EMPLOYMENT TRIBUNALS

Claimant: Mrs A Durrani-McCann

Respondent: Play Factore Activities Limited

Heard at: Manchester (by CVP) **On:** 4, 5 and 6 October 2021
1 November 2021
2 November 2021
(in Chambers)

Before: Employment Judge Cookson
(sitting alone)

REPRESENTATION:

Claimant: Ms R Levene (Counsel)
Respondent: Mr T Fuller (Chartered Legal Executive)

RESERVED JUDGMENT

It is the decision of the Employment Tribunal that:

1. The claimant was dismissed by the respondent under section 95(1)(c) of the Employment Rights Act 1996 ("ERA").

2. The claimant was unfairly dismissed contrary to section 94 of the ERA.

3. This reserved judgment and the reasons for it relate only to the claimant's claim of unfair dismissal, judgment having been given separately on her breach of contract claim in relation to her bonus payment which was conceded by the respondent at the outset of this hearing.

REASONS

Introduction

1. The respondent operates a children's activity centre. Mrs A Durrani-McCann ("the claimant") is 51 years of age. She was employed from 1 March 2012 until 11 October 2019 as General Manager. The claimant resigned from her

employment asserting that she had been constructively dismissed by the respondent. The claimant brought claims of unfair dismissal and breach of contract on 10 February 2020 following a period of early conciliation. The respondent filed a response to the claim on 13 March 2020.

2. At the outset of this hearing the respondent accepted that it was liable for the alleged breach of contract which related to the non-payment of a bonus and I have already issued a judgment in relation to that claim.

3. In reaching my judgment I have considered the following:

   (a) A bundle of documents prepared by the respondent which included a document disclosed by the respondent at the outset of this hearing ("the bundle");

   (b) An agreed list of issues;

   (c) The evidence given in the claimant's witness statement and in her oral evidence;

   (d) The evidence in a witness statement from Christopher Hulme which had been accepted as not contested by the respondent before this hearing;

   (e) The evidence in the witness statement and given orally by Mr Fawad Munir, Managing Director of the respondent;

   (f) The evidence in the witness statement and given orally by Mr Marcus Stefani;

   (g) Written submissions produced by Ms Levene for the claimant at the conclusion of the hearing, supplemented by oral submissions and oral submission given on behalf of the respondent.

Findings of Fact

4. I have made my findings of fact on the basis of the material before me taking into account contemporaneous documents where they exist and the conduct of those concerned at the time. I have resolved such conflicts of evidence as arose on the balance of probabilities. I have taken into account my assessment of the credibility of witnesses and the consistency of their evidence with the surrounding facts. I have not made findings of fact in relation to every matter which was contested in evidence before me, simply those which were material to the determination of the legal issues in this case.

5. It is relevant to note the context to this claim. The claimant and Mr Munir are sister and brother-in-law. The respondent is largely owned and controlled by Mr Munir alongside his wife (the claimant's sister), and other members of Mr Munir's family. The Play Factore is a venue for children's parties and play centre located near the Trafford Centre. Before joining the respondent, the claimant had worked in the fashion industry, most recently as a buyer for a well-known designer brand in Manchester. The claimant was initially approached by her sister who asked the claimant to join the respondent's

business when they planned to open the Trafford Centre site and the claimant had worked there since the first day it opened.

6. In terms of the operation of the business, the claimant's sister would only attend the site very rarely. Mr Munir has a range of commercial interests and was based on a day-to-day basis elsewhere, although he would regularly visit the site during the claimant's employment. In the main the claimant was the most senior employee on site at the Trafford Centre with responsibility for most of the day-to-day operation of the play centre, its activities and staff, apart from matters relating to the accounts and payroll. The claimant was employed on a salaried basis.

7. The bundle of documents contained a statement of terms and conditions of employment, but it is clear that that statement did not reflect the reality of the working arrangements agreed between the claimant and the respondent from the start. The statement states that the claimant will be paid on the basis of a working week of five days between Monday to Sunday, with payment for individual days on a pro rata basis and variable hours of work according to shift patterns. That was not how the claimant nor indeed Mr Hulme (who was also a senior employee) were employed. Senior staff like them were expected to work the hours required to meet the needs of the business. It was a regular practice for the claimant to work in the evening or at weekends if required to do so. These senior staff were salaried not hourly paid. It was accepted at this hearing by Mr Munir that the claimant had autonomy in relation to her working hours. In her witness statement the claimant explained that she was not expected to keep regular office hours and sometimes she would start later in the day and work later in the evening or take an extended break during the day, which she regarded as being balanced out by the extra time she worked at other times. The claimant's assertion that this was how she had worked for around six years and that no issues were ever raised about this was not challenged by the respondent, although Mr Munir did not accept that the claimant worked extra hours as often as she appeared to suggest.

8. In 2017 and 2018 there were negotiations for the sale of the company to a third party which came to nothing. From October 2018, when the negotiations fell through, the claimant says that Mr Munir began to take a more active interest in the company, and this seems to have been the source of tension between the claimant and Mr Munir as was a new relationship she had developed with someone outside the claimant's faith and to whom the claimant got married around the time of the events in this case. Tension built up in the months leading to the claimant's marriage. It is not necessary to make a finding as to the reason for the tension between Mr Munir and the claimant but it is clear that their relationship had become increasingly difficult and for whatever reason I accept that there was a material change in late 2018/early 2019.

9. In January 2019 Mr Munir asked a senior manager at "Yellow Sub", which I understand to be a sister company of the respondent with a site in Liverpool, which is where Mr Munir is based on a day to day basis, to introduce a strict policy for staff at the Trafford Centre site for signing in and out. The claimant acknowledged that she received an email telling all staff to sign in and out and

that she been instructed to follow that policy but she did not think that it was crucial to do so because reference had been made for the need for records to be accurate for payroll purposes and she was not hourly paid. Any other reason for the introduction of the policy was not discussed with the claimant. The claimant's account is consistent with the wording at the bottom of the signing sheet and the fact that when the initial email was sent out the claimant was copied in, but the email was addressed to her. The instruction given was that employees had to sign in and out of the site but the claimant was not told that she had to keep record of all of her working hours, for example recording what she did at home or away from the office.

