response to it, then constructive dismissal is made out. It may well be that the latter conduct is the conduct which has tipped the employee into resigning but as a matter of causation is a combination of both the earlier and later conduct that has together caused the employee to resign. The EAT held in that case that all that is required for a last straw resignation is a series of incidents, whether or not previously affirmed, which amount to a fundamental breach of contract.

22. The case of **De Lacey v Wechsein T/A The Andrew Hill Salon UKEAT/0038/20** the EAT provided guidance on what amounted to the last straw. It held that it need not be of the same gravity as the previous acts relied upon and need not be unreasonable or blameworthy conduct but must not be entirely innocuous unless the employer's prior fundamental breach materially contributed to the employee's decision to resign and must be more than utterly trivial.

The issues

23. The parties had agreed a list of issues which is set out at page 449 – 451 of the bundle and is summarised below.

24. In relation to the statutory right to be accompanied - was the claimant invited to a grievance meeting on 30th September and/or 7th October; did she reasonably request to be accompanied at those meetings; did the respondent fail or threaten to fail to allow the claimant to bring a companion to either or both of those meetings?

25. In relation to the complaint of flexible working did the respondent fail to deal with the claimant's flexible working request in a reasonable manner? In particular, did the respondent not inform the claimant of her right of appeal; and was the respondent's refusal of the flexible working application based on a ground not set out at Section 80G (1) (b) of the Employment Rights Act 1996?

26. In respect of the complaint of constructive automatic unfair dismissal, the tribunal first had to consider whether the respondent had committed a repudiatory breach of contract i.e. without reasonable and proper cause acted in a way that was calculated or likely to destroy or seriously damage the relationship of trust and confidence by one or more of the following:-

    (a) rejecting the home working element of the claimant's flexible working request on 24/8/20 the same day the request was made or on 29/9/20;

    (b) not holding any discussion about the home working element of the claimant's flexible working request;

    (c) the events surrounding the meeting 24/9/20, the content of the meeting bullied and harassed the claimant;

    (d) declining the home working element on the basis of arbitrary opinions, not fact;

    (e) not holding any grievance hearing with the claimant in relation to the grievance submitted on 29/9/20;

    (f) attempting to hold a grievance hearing with one-hour notice on 30/09/20;

    (g) holding a formal meeting on 30/9/20 at 12.30 which intimidated the claimant in its content and arranging of the meeting;

(h) providing a response to the grievance of 29/9/20 only four days after it had been raised;

(i) Mr G Turner's e-mail dated 5/10/20 which the claimant alleged was deliberately vague to ensure the claimant did not raise a grievance;

(j) the meeting between Mrs Wood and the claimant on 7th October 2020 during which the claimant alleges that Ms Wood was deliberately being vague to ensure that the claimant did not raise a grievance;

(k) forcing the claimant to attend a grievance meeting on 7/10/20 whilst the claimant was anxious. The events surrounding the meeting 7/10/20 and the content of the meeting being bullied and harassed the claimant;

(l) on 9/10/20 requiring the claimant to work at the work place despite new government guidance saying "if you can work from home you should";

(m) the e-mail sent by Mrs Wood on 9/10/20 which the claimant alleges contains further malicious comments continuing to insist the claimant just resign as Ms Wood had formed her own opinion as the claimant's move to Milton Keynes was permanent and then presented it as fact;

(n) refusing to accept the claimant's resignation on 12/10/20.

27. So did the claimant resign in response to any such breaches?

28. Did the claimant affirm the contract or waive any such breaches?

29. Can the claimant show that the reason or principal reason for dismissal (i.e. the reason for which the respondent committed any repudiatory breach of the contract) was either

(a) the fact that the claimant had made an application under Section 80F

(b) the fact that the claimant alleged the existence of any circumstances which would constitute a ground for bringing such proceedings?

Findings of fact

30. The respondent is a large hospital based in Newcastle. The claimant commenced employment with the respondent in April 2019 as an assistant directorate accountant.

31. As a result of the coronavirus pandemic and the national lockdown which occurred in March 2020, the claimant worked from home from March 2020 until, she like other finance staff, were asked in May 2020 to return to the office with social distancing being put in place.

32. A rota was put in place for members of the finance team, which commenced in June 2020. The claimant returned to work in the office for some days from June 2020.

33. In or around mid-August 2020, an informal meeting took place, at the claimant's request, between the claimant and her line manager Mrs Woods. Mrs Woods said in evidence to the tribunal that the claimant requested this meeting and informed her that she had sold her Bed & Breakfast business and was moving to Milton Keynes. Mrs Wood said that the claimant told her this because she wanted to give her some warning before she handed in her notice which was only six weeks' notice. The claimant was not handing in her notice at that time but did ask whether she might be able to accommodate where the claimant could work her notice. Mrs Wood said that she told the claimant that she would make some enquiries with her own line manager, Mr Turner.

34. The claimant, in her evidence to the tribunal, denied that this meeting ever took place. The tribunal prefers Mrs Wood's evidence in that regard, as it is supported by documentary evidence in the form of emails, she sent, firstly to HR and her line manager on 9th October 2020 where she alludes to that conversation - page 332 of the bundle. She also refers to it in her email to the claimant on the same day - page 336; which the claimant does not contradict in her subsequent emails to Mrs Woods at page 347 of the bundle nor in the subsequent email sent by the claimant on the 14th of October 2020 - page 349 of the bundle.

35. On 24th August 2020, the claimant sent an email to Mrs Wood, who was on leave at the time, and which is copied to Mr Turner. In the email, the claimant requests flexible working to change her working days to working Monday - Wednesday in place of Monday, Wednesday, and Thursday and for all three days to be worked from home with immediate effect. That email is at pages 243–244 of the bundle. She suggests in the email that she would be prepared to do a two month trial period for the homeworking albeit but she does not think that is necessary due to having worked from home during COVID-19.

36. Mr Turner responds to that email on the same day. In his evidence to the tribunal, Mr Turner explained that he responded to the email immediately, before Mrs Wood's return from leave, because the claimant had requested that the arrangements be put in place immediately. Therefore, he felt it was necessary to respond straight away. In his response, Mr Turner explained that any request would have to be made to Mrs Woods in line with policies and set out the approximate timescale for dealing with such requests and the factors to be taken into account in relation to both any request for changes to working days and homeworking. In his email, at page 248, Mr Turner states that he is not prepared to implement the changes immediately.

37. The claimant replied stating that her email was the formal request to her line manager – page 247 of the bundle.

38. On her return to work on 1 September 2020, Mrs Wood writes to the claimant asking her to submit a formal flexible working request.

39. The claimant submits her flexible working application on 1 September 2020. The request form is the pages 234–236 of the bundle. In the request form, she cross references to her email of 24th August 2020 and requests the same changes to her working days and to work from home for all three days. She also asks that the changes

take place immediately. The flexible working application is acknowledged. Mrs Wood informs her that she will set up a meeting to discuss the request in the coming weeks – pages 239-240. At the claimant's request, Mrs Woods agrees that the date of the application should be treated as 24th of August 2020.

40. On 3 September 2020, the claimant confirms by email that she does not wish to be accompanied to that meeting – Page 238 of the bundle.

41. On 23 September 2020, the claimant messaged Mrs Wood to suggest that the Government advice on homeworking had changed and asked if homeworking was an option. Mrs Wood replied saying that it was not because the respondent had a COVID secure workplace and that the finance team were required to be in the office - there being social distancing measures in place – page 271 of the bundle.

42 On 23 September 2020, the claimant emails Mrs Wood to inform her of her change of address, which she says will be her father's address in Milton Keynes with effect from 12th October 2020. She asks if she can temporarily work from home pending the outcome of her flexible working request / homeworking. That email is at pages 272–273 of the bundle. In that email, she also suggests that the Government advice on homeworking has changed such that all employees should work from home if they can.

43. On the same day, 23rd September 2020, Mrs Wood invited the claimant to a meeting regarding flexible working policy/agile working policy which was scheduled to take place the following day – 24th September 2020-pages 269 270.