10. In March 2019 Mr Munir asked his manager, Ms Karpova to send him the recent sign-in sheets completed by the claimant. In his witness statement Mr Munir says that he *"had become aware that Asiya was away from the office but not necessarily on work-related duties, nor did we receive any email stating she needed to be away from the office*". This appeared to be an occasion when it had come to his attention that the claimant had visited her mother while she was making wedding plans when Mr Munir had thought she was at the Trafford Centre. I was not shown evidence that the claimant had ever been told that she had to tell Mr Munir if she worked away from the Trafford Centre because she was attending a meeting or that that she had to tell him if she was working flexibly expect to the extent there had been discussions about ensuring there was always a senior employee on site.

11. The sign-in sheets showed a number of weeks in late January, February and in the early part of March where the claimant had not signed in and out. Mr Munir had then looked at the claimant's Outlook calendar to see if this explained her apparent absence from the site, but his witness statement says that there was limited information within her calendar to explain her whereabouts. It would transpire that the claimant was having some difficulties to "sync" with her office Outlook operating on the respondent's system. The claimant mainly used the calendar on her iPhone to keep a record of appointments.

12. On 20 March 2019 Mr Munir and his wife came to the Trafford Centre site to raise Mr Munir's concerns related to timekeeping and attendance with the claimant. The claimant was not given advance notice of the meeting. No notes were made by Mr Munir or his wife at that meeting, but the claimant emailed Mr Munir the next day to raise concerns about how she had been treated. She describes Mr Munir's behaviour at the meeting as being "threatening". Mr Munir says in his statement that he became frustrated by what he regarded as evasive answers to his questions and what he regarded as rude comments and he accepts that he swore and left the room. In his evidence Mr Munir sought to suggest that he had not sworn at the claimant but rather sworn out loud as a means of venting his frustrations. However, I accept that given the circumstances in which the claimant was effectively being accused of misconduct and the fact that it was only Mr Munir, his wife and the claimant in the room, the comments and Mr Munir's aggression were directed at the claimant. The claimant was so upset that she told Mr Munir in her email of 11 March that she and her husband had decided that they did not want him or his father to attend her forthcoming Nikah.

13. On 25 March 2019 Mr Munir replied to the claimant's email. The respondent sought to describe this email as an apology to the claimant. The email said this:

"I agree that all employees have the right to feel safe and respected during work. However, I am surprised by the contents of your email; I disagree that there was any behaviour that could be deemed to be threatening during the meeting. I acknowledge that I swore which I agree was inappropriate, however I immediately removed myself from the situation and left the room."

14. The email continued by saying that:

"I immediately apologised at the time for swearing and accept that this was unprofessional and inappropriate of me. I will of course endeavour to ensure that there will be no repeat of this."

15. Mr Munir then went on to say that although his reaction was inappropriate it was because he was being frustrated at the claimant's failure to reply to what he felt were reasonable questions, and that he felt she was being obstructive. The email also informed the claimant that under the terms of her contract of employment she was only entitled to statutory sick pay. Mr Munir acknowledged that in the past the claimant had been paid in full for absence but said that this was a gesture of goodwill and she would only be paid statutory sick pay in future.

16. In cross examination Mr Munir accepted that his behaviour on that day had been inappropriate and for the avoidance of doubt I make a finding of fact that it was. It was not simply that his behaviour had been aggressive. It had been witnessed by other staff and the fact that it led to gossip about the claimant and the incident was shown by the fact staff in Liverpool asked the claimant's sister about what had happened. I accept this meant the claimant had good reason to feel humiliated and undermined in her position as general manager.

17. On the following day the claimant wrote to Mr Munir to make clear that she continued to be unhappy because Mr Munir's outburst had been overheard by staff which the claimant felt undermined her position. The claimant also felt that her movements were being monitored by a more junior member of staff and that this was inappropriate.

18. On the same day the claimant received an email from Ms Karpova stating that she had been told by Mr Munir to *"record the hours on payroll for all salaried staff with more accuracy in comparison with the sign-in sheets"*. That is a curious statement because salaried employees are not paid by reference to the hours that they work.

19. In the meantime, Mr Munir was seeking advice from Citation who represent the respondent in the current proceedings. The emails disclosed in the bundle reflect Mr Munir taking advice from Citation in relation to dealing with matters relating to the claimant including the drafting of investigation and other correspondence. The respondent has not sought to claim any privilege in relation to these emails in these proceedings.

20. On 23 April 2019 the claimant was sent a letter asking her to attend an investigation meeting on 24 April, the following day, to discuss discrepancies in timekeeping and not signing in and out on the timesheet. The letter states that this is not a disciplinary hearing in itself but *"should we not be satisfied with your explanation this may lead to formal disciplinary action"*. The letter is signed by Mr Munir.

21. Later that evening the claimant replied, expressing some confusion about the letter and asking for details of the exact times that were being referred to, asking for meeting notes to be taken and agreed and warning Mr Munir that if there was any shouting or bad language she intended to leave the meeting immediately. The claimant also asked that the meeting be used as an opportunity for her to raise some of the concerns she had about the way she had been treated. When Mr Munir replied he told the claimant she could raise a formal grievance if she wished to do so.

22. On 24 April 2019 the claimant wrote to Mr Munir continuing to query whether this was a formal or an informal meeting. She pointed out that there had already been an informal unscheduled meeting (the one on 20 March) at which there had been a discussion about the signing-in sheets and in relation to the issue of dates, and highlighting that Mr Munir had added on the record that he considered that the claimant "owed" the company some £506.61 for 19.5 hours, and that the claimant disputed that she had not been in attendance and that she had given her reason for those absences. In the email the claimant referred to having syncing problems with her calendar to explain a lack of appointments showing on outlook.