44. The flexible working meeting / change of address meeting took place on 24th September 2020. The notes of that meeting are at pages 274–275. The claimant says that the meeting was about her change of address and disputes the contents of the notes of the meeting, albeit it was not clear from her evidence which elements she specifically disputed in relation to those notes. She complains that she was not provided with the notes until these proceedings. Mrs Wood said that the meeting notes are accurate and a summary of what was discussed, which she said involved both a discussion about flexible working and the claimant's 'change of address. The tribunal finds, having heard the evidence of both parties and after reviewing the notes, that both matters were discussed, albeit that the discussion about the change of days was minimal with most of the discussion being about the claimant's change of address and the implications of that change of address.

45. The claimant said in evidence that she had been bullied and harassed in the meeting. She also suggested that Mrs Wood had threatened her with the absence management policy if she did not attend the workplace. The claimant also said that Mrs Wood had suggested she should resign. Mrs Wood said that the meeting was difficult, and the claimant did not really engage in the discussion. She said that the claimant did not want to talk about matters until after her application for flexible working had been determined. Mrs Wood said that she tried to ascertain from the claimant what the position would be if her flexible working request was not agreed and how the claimant would be able to attend the workplace. She said that she did not ask the claimant to resign or threaten her in any way. The tribunal prefer Mrs Wood's evidence which is consistent with the notes of the meeting, which the tribunal note were sent to Mr Turner

shortly after the meeting. The notes of the meeting were not sent to the claimant, who said that the first time she had seen them was in these proceedings, which seemed to be the main concern which she had about the notes.

46. On 28 September 2020, Mrs Wood messaged the claimant about her homeworking request to ask if her personal situation had changed. In evidence to the tribunal, Mrs Wood said that she was trying to understand whether there was any change to the claimant's circumstances which she should be considering. In the message, which is a page 276 of the bundle, Mrs Wood says that she has been thinking about things over the weekend and said that she realised she had not really asked about the claimant's personal situation and whether everything was okay with her dad and whether there was anything else that needed to be considered.

47. On 29 September 2020, Mr Turner emails the claimant with the outcome of her flexible working application. He states that her request to change her working days is agreed, but her request for homeworking is not. The email and completed application form are at pages 278–282 of the bundle. Page 282 sets out the reasons why the application for homeworking is not recommended. It states that the role cannot be performed from home on a permanent basis. This includes the ability to build relationships and communicate with colleagues internal and external which it is said to be a fundamental part of the role. It also states that the role requires the sharing of best practice with colleagues, the ability to plan and prioritise workload, and to keep up to date with ongoing changes in the workplace, which it says would have a detrimental impact on performance and ability to deliver the service required.

48. The form also states that an employee may appeal the outcome of their application in writing to the head of HR outlining the basis of their appeal. The appeal must be received in 14 days of the employee receiving the decision and will be heard by a manager more senior to the one who considered the application.

49. On the same day, 29th September 2020, the claimant submits a response and supporting documentation – pages 283, 288-298. The documentation included with that response include discussions about the change of government advice, the change of address email and various comments on policies and procedures. After commenting on the various policies, the claimant then refers to the reason for her grievance being that the decision regarding her flexible working request being rejected was not made in a reasonable manner; based on fact; based on the proper grounds; is not covered under the flexible working policy or the agile working policy. She states that the grievance policy is out of date. The document is very difficult to follow, as her comments are interspersed with documents throughout and it is very difficult to ascertain whether she is raising a grievance or an appeal against the rejection of her flexible working request.

50. On 30th September 2020, Mr Turner emailed the claimant to ask for an informal discussion to discuss the matters raised in her response. He proposes that a representative from HR attend. He also informs the claimant that she can bring a colleague or trade union representative if she wishes – page 302. He suggests that the meeting take place at 12:30 pm that day. In evidence to the tribunal, Mr Turner said that he did not understand whether the claimant was appealing against the decision to reject her flexible working request he wanted to understand what she was requesting. He said he did not consider that her response amounted to a grievance, even though he

acknowledged from questions from the tribunal that there were various references in the response to a grievance. The document on two occasions used the word “grievance” and referred to the grievance policy. He said he wanted to bring HR to explain issues about the policies to the claimant. In his evidence, he said he did not really know understand what thee claimant was seeking which was the reason why he wanted to informally meet with her to discuss it before proceeding further.

51. They then followed several emails passing between the claimant and Mr Turner. The claimant indicated in her email in response, that she did not know how Mr Turner intended to proceed and she asked why she needs to provide more detail about how she wishes to proceed at this stage. She suggests that the meeting sounds like a formal meeting. She also indicates that, if she were to follow a process that looked like a grievance, it could be deemed she was accepting any breach of the policy which she says she is not prepared to do. She also says that she needs more time and that she would not be able to arrange facilitation for a colleague to attend. Mr Turner replies by stating that he needs to understand the issues which are being raised more clearly and that it is intended to be an informal meeting. In his evidence to the tribunal, Mr Turner said that he was keen to go ahead with the meeting because they were both in the office that day and there was some urgency because of the claimant’s pending change of address – pages 301-302.

52. Mr Turner then proceeded to speak to the claimant at her desk and asked her if she was willing to meet with him, but she says that she was not. He suggests that she suggested going to a room, but the claimant said that it was Mr Turner, who suggested that they do so. They then went into a room to discuss the matter further privately. Mr Turner suggested that the claimant agreed to go into a room with him to discuss matters, but the claimant in her evidence suggested that she did not and that she was effectively intimidated into going into a meeting with Mr Turner, who was her manager’s manager. This tribunal accepts the claimant’s evidence that it was Mr Turner who pushed to proceed with the meeting, which is consistent with all her preceding emails prior to the meeting. The meeting did not go well. Mr Turner tried to ascertain what the claimant wanted out of her letter. She made it clear that she did not want to proceed with the meeting. She did not think that she had enough time to prepare nor be accompanied. The meeting was very short, and no meaningful discussion took place.

53. It appears that neither Mr Turner nor Mrs Wood had any experience of dealing with grievances. The Tribunal consider that it would been more prudent for Mr Turner to have tried to rearrange the meeting rather other than proceeding in the way in which he did at that stage. Mr Turner sought advice from HR that day. He was concerned that the situation was spiralling out of control and that there were only a few days left remaining to resolve the problem. The claimant was due to move to Milton Keynes within a few days. He notes that the claimant is unwilling to engage in any informal process.

54. On 5 October 2020, Mr Turner replied to the claimant’s email of 29th September 2020. He refers to his unsuccessful attempt to try and discuss the matter informally. He then responds to each of the matters raised in the claimant’s email. He makes it clear that the grievance procedure is still live and valid. He goes on to state “in relation to the reasons for your grievance” and then deals with each of the points raised by the claimant in her email. He further states that the claimant can raise a grievance if she wishes to and can appeal the flexible working decision if she wishes. He says he will

provide her with a further 14 days to appeal. His reply is at pages 318–319 of the bundle.

55. On 7 October 2020, Mrs Wood, as her line manager, emails the claimant about some work issues. She also indicates that she needs to discuss some matters with the claimant regarding her change of address. She indicates that she will book a catch-up discussion – pages 340–341. The claimant queries whether the meeting is a catch up or to discuss her grievance. She says that, if it is to discuss her grievance, she needs to be given reasonable notice and have the opportunity to be accompanied - pages 340 and 342.

56. There is then an exchange of emails between Mrs Wood and the claimant. Mrs Wood informs the claimant that the meeting is not a formal meeting. She says that she wants to understand the claimant's issues about coming into the office and to try and find out if she has any health conditions since the last risk assessment or caring responsibilities. She says that she also needs to look at changing plans for when people are in the office with the claimant's agreed changed shift pattern. She therefore says that she needs to know what the claimant's plans are about coming into work next week once she is living in Milton Keynes – page 339. In her evidence to the tribunal, Mrs Wood said that she needed to meet with the claimant as she needed to sort out the arrangements for the rota as to who would be in the office each day. She said several times, in answer to questions on cross examination, that she needed to be able to give adequate notice to other employees who had childcare responsibilities.

57. The claimant replied to that email indicating that she was feeling anxious about the whole issue. She says that she has not questioned coming into a COVID secure office and has been doing so since June. She explains that she has not been able to secure accommodation due to COVID 19 and local lockdowns and has asked for temporary homeworking. She confirms there is no change to her caring responsibilities. She also asked why there would need to be any desk moves and effect on others in the office – page 338.