23. On 30 April 2019 Mr Munir asked the claimant to attend a further investigation meeting on 1 May 2019. The claimant advised Mr Munir that she had an emergency dental appointment in the morning and she later notified the office that she would not be fit for work because of the medication she had been required to take. That prompted Mr Munir to contact Citation to ask if he could hold the investigatory meeting in the claimant's absence. Not surprisingly Citation advised Mr Munir that it was not recommended to have an investigation without the employee being present. The idea that an investigation meeting could be held in the absence of the person being interviewed is an odd one. It suggests that Mr Munir saw this as a necessary procedural step rather than serving any fact-finding purpose.

24. An investigation meeting went ahead with the claimant on 16 May at which she was asked to provide an explanation regarding three particular times when she had been absent from work. The claimant had explained that she had an issue with her Outlook and that it had not been showing her appointments properly, and she then produced a hard copy of the appointments printed from her diary. Mr Munir had asked IT to investigate these and he was told that the three appointments from March 19 had been inputted into the calendar on 14 May 2019 at round the same time. Mr Munir regarded that as evidence that the appointments were not real.

25. Mr Munir had carried out further investigations into those appointments and told the adviser at Citation that of those three appointments, one had not taken place, another was with a person who had said they did not want to get

involved, and that he was waiting for confirmation regarding the third. Mr Munir asked how long he would have to wait to provide the findings of an investigation meeting if there was a further investigation meeting based on these matters, and whether *"we are in a position to sack for gross misconduct"*. Taken with the previous comment about the investigation meeting, it is clear that Mr Munir wanted to end the claimant's employment as soon as he could.

26. The emails indicate that significant weight was attached by Mr Munir to the alleged creation of the Outlook calendar appointments. What does appear curious is that it does not appear to have occurred to Mr Burrows, the company's internal IT support, that the time shown for the creation of the calendars appears to closely correspond to when the claimant's reported outlook issues were being resolved with his help and on the same afternoon when he had been working on the claimant's computer. In course of cross examination the claimant raised that cctv footage could have been checked to show Mr Burrows that had been working on her machine that the relevant time. That was rejected by the respondent because cctv footage would not show what was on the claimant's screen, although it would have shown when Mr Burrow was working at the claimant's desk and whether, as she claimed, he was sitting at her desk when the calendar entries were, on the respondent's case, "created" by her. It seems to me that the issue of the calendar entries was seized on by Mr Munir as being evidence of the claimant's dishonesty and his mind was closed to the possibility that the evidence abut the calendar entries could show anything else.

27. Emails in the bundle show that on 14 May 2019 Mr Burrow was working with the claimant to try and resolve problems she was having with "outlook", including seeking support from an external third party provider. There are emails to Mr Burrows on 14 May 2019 at 13:57 to Abtech Support trying to resolve the issues, and an email on 14 May at 13:45 informing Mr Burrows that the claimant's email profile has been recreated. There is then a further email to 14.50 stating that the account had been disabled and further correspondence the next morning referring to "the corruption issue" and its resolution. The disputed appointments were created around 16.45 to 16.50 on 14 May 2019, in other words the period immediately after the email profile had been recreated enabling Mr Burrows to move forward to sort out the claimant's account.

28. On 28 May 2019 Sarah Clark at Citation emailed Mr Munir and said this: *"If she [the claimant] is lying about her whereabouts and claiming to be at a meeting, then it is potentially gross misconduct. It would be helpful if a third person could confirm whether she did/did not attend the meeting."* Ms Clark went on to ask when this came to light, pointing out to Mr Munir that the longer the claimant is allowed to continue working without being suspended then that may weaken the case for gross misconduct, and that she would be minded to hold another investigation meeting. The email correspondence between Ms Clarke and Mr Munir relates to how matters might progress with an assumption that the claimant has been dishonest.

29. On 31 May 2019 Mr Munir wrote to the claimant requiring her to confirm by the end of the day that the very brief notes of meetings on 15 May and 30

May are correct. The notes of 30 May record a discussion about 3 outlook appointments, one referred to as Visit Manchester where that organisation said there was no record of meeting but the claimant says that they have not been in contact with the same person as she dealt with, an issue about Culture Calling which related to a leaflet drop off which records that Mr Burrows says he dropped off the leaflets and the claimants says they were different leaflets, and Raring To Go where the person at the company said they did not want to get involved. Mr Munir referred to the facts the appointments for these had been added to outlook "at [a] later date" and the claimant raised her outlook problems. The notes also record that the claimant is suspended from work on full pay. It appears there was no other confirmation of suspension and the reasons for it.

30. On 4 June 2019 the claimant submitted a grievance to her sister, whose formal job title is Joint Managing Director of the company, raising various concerns about the way she has been treated, and in particular that she has been subjected to humiliating and bullying treatment, that she had been undermined, humiliated and embarrassed by Mr Munir's conduct and alleging that the disciplinary investigation has been a sham undertaken in bad faith, making her position at the respondent untenable. She goes on to say that in consequence she will be looking for a compromise agreement to allow her to exit the business and bring the matter to a close.

31. In cross examination the claimant refused to accept that this correspondence meant that this showed she wanted to leave the business. She said that she was looking for a resolution and a way forward. I did not find that credible. It is clear to me that the claimant did want to leave on agreed terms if she could although, as I have explained in the conclusion section below, I do not attach the weight to that that the respondent seeks to suggest that I should.

32. Mr Munir was advised by Citation that the grievance should be dealt with prior to any disciplinary action and that the disciplinary hearing should be postponed, and a grievance meeting scheduled instead. That was what happened.

33. On 11 June 2019 the claimant's sister wrote to acknowledge the grievance and to notify the claimant that a formal grievance hearing had been arranged on 17 June 2019. This was to be chaired by an independent HR specialist from Citation in the presence of a business partner of Mr Munir, who would be the individual who would make a final decision on the concerns raised after they have been investigated by a specialist from Citation.

34. At around the same time the claimant instructed solicitors and on 14 June 2019 they wrote to the respondent in relation to the claimant's suspension from work and requiring that the respondent state who the decision maker in relation to the grievance will be. The reply to that letter identified that the decision maker will be Mr Stefani who is described a "*partner from another business*".