58. A one-to-one meeting was arranged with the claimant, which she attended. There are no formal notes of that meeting. Shortly after the meeting, Mrs Wood emailed HR and Mr Turner – page 326. In evidence to the tribunal, Mrs Wood said that email and her subsequent email to the claimant the following day (page 334) are a summary of the discussion at the meeting. In her evidence to the tribunal, Mrs Wood said the meeting did not go well. She said that the claimant was aggressive and appeared frustrated during the meeting. She also said the claimant seemed anxious and she was concerned about her well-being, which is why she then offered her a referral to occupational health. Mrs Wood said that the meeting could not continue because it felt to both of them like they were going around in circles. The Claimant said that she felt bullied and harassed at the meeting. She denied being aggressive. In the meeting, the claimant expressed concern about the way meetings were being arranged by the respondent.

59. The claimant said in evidence that Mrs Wood threatened go down the absence management procedure, if the claimant did not attend work. She also said in evidence that Mrs Wood suggested that she could simply resign. In her evidence, Mrs Wood said that she did not threaten the claimant, but she did make it clear that she had to manage

the claimant's attendance at work as her line manager. She denied that she had suggested the claimant resign. Mrs Wood said that she was trying to manage the claimant and her colleagues' attendance in the office under the rota. In her evidence to the tribunal, Mrs Wood said that she was trying to establish what the claimant's plans were and whether she was intending to come into the office so that she could sort out the rota for the office and liaise with other colleagues to give them some advance warning of changes to the rota so they could also make arrangements. The claimant on the other hand believed that this was a grievance meeting and still felt that she had a grievance in respect of her request to work from home. At the meeting, Mrs Wood formally acknowledged the claimants change of address. By this stage, there was some urgency in trying to establish the claimant's intentions so that operational arrangements could be put in place, because of the claimant's imminent move to Milton Keynes. Mrs Wood in her evidence emphasised several times that she needed to make arrangements with another colleague to accommodate the claimant's change of days as agreed under her flexible working request.

60. On 8 October 2020, Mrs Wood emailed the claimant following the meeting the previous day. That email is at page 334 of the bundle. She states that the purpose of the meeting which was to catch up informally following the outcome of the claimant's flexible working request and the agreement to her new working pattern. The tribunal considers that these are operational issues which the manager had to resolve. In the emails, Mrs Wood acknowledges the claimant's change of address and refers to attempts to discuss any change in personal circumstances that might relate to the request for temporary homeworking. In her evidence to the tribunal, Mrs Wood said she needed to understand what the claimant was asking for before she could consider whether it could be accommodated, in particular for how long any temporary arrangement might be. In the letter, Mrs Wood states that no agreement was reached about the claimant's new shift pattern, but makes it clear that the claimant is required to attend the office and any failure to attend work would be dealt with under Trust policies. She also offers the claimant a referral to occupational health.

61. The claimant replies to that email on the same day – page 334. She states that she considers that the meeting was a forced meeting. She said that Mrs Wood, despite having said it was a one-to-one meeting, went ahead and discussed the claimant's change of address and the issues around that matter.

62. Mrs Wood then seeks further advice from HR and Mr Turner. In her email to HR of 9th October 2020, she asks whether the respondent should refer to the claimant previously making her line manager aware that her home and business were in the process of being sold and that she was putting off handing in her notice and to clarify if the move to Milton Keynes was a permanent one – page 332.

63. On 9 October 2020, Mrs Wood responds to the claimant's email of the previous day. That response is at page 336 of the bundle. In that email, Mrs Wood refers to the previous discussion with the claimant when the claimant told her that she was intending to sell her home, move to Milton Keynes, and resign. She states in that letter that, as she has not been able to discuss the matter with the claimant, she is not aware of any change of circumstances in relation to that situation. She refuses the claimant's request to temporarily work from home "during COVID'. She indicates that she is unclear of the

timescales involved. She asks the claimant to confirm when she wants her new shift pattern to commence, so that she can put the appropriate arrangements in place.