35. On 21 June 2021 the claimant's solicitors wrote to formally set out the claimant's complaints about her employment. The concerns relate the following matters:

a. Unjustified and inappropriate monitoring of the claimant's conduct/timekeeping

b. Removal of responsibilities/unjustified criticism

c. Incident on 20 March 2019

d. Suspension on 30 May 2019

e. There is also a reference to a discrimination claim which has not been pursued.

36. Mr Munir wrote to Citation to ask "*if the advice given by Citation ie to hear her grievance before the disciplinary, has dented our chances to sack her on the grounds of gross misconduct*". This question is evidence that Mr Munir had a clear intention to end the claimant's employment. He was told that it is good practice to hear a grievance prior to a disciplinary hearing.

37. On 28 June 2019 there was a grievance hearing held at the claimant's solicitor's offices. The hearing was led by a consultant from Citation and also attended by Mr Stefani. The notes of the meeting say that he was there "to take notes".

38. The notes of the meeting show that the claimant was asked to explain her grievances and the notes suggest that what she raised is consistent with her witness evidence before me. Following the meeting the Citation consultant, Ms Adams prepared a report on the grievance meeting. The introduction refers to the fact that the decision on the grievance would be taken by Mr Stefani.

39. In her report Ms Adams said that the claimant's first grievance, about the meeting on 20 March 2019 "is upheld" and that foul language was used which may have come across aggressively. The second grievance, which related to whether the claimant was entitled to sign off on a promotion without Mr Munir's permission and whether he was trying to push her to resign, the grievance was not upheld. Ms Adams did note that the language used by Mr Munir was "firm and to the point" and that there was "clear frustration" between both parties. The third grievance, about whether the claimant's position was undermined by Mr Munir was not upheld. The fourth grievance, about whether Mr Munir undermined and devalued the claimant's position through getting subordinates to monitor the claimant's arrival and departure times and that he had bullied her, was not upheld. Ms Adams recommended mediation was considered by both sides to seek mend the relationship between the claimant and Mr Munir, but her report notes that neither party wished to consider this. Her report also notes that Mr Stefani, as the decision maker, would be free to follow or reject these recommendations.

40. Mr Stefani wrote to the claimant on 2 July 2019 to confirm the outcome of the grievance. His letter says this *"I agree with these findings and for the reasons set out in the attached report have decided not to uphold your grievance"*. That outcome does not make sense because Ms Adams had recommended that the first grievance should be upheld. Mr Stefani does not explain why he

has not accepted that recommendation in the letter. In his witness statement he says that he determined that Mr Munir had not directed any abuse at the claimant and this was why he rejected this element of the grievance. However I found this evidence to be unconvincing. Mr Stefani's evidence that he had carefully weighed this up before he wrote the grievance letter is inconsistent with the grievance outcome letter itself. I found it implausible that Mr Stefani thought about this carefully, decided to not accept all of the recommendations but wrote a letter which did not reflect that. My conclusion on the evidence was that Mr Stefani had paid only cursory attention to the grievance report and had simply assumed that Ms Adams had not upheld the grievances. I have concluded that his evidence was an attempt to justify the terms of that grievance letter to support the case now presented by the respondent but it is not what happened at the time.

41. On 9 July 2019 the claimant's solicitors wrote to appeal against the grievance outcome on a number of grounds including the conflict between the report and the outcome noted above.

42. On 11 July 2019 the respondent wrote to the claimant to invite her to attend a disciplinary hearing to answer a number of disciplinary charges, in particular that she had *"failed to carry out the duties of your role of general manager. Namely that you claimed to have been undertaking work whilst at meetings and/or other appointments when there is no evidence of you carrying out such work"* and referring to a number of particular occasions on 8 and 11 March and alleging that the claimant had falsified her outlook calendar to include appointments for these events after they had taken place. These matters were identified as potential gross misconduct. The letter was sent by Mr Stefani and he informed the claimant that he would be accompanied by an impartial consultant from Citation to attend chair the hearing and then provide Mr Stefani with a report making recommendations in relation to potential sanctions. The letter warns the claimant that a possible outcome is that she may be summarily dismissed.

43. The claimant's solicitors wrote to the respondent on 15 July 2019 raising a number of concerns about the disciplinary process in light of the claimant's ill-health and suggesting that this was evidence of bad faith and that the process was a sham. The claimant objected to Mr Stefani's involvement pointing out that she had already alleged he had not dealt with her grievance appropriately.

44. The hearing on 16 July was postponed and the claimant was asked to provided evidence of her ill health and informed her would only be paid statutory sick in accordance with her contract of employment. The objection to Mr Stefani was rejected.

45. By an email on 18 July 2019 the respondent's solicitors made clear their client's continued objection to the approach of the respondent and that she believed that the process was going to lead to her dismissal but that she could attend a disciplinary hearing on 22 or 23 July 2019. There was a specific request for Mr Burrows to attend the hearing to give evidence in the question of syncing of calendar appointments.

46. Mr Munir replied that the hearing would proceed on 23 July and would be conducted by an independent consultant from Citation plc with a note taker. It stated that Mr Burrows was not available *"but if there are any specific questions you would like me to put to him prior to the meeting, I can provide his responses in advance of the hearing"*. The claimant's dissatisfaction with that and her continuation objection to Mr Stefani's involvement was made clear in the reply which referred to the ACAS Code of Practice. On 22 July the claimant provided comments and questions to put to Mr Burrows.

47. On 30 July 2019 2019 Ms Vickers, a HR consultant from Citation plc who did not appear before this Tribunal, wrote to Mr Munir to provide her decision on the grievance appeal. That letter states that Mr Stefani's decision about the grievance is overturned in part. In particular Ms Vickers determined that the claimant's first and second grievance should be upheld.

48. The disciplinary hearing went ahead in 23 July 2019. Unusually, despite being the designated decision maker, Mr Stefani did not attend. I was told he was on holiday. The hearing was chaired by Ms Vickers with a note taker present. At the start of the meeting there was discussion about whether the claimant wished to have a companion. At this point the claimant said that she wanted Mr Burrows to be present at the hearing. Ms Vickers appears to have misunderstood that as meaning the claimant wanted Mr Burrows to be her companion but it appears to be to be repeat of the request made by the claimant's solicitors for Mr Burrows to attend to be questioned about whether the calendar appointments "created" when he resolved the claimant's outlook problem and the iPhone appointments synced with outlook. Although the way it was raised by the claimant in a somewhat confusing way given the earlier correspondence which Ms Vickers must have been aware of it is surprising she did not identify the issue being raised.