64. On 12 October 2020, the claimant resigns from her employment. Her email is a page 347 of the bundle. In the email she refers to her request for flexible working on 24th August which she says was not decided in accordance with legislation. She says that she raised this with the respondent on 29th September 2020. She states that there has been a breach of her statutory and contractual rights and that the grievance policy is out of date, of which she made the respondents aware on 29th September 2020. She then goes on to refer to a change of personal circumstances and difficulties due to COVID. She states that the way that has been decided and the decision makes it clear that her employer is no longer capable of treating her fairly and adhering to her rights. She says that the treatment of her since raising her statutory request for flexible working on 24th August and then identifying of other issues on 29th September has breached her trust and confidence in her employer. She says that she has been forced to resign with notice.

65. The same day, Mrs Wood replies to the claimant's email of resignation. She says that she tried to engage with the claimant before she resigned. She also refers to the claimant's right of appeal and makes it clear that the grievance procedure is live and valid for her to use. She says that the claimant failed to engage with the respondent. She offers to meet with the claimant on 19th October to discuss her email – page 346.

66. The claimant responds by stating that she considers there to be a breach of trust and confidence and that it is impossible for her to continue. She asks when will be her last day of employment and says that she does not want to attend a meeting. She also says that it is her decision as to whether she wishes to appeal and that she has not yet decided whether to appeal any decisions. – page 345.

67. On 15th October 2020, Mrs Wood emailed the claimant to accept her resignation and confirms her last working day will be 22 November 2020 page 344. The claimant worked her notice.

68. Following questions from the tribunal, the claimant said that her move to Milton Keynes did not in fact proceed until around mid-December, when the sale of her property was completed. No evidence was led by the claimant that she had made the respondent aware of any change to her proposed move date of 12th October 2020.

Submissions

69. Both parties filed written submissions. The claimant, a litigant in person, indicated to the tribunal that she would prefer to support to provide submissions in writing.

Conclusions

70. This tribunal reminded itself that the burden of proof in a complaint of constructive unfair dismissal rests with the claimant.

71. The tribunal has considered the various alleged breaches of contract relied on by the claimant as set out at page 450 of the bundle. The tribunal does not consider that

any of those alleged breaches either individually or collectively amount to a fundamental breach of the claimant's contract of employment.

72. Dealing with each of those alleged breaches relied upon in term: –

73. Paragraph 6a – this tribunal does not consider that any part of the claimant's flexible working request, made at that stage by email on 24 August 2020, was rejected on the same day. We accept Mr Turner's evidence that he had to respond to the claimant's request for the implementation to be with immediate effect. On that basis we accept that it was reasonable for him to respond to the claimant's request as her line manager was not available on that day, as the claimant well knew, because she was on annual leave. Further, the claimant was and in fact did then subsequently submit a formal flexible working request, so it was clearly not decided on that day.

74. Paragraph 6b – this tribunal finds that there was a discussion about the homeworking element of the claimant's flexible working request. She was invited to and attended a meeting to discuss her flexible working request and her change of address on 24 September 2020. The evidence of both parties is that the main topic of discussion in that meeting was effectively around the homeworking issue as opposed to the change in days, which is reflected in the notes of the meeting.

75. Paragraph 6c – this tribunal prefers the evidence of Mrs Wood to that of the claimant in relation to the meeting, which is consistent with the notes of the meeting. This shows that the meeting was principally about the homeworking element of the claimant's request and the implications of her change of address. The claimant may have been asked some difficult questions in this meeting (which she did not want to answer) about what she would do if her request was not granted, but we do not consider that there is any suggestion that she was either bullied or harassed in that meeting. Her letter of resignation makes no specific mention of this meeting, so if she felt that she had been bullied or harassed in the meeting, the tribunal would have expected some details to have been incorporated into her letter of resignation.

76. Paragraph 6d– This tribunal does not accept that the claimant's homeworking element was declined on arbitrary opinions and not facts. We should point out that the claimant was not prepared, despite being asked several times, to provide any further information about her request for homeworking, which made it very difficult for the respondent to consider it. However, we accept they did consider it and based their decision on the information provided to them by the claimant, in accordance with their statutory obligations, as it is clearly noted at page 282 of the bundle.