49. At the meeting the claimant maintained that she had met someone, "Jo", from Raring to Go at the end of the day on 8 March 2019 because it was the last chance to meet her before the claimant took time off for her wedding and honeymoon. In relation to an event at Hotel Football she explained that she had not dealt with the person the respondent had been in contact with and that the invite for the meeting might not have come from Hotel Football or Marketing Manchester. The claimant has explained that Marketing Manchester is a networking organisation and events were sometimes arranged by other networking members and might not be recorded by Hotel Football as Manchester Marketing events. In her witness evidence the claimant explained that sometime network members would just meet up for breakfast or drinks.

50. In relation to leaflet drop off on 11 March the claimant explained that there had been 2 drops offs. Mr Burrows had done one in central Manchester and the second had been to the Oldham warehouse. The claimant had done that one and because she was owed some time she had gone to see her mother after visiting the warehouse to discuss wedding plans. The claimant has explained at this hearing that this was an additional leaflet drop which had she had negotiated with the company as reward for past business. The claimant also stressed at the disciplinary hearing that she did not work fixed hours. She felt was entitled to go and see her mother after dropping off the leaflets. In

relation to the allegation of falsification of appointments the claimant explained the problems she had with her outlook system and that she had been receiving support and help from Mr Burrows and highlighting the questions which she wanted to be raised with Mr Burrows. Ms Vickers assured her that this would be done.

51. Ms Vickers did subsequently speak to Mr Burrows. He confirmed that the claimant had had problems with appointments on her phone not syncing with her office calendar and that he had shown her how to correct this. Further investigations were also carried out with the leaflet company who stated there was only one order from the respondent during the relevant period but they were asked which campaigns the respondent had been invoiced for and for copies of the invoice. The hotel confirmed no events in the name of Visit Manchester or Marketing Manchester on the date in question. However before me it has been pointed that the points the claimant was making had been missed. The leaflet drop was free so there would be no invoice. Mr Burrows requested copies of invoices. He did not ask in terms if there had been a free leaflet drop. The claimant could not recall who had arranged the event at Hotel Football but her point was that that it wouldn't necessarily have been arranged through one of the networking companies but could have been ranged by a fellow networking member. There was a subsequent email from Hotel Football sent on 25 July 2019, albeit from someone who had not been working at Hotel Football at the relevant time, which states that there "were no daytime events held with us on this date". The claimant was not shown that email and was not given an opportunity to respond to this.

52. There were also further investigations with the IT support company. The IT support company explained that the "created" date for a calendar appointment is the date when an item is entered into the calendar. The IT support company were never asked if, at the time the syncing issue was resolved, the Outlook system would have recognised a newly sync'd Apple iPhone appointment which had not previously shown in the outlook calendar as being "entered" for the first time and would therefore show as a "new" appointment or as a modified appointment. For this reason this information from the IT support company was regarded as corroboration for the claimant falsifying the calendar entries.

53. A report of the disciplinary hearing was prepared by Ms Vickers. She did not go back to the claimant with the outcomes of the investigations undertaken since the disciplinary hearing so final conclusions were reached on the basis of the evidence the claimant was never given the opportunity to respond to. Ms Vickers report states that she found that the first disciplinary allegation was partially substantiated because Hotel Football confirmed that they had not hosted any events and because the leaflet company had confirmed only one promotion. The claimant argued before me that both conclusions ignored what she was saying about networking not always being formal events which would be recorded as such – they could informal meetings arranged between network members, and that the leaflet drop had been free. The second allegation about falsifying events was upheld because the date the appointments were "created" was 14 May 2019, after the appointments had happened. It is not clear from the report how Ms Vickers how considered the

issue raised by the claimant about how the system recognised the synchronised appointments nor the obvious implausibility that the claimant falsified calendar entries at the same time that Mr Burrows was helping her with her computer. Ms Vickers did set out in her report the issues raised by the claimant in her mitigation but says she did not accept those issues because "based on the evidence gathered AD appears to have dishonest" and recommended to Mr Stefani that the claimant should be given a final written warning. The claimant was not given any opportunity to make representations to Mr Stefani directly.

54. Mr Stefani agreed with Ms Vickers' disciplinary recommendation and wrote to the claimant on 12 August 2019 to issue her with a final written warning on 12 August 2019. The claimant was allowed a right of appeal to Mr Munir.

55. The claimant reported that she was too unwell to come to work on 13 August 2019 because of stress and on 16 August submitted a doctor's note to that effect. On 28 August 2019 the claimant was invited to a welfare meeting to discuss her return to work.

56. On 11 September 2019 the claimant emailed the respondent with her resignation giving the reasons for her resignation as being undermined and subjected to unfair criticism, being monitored when she had previously been allowed autonomy over working hours, being shouted and sworn at and being subjected to unwarranted disciplinary charges and a final written warning based on an unfair finding of dishonesty. It was her evidence that she concluded although she had not been dismissed by Mr Stefani she thought she was deliberately being placed in a position where she could be dismissed more easily in the future and she could not trust the respondent to treat her fairly. She denied that she left then because she had always planned to leave. Her employment ended on 11 October 2019.

Submissions

57. I received oral and written submissions from Ms Levene for the claimant and oral submissions from Mr Fuller and I am grateful to both for their assistance. I have referred to those in my discussion and conclusions below.

Relevant law

58. Mr Fuller and Ms Levene did not disagree with each other about the law to be applied in this case but rather about the findings of fact I should make and how I should apply the law to the facts.

59. Section 95 Employment Rights Act ('ERA') defines the circumstances in which an employee is dismissed for the purposes of the right not to be unfairly dismissed under section 94. Section 95(1)(c) provides that an employee is dismissed by his employer if 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. This is known as 'constructive dismissal'.