77. Paragraph 6e– There was clearly an attempt by the respondent to meet with her informally to understand her email response of 29th September 2020 following the decision on her flexible working request. It was unclear to this tribunal and would also have been unclear to the respondent whether the claimant was asking for a grievance, or was appealing against the decision on her flexible working request or indeed making some other complaint. We consider that it was entirely reasonable for the respondent to attempt to clarify the position with the claimant. We do however consider that, as the respondent was unable to obtain any further information from the claimant, despite their attempts to do so, they should have treated her email of 29th September 2020 as a grievance and acted more cautiously in how they proceeded once it became clear that

the claimant was not prepared to meet with them to clarify the position. The claimant's email was confusing and extremely difficult to follow. However, it contained two references to the word "grievance" and referred to the grievance policy, which should have alerted the respondent, who were receiving advice through their HR department, that this could be a grievance and should be treated in that way. Indeed, when they responded in writing to the email, they also use the word grievance. Nevertheless, the tribunal does not accept that there was any breach of contract in the way that this email ("grievance") was dealt with because the respondent attempted to deal with it initially in an informal manner which is consistent with good HR practice.

78. Paragraph 6f – as indicated above we do not criticise the respondent for trying to meet with the claimant on 30th September to explore what was intended by her email of 29th September 2020. However, by this stage, it is quite clear that the claimant does not want to meet with the respondent and yet they continue to pursue the matter. This tribunal takes the view that, taking account of the claimant's reluctance to meet with them and the explanation given by her, we do not think that it was reasonable for the respondent to go ahead and push for the meeting without effectively treating it at that stage as a grievance meeting and giving the claimant the opportunity to be accompanied to that meeting. We do not consider that in itself would amount to a fundamental breach of contract entitling the claimant to resign for the reasons indicated below. Indeed, if it had done so we would have expected the claimant to have made that clear in her letter of resignation, which she did not.

79. Paragraph 6g – For the reasons we have indicated above, we do not think that it was a reasonable course of action for the respondent to proceed with the meeting when the claimant had made her position clear. However, we do not consider that the content of the meeting intimidated her. It is clear from both parties' evidence that the meeting was very short and inconclusive. Her evidence also established that she was not prepared to engage in any discussion during the meeting, which contradicts her suggestion of being intimidated as that was consistent with the approach she adopted before the meeting and which she was clearly content to maintain during the meeting.

80. Paragraph 6h – this tribunal does not consider that there was any breach of contract in the respondent providing a response to the claimant's email in the timescale indicated, bearing in mind that they had attempted unsuccessfully to discuss the matter with the claimant before providing any written response. The tribunal itself considers that a better course of action may have been to have arranged a formal grievance meeting; albeit that, at that stage, the matter was becoming urgent, due to the claimant's impending move to Milton Keynes, which was imminent as far as the respondents were aware; the claimant having never indicated that the move may not take place on the 12th of October 2020.

81. Paragraph 6i – this tribunal does not consider that the email which was sent by Mr Turner to the claimant in response to her email was vague and designed to discourage her from raising a grievance. It was in fact the opposite. He dealt in writing with the all the matters raised by the claimant. He also made it absolutely clear in his response that the claimant could raise a grievance or appeal against the decision on flexible working and indeed provided her with an extension of time in order to lodge any such appeal.

82. Paragraph 6j /k– this tribunal accepts Mrs Wood's evidence that this meeting was set up as a one-to-one meeting to try and establish what the claimant's plans were on an operational basis, so that Mrs Wood could manage the team. At this meeting, as is clear from the notes, Mrs Wood was trying to find out whether there was any change in circumstances for the claimant and what her plans were going forward, bearing in mind she was about to move to Milton Keynes within a few working days and arrangements had to be made about sorting out attendance in the office for all the team. The claimant may have been asked difficult questions at this meeting (which she again was not prepared to answer); but that did not amount to bullying or harassment. Mrs Wood was simply trying to clarify the position, so that she could make plans for the team going forwards. It was not unreasonable for her to do so in her role in managing that team. She acknowledged that the claimant was anxious and offered her access to occupational health.

83. Paragraph 6l is not being pursued by the claimant

84. Paragraph 6m – this tribunal does not accept that the email was malicious nor do we accept that it suggested the claimant should resign. In contrast, we find it referred to the earlier conversation which the claimant had informally with Mrs Woods in mid-August 2020, which meeting this tribunal finds did take place.