60. The word 'entitled' in the definition of constructive dismissal means 'entitled according to the law of contract.' The 'conduct' must be conduct amounting to a repudiatory breach of contract, that is conduct which shows that the employer no longer intends to be bound by one or more of the essential terms (express or implied term) of the contract of employment.

61. In this case, the breach of contract relied upon by the claimant is of the implied term of trust and confidence. As Ms Levene identified in her submissions, how I should approach assessing whether this term has been breached is expanded upon in a very well-known passage from the judgment of the EAT (Browne-Wilkinson J) in ***Woods v WM Car Services (Peterborough) Limited*** [1981] I.C.R. 666: *"It is clearly established that there is implied in the contract of employment a term that the employers will not, without reasonable and proper cause, conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee* ***Courtaulds Northern Textiles Ltd. v. Andrew*** *[1979] I.R.L.R. 84. To constitute a breach of this implied term it is not necessary to show that the employer intended any repudiation of the contract: the tribunal's function is to look at the employer's conduct as a whole and determine whether it is such that its effect, judged reasonably and sensibly, is such that the employee cannot be expected to put up with it: see* ***British Aircraft Corporation Ltd. v. Austin*** *[1978] I.R.L.R. 332 and* ***Post Office v. Roberts*** *[1980] I.R.L.R. 347. The conduct of the parties has to be looked at as a whole and its cumulative impact assessed:* ***Post Office v. Roberts***"

62. In terms of the key issues, Mr Fuller did not disagree with Ms Levene's submission that I must have regard to the following questions to determine whether an employee was constructively dismissed:

    a. What was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, his or her resignation?

    b. Has he or she affirmed the contract since that act?

    c. If not, was that act (or omission) by itself a repudiatory breach of contract?

    d. If not, was it nevertheless a part (applying the approach explained in ***Waltham Forest v Omilaju*** [2004] EWCA Civ 1493) of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a repudiatory breach of the implied term of trust and confidence? If it was, there is no need for any separate consideration of a possible previous affirmation, because the effect of the final act is to revive the right to resign.

    e. Did the employee resign in response (or partly in response) to that breach

63. I accept Ms Levene's submission that the final incident which causes the employee to resign does not in itself need to be a repudiatory breach of contract. In other words, the final incident may not be enough in itself to justify

termination of the contract by the employee. However, the resignation may still amount to a constructive dismissal if the act which triggered the resignation was an act in a series of earlier acts which cumulatively amount to a breach of the implied term. The final incident or act is commonly referred to as the 'last straw'. The last straw must itself contribute to the previous continuing breaches by the employer. The act does not have to be of the same character as the earlier acts. When taken in conjunction with the earlier acts on which the employee relies, it must amount to a breach of the implied term of trust and confidence. It must contribute something to that breach, although what it adds may be relatively insignificant so long as it is not utterly trivial.

64. It is a question of fact in each case whether there has been conduct amounting to a repudiatory breach of contract: ***Woods v WM Car Services (Peterborough) Ltd*** [1982] I.C.R. 693, CA. In determining this factual question, the tribunal is not to apply the range of reasonable responses test (which applies instead only to the final stage of deciding whether the dismissal was unfair), but must simply consider objectively whether there was a breach of a fundamental term of the contract of employment by the employer. As Ms Levene noted in her submissions, it is not possible for the employer to "cure" a repudiatory breach of contract by attempting to make amends or undo what has been done. An employee has an "unfettered" right to choose whether to treat the breach as terminal.

65. Ms Levene drew my attention to a number of cases including ***Blackburn v Aldi Stores Ltd*** UKEAT 0185/12 in which the EAT held that failure to provide for an impartial grievance appeal process might contribute to or of itself amount to a breach of the implied term of trust and confidence, entitling an individual to resign and claim constructive dismissal. The employee must resign in response to fundamental breaches of contract by the employer. However, the fact that the employee also objected to other actions or inactions of the employer, not amounting to a breach of contract, would not vitiate the circumstances of the repudiation: ***Meikle v Nottinghamshire County Council [2005] ICR, CA***. Once a repudiatory breach is established, if the employee leaves and even if he may have done so for a whole host of reasons, he can claim that he has been constructively dismissed if the repudiatory breach is one of the factors relied upon and mere delay on the part of the innocent party does not, by itself, constitute affirmation. If the claimant has affirmed the contract the right to claim constructive dismissal would be lost. Ms Levene drew my attention to ***Munchkins Restaurant Ltd and other v Karmazyn and others*** UKEAT/0359/09 where the EAT held that it was not perverse for the tribunal to find that there were grounds for constructive dismissal where the claimants had put up with allegedly "intolerable" conduct day after day for several years before resigning.

66. Even if an employee has been constructively dismissed, the employer may still seek to show that the dismissal was fair was for the purposes of s98 of the Employment Rights Act but, as is often the case, this respondent did not seek to run that argument at this hearing..

Discussion and conclusions

67. The parties had agreed a list of issues which I have also considered and which I have used to explain my conclusions in this case. I have referred to the helpful submissions I received from both parties although I stress that I have not sought to record every point and argument advanced before me but to fairly reflect the main arguments advanced and to explain how I have applied the law above.

Issue 1: The first issue is: did the respondent, without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of mutual trust and confidence between itself and the claimant such that there was a fundamental breach of contract?

68. The claimant relies on the last straw doctrine, the last straw being the outcome of the disciplinary action from Mr Stefani dated 12.8.19. The breaches alleged by the claimant are set out in her particulars of claim and she has relied on those as both individual and cumulative breaches of contract.

69. The respondent's position was that there has been no breach. To briefly summarise Mr Fuller's arguments, he submitted that the respondent introduced a strict policy about signing in and out which the claimant accepted she was not exempted from and the respondent was entitled to monitor her time and the obligation imposed was not in fact onerous. The respondent had reason to examine the claimant's conduct because she had not followed that policy and the evidence that came to light justified it concluding the claimant had been dishonest. It is denied the process was unfair.