85. Paragraph 6n cannot amount to a breach of contract that would have entitled the claimant to resign as she had already resigned by that time.

86. None of these alleged breaches (apart from one as referred to above) have been upheld, but none of them, as indicated above, would amount to a fundamental breach of contract entitling the claimant to resign. It is interesting to note that, in her letter of resignation, the claimant does not reference any of these specific matters as reasons specifically for her resignation. If she had considered these to be serious breaches of contract in their own right, we would expected that she would have referred to them in her letter of resignation, but she did not do so, which suggests that she did not, at the time she resigned, consider them to be serious breaches of contract.

87. This tribunal does not find that the claimant resigned in response to any or all of these alleged breaches of contract. On the contrary, we find that the claimant resigned from her employment because she did not get the working arrangements she requested. Indeed, her letter of resignation hints that was the reason why she resigned. Further, that would be entirely consistent with the claimant's initial discussion with Mrs Wood in mid-August 2020 when she suggested that she was looking at moving to Milton Keynes and handing in her notice.

88. It therefore follows that the Tribunal finds that the principal reason for her dismissal was for the reasons referred to above and not because she had raised an application under section 80F or section 80G Employment Rights Act. 1996.

89. For those reasons, the claimant's complaint of constrictive unfair dismissal fails.

89. In relation to the claim under the flexible working provisions, this tribunal taking note of the case of **Whiteman** and the ACAS Code of conduct in dealing in with such matters, find that respondent dealt with the application for flexible working in a

reasonable manner. They followed a fair procedure, which was consistent with the statutory provisions; they acted in good faith - no evidence to the contrary has been led; they properly considered the application, having met with the claimant to discuss it and having given her every opportunity to provide further information in particular in respect of the homeworking element; they accepted part of her application and rejected the homeworking element; they made the decision based on one of the statutory grounds - detrimental impact on performance amongst other concerns identified. The tribunal note that it is not its role to assess the respondent's decision; finally, the claimant was given a right of appeal. The way the application was dealt with was reasonable and accorded with the statutory provisions. Accordingly, for those reasons, her complaint of a failure to comply with the flexible working provisions fails.

90. As referred to above, we consider that the claimant's email of 29th September 2020 should ultimately have been dealt with as a grievance for the reasons referred to above, once the respondent was unable to clarify the position with the claimant informally. The email on two occasions refers to the word "grievance". It also refers to the grievance policy. Further, the respondent in its reply also refer to it as a grievance. Therefore, for those reasons, we consider that it could amount to a grievance and the respondent should have treated it so, after they were unable to clarify matters informally with the claimant. On that basis, we consider that the claimant should have been given the right to be accompanied at the meeting on 30th September 2020, even though the respondent described that meeting as an informal meeting. It was clearly arranged to discuss the issues set out in the claimant's email; albeit to try and clarify those issues. The respondent, who were being advised by their HR department, should have realised that there was sufficient information in that email to alert them to the fact it could amount to a grievance. We also note that she specifically raised the issue about being accompanied to that meeting.

91. The tribunal does not however consider that the meeting of 7th of October could have been a grievance meeting. By then the claimant had already received a response to her email of 29th September 2020; so there was no outstanding grievance. Further, as referred to above, we consider that meeting was arranged to deal with, and did attempt to deal with, operational issues arising from changes to the claimant's working pattern and her imminent move to Milton Keynes and the implications of that for the team. We accept Mr Wood, who was the claimant's line manager, called this meeting to try to manage the operational issues which needed to be addressed because of the agreed change to the claimant's working patterns and her imminent move to Milton Keynes.

92. The tribunal has therefore concluded that there was a failure to allow the claimant to be accompanied at the meeting on 30th September 2020. Accordingly, her complaint of a right statutory right to be accompanied is successful in that regard. We have concluded that she is entitled to one weeks' wages for the failure to allow her to be accompanied to that one meeting.

EMPLOYMENT JUDGE MARTIN

JUDGMENT SIGNED BY EMPLOYMENT JUDGE ON
9 January 2022