70. Ms Levene made submissions about each of the alleged breaches and their cumulative effect. The first alleged breach is unjustified monitoring of the claimant's timekeeping and conduct. Mr Munir accepted that the claimant had autonomy in respect of her hours and that there was no discussion with the claimant about any changes to the way she worked. Mr Fuller submitted that even if they have autonomy, a senior employee can be expected to account whether they are working and there was nothing unreasonable in asking the claimant about 3 out of 6 records for which there seemed to be no explanation for failure to complete the records.

71. Ms Levene argued that for the claimant to have worked successfully in a particular way for a number of years and then suddenly be challenged about her working patterns was a diminution in her role and autonomy. If an individual has autonomy over their hours that means they have flexibility which is not consistent with strict start and finish times. Mr Munir suggested that the claimant owed the company for the "missing hours" on the sign-in sheet which he suggested amounted to a loss 19.5 hours and that the claimant owed the company over £500 was treating the claimant as if she was dishonest and an hourly paid member of staff. Ms Levene pointed out that the respondent did not contest the evidence of Mr Hulme which supported the claimant's evidence about her working hours and autonomy. The claimant was never told that the flexibility she understood that she enjoyed was no longer acceptable. The respondent introduced a signing in and out sheet but

the claimant had no reason to perceive that as being an instruction to her and her confusion and surprise was clear in her email of 25 March 2019. Further the signing in and sheet related to when she was present at the respondent's premises and it was not contested that she sometimes worked away from the office.

72. Throughout the investigation, grievance and disciplinary process the claimant continued to make clear her dissatisfaction which what she felt was a fundamental change to her contractual terms of employment and she continued to maintain that that the monitoring undermined her position as the general manager.

73. The respondent in this case had given the claimant a statement of terms and conditions which did not reflect at all the reality of her working arrangements. I accept that the respondent was entitled to introduce changes to the requirements for the claimant to account for her time and at least to some extent diminishing the autonomy she had previously enjoyed, but the duty of trust and confidence required it do so in a reasonable manner reflecting this was a change to working arrangements and in a way which did not undermine the claimant in the eyes of the staff she managed. This respondent failed to do that. The requirement to sign in and out was imposed on the claimant at the same time and in same manner as the hourly paid staff with no discussion or attempt to acknowledge that her working arrangements were quite different and had been since the start of her employment and without any acknowledgment that, unlike the play centre hourly paid staff, the claimant carried out duties away from the workplace and outside "shift hours". I accept Ms Levene's submissions that the manner of way the monitoring was introduced and how it was applied was demeaning. The accusation that the claimant "owed" the respondent around £500 was wholly unjustified and unfounded. As a result the respondent's actions were so unreasonable as to amount to a breach of the implied term of trust and confidence.

74. The second alleged breach was the treatment of the claimant in the meeting on 20 March 2019. Ms Levene says that Mr Munir behaved aggressively, unfairly and a high-handed way which was clearly inappropriate and in itself a fundamental breach of contract. Mr Fuller accepted that Mr Munir had conceded that his approach to the meeting was inappropriate but argued that it was not an attempt to brush anything under the carpet and the claimant had been reminded she was able to raise concerns. He argued it had not been unreasonable for Mr Munir to ask the questions he did and he had responded to the claimant being evasive. Ms Levene also submitted that Mr Munir's hostility towards the claimant was further evidenced by his sudden withdrawal of company sick pay moving forwards and removal of some of her responsibilities for marketing, and her right to approve holiday requests. Mr Munir's conduct amounted to a breach of the implied term of trust and confidence which the claimant had never waived.

75. I note here that in terms of that meeting Mr Munir gave somewhat conflicting evidence about this conduct. He accepted that he swore but sought to suggest that this was not directed at the claimant. That was not credible. He argued that he apologised but I find that such apology as was offered, was not genuine or meaningful. That is reflected in the terms of the email sent the

following day when he said that the claimant did not "warrant further apologies". The fact that his behaviour was inappropriate and unreasonable is supported by the fact that the claimant's grievance about this was upheld by both Citation consultants in the course of the grievance process. The incident was observed and heard by other staff leading to gossip, not only where the claimant worked but also in the Liverpool office. I accept that this humiliated and undermined the claimant. I accept Ms Levene's submissions on this issue and find that the respondent breached the implied terms of trust and confidence in this regard.

76. The third alleged breach was the instigation and conduct of the disciplinary process against the claimant.

77. Mr Fuller argued that the disciplinary action was justified. He argued the evidence shows that the claimant had a case to answer about her honesty. The email from Hotel Football itself suggests an event there did not happen and the evidence suggests there was no second leaflet drop. The information from the IT support teams shows the calendar appointments were created on 14 May after the events they referred to. When the claimant offered reasons for having not been present in the office which the respondent had good reason to believe were not true, the respondent had reasonable cause to doubt the claimant's honesty and the respondent's further investigations supported that belief and were reasonable in the circumstances.

78. In her submissions Ms Levene emphasised that given the claimant's autonomy the disciplinary action was never justified in the first place and that should not have been disregarded. The respondent had inadequately consulted and warned with the claimant to explain how her previous autonomy had changed. If the claimant had autonomy over her hours, she had autonomy to be flexible and, for example finish a little earlier one afternoon to visit her mother. The respondent was entitled to expect the claimant to undertake her duties but there was no evidence to support any suggestion from the respondent that the claimant's performance was inadequate and Ms Levene pointed to the bonuses the claimant had been awarded. Ms Levene pointed to the unreasonable way the disciplinary process began, the letter on 23.4.19 referred to discrepancies in timekeeping without citing any details of which date, event, time was being referred to which was insufficient and unfair.

79. Ms Levene also argued that the evidence supports the claimant's case that Mr Munir was intent on ending the claimant's employment – for example in the email on 26 May to Citation, Mr Munir says "*am I allowed to have a secondary investigation meeting based on the above [the allegations referred to earlier in the email]; how long do I have before I have to provide the findings of an investigation meeting; are we in a position to sack Asiya for gross misconduct?*" and his email of 21 June where he asks if advice that a grievance should be considered before a disciplinary hearing "*has dented our chances to sack [the claimant] on the grounds of gross misconduct*". This was more that Mr Munir simply seeking HR advice, it suggests he is looking for a basis to terminate the claimant's employment as soon as possible before the investigation has examined the evidence in the case. The claimant became aware of these emails after she made a subject access request and

that led to an understandable perception on her part that Mr Munir was looking for a reason to dismiss her. As Ms Levene pointed out in her submissions, in cross examination Mr Munir conceded that the claimant's view in this regard was reasonable. I accept Ms Levene's submissions that Mr Munir was hostile and biased towards the claimant. He wanted her employment to end and the claimant was aware of that. Mr Munir undermined the trust and confidence which the claimant could have in the respondent though his conduct.

80. Ms Levene further submitted that not only was there no reason to form any belief as to the claimant's dishonesty because the disciplinary action was not justified in the first place and there was an unwillingness to look at evidence which might support her account. The claimant has always been clear that calendar entries returned on the day her outlook synched and that appears to be consistent with the evidence of when the diary appointments were "created" in outlook. The claimant repeatedly tried to explain that this had happened on syncing when Mr Burrows was there. She asked for Mr Burrows to come to the disciplinary hearing but that request was refused. The claimant was making what seems to be simple and straightforward point, that on syncing her iPhone calendar entries were treated by the outlook system as "new" entries. That point has never been unambiguously answered and it is difficult to see this should be the case. Ms Levene pointed that was never put in terms to Mr Burrows and the IT support company and the obvious way it could have been answered, by asking Mr Burrows to come to the disciplinary hearing, was refused without meaningful explanation. Despite the flaws evidence in the respondent's evidence highlighted by Ms Levene, Mr Fuller continued to submit that the calendar entries were "new" and corroborated the respondent's case and show its concerns were well founded.

81. I do not accept Mr Fuller's submissions and prefer the claimant's submissions in this regard. I agree with Ms Levene that the approach of the respondent and its representatives to the evidence about the calendar entries suggests a bias in their approach which resulted in a failure to fairly or meaningfully consider the claimant's case and that weight was attached to evidence of alleged dishonesty which was unwarranted. The impression I gained from Mr Munir and the emails was that he seized on evidence which he felt supported his desire to end the claimant's employment and this influenced the advisers. Ms Vickers was described as impartial but I did not receive any evidence from her to enable me to assess that and the correspondence shows that Mr Munir was being very explicit to Citation that he wanted an outcome that would result in the termination of the claimant's employment.

82. In cross examination the claimant had suggested that that cctv footage could have been checked to see if calendar appointments were created when Mr Burrows was there. In his submissions Mr Fuller criticised that because the claimant had not raised that in the course of disciplinary process but I accept the claimant was simply trying to make the point the respondent never made any attempt to fairly look for evidence which might support what she was saying. Given the weight the respondent attached to the alleged falsification of the calendar entries and the claimant's insistence that the timing of the "creation" coincides with when Mr Burrows was helping her it does not seem

an unreasonable point for the claimant to make when it was being put to her that the evidence was clear that she had falsified the calendar entries.

83. In her submissions, Ms Levene also argued that the claimant was also denied the chance to search her inbox for relevant emails to defend herself and this was particularly relevant in relation to the disciplinary allegations about the event at Hotel Manchester. The claimant made the point that the meeting might not be connected with the networking companies but because she was suspended she could not search for any relevant emails to remind her of the details and that she put in an impossible position. In essence it is submitted this was a one-sided investigation which looked for evidence of guilt. I accept that the claimant was not treated fairly in the course of the investigation. On the basis of the evidence presented to me and the flaws raised by Ms Levene which are apparent from the face of the documents, I am unable to find that the disciplinary process was conducted in an impartial way. I accept Ms Levene's submissions that any belief the respondent and the consultants had in the claimant's guilt of misconduct was unreasonably held.

84. The claimant also criticised the involvement of Citation in the grievance and disciplinary process on the grounds that it would be biased in favour of its client who was effectively Mr Munir. I accept the respondent's argument that this was a small company without an HR department and without a large management team enabling a separation between the respondent and Mr Munir. Ms Levene argued that the delegation to Citation decision makers was inappropriate given their role in advising Mr Munir because there would be perception of bias. Mr Fuller argued whoever was appointed would have some financial connection to the respondent and the decision reached by the Citation consultants which on the grievance were partly in the claimant's favour show the criticism is unfounded. I accept that the respondent had a discretion in these circumstances. Someone appropriate had to be found. I do not accept that the appointment of Citation or Mr Stefani per se could be a breach of the implied duty of trust and confidence and although I agree with Ms Levene that there were other options available to the respondent which could have offered more obviously impartial and independent decision makers, I cannot find this was a breach of the implied term of confidence. It cannot be said that the implied duty of trust of confidence requires an employer to act as fairly as possible or never to act unreasonably. However in light of the emails between Mr Munir and Citation which the claimant became aware of, it is not surprising that the claimant perceived that Citation's consultants were following or influenced by Mr Munir's directions and were not independent.

85. Mr Fuller argued that Mr Stefani was a reasonable and independent decision maker. The claimant and her solicitor had known of his involvement and had not objected at the time. He argued that Mr Stefani's evidence should be accepted. Ms Levene argued that it was understandable that the claimant had no confidence in the impartiality of Mr Stefani and the grievance process was not thorough. She submitted that the respondent's case on what happened with the grievance was confused. At the first stage Citation made recommendations which Mr Stefani said he accepted but his outcome letter contradicted that. At the appeal stage there was a letter explaining the

outcome prepared by Citation but that was addressed to Mr Munir not the claimant. The respondent never directed a response to the claimant herself. In the initial grievance process and at the disciplinary stage, Citation had made recommendations to the respondent but did not make decisions themselves and then at the appeal stage they again directed a decision to the respondent and it was not clear if this therefore required Mr Munir to accept it and it was not surprising that the claimant perceived she was never given an outcome when she received no outcome addressed to her personally.

86. In terms of the initial grievance outcome I found Mr Stefani's account that, in essence, his letter saying the Citation recommendations were accepted had been a typographical error or a mistake but that he had reached a reasoned decision at the time, to be unconvincing. If a decision maker has decided to depart from recommendations made by investigator on the evidence I find it implausible that they would provide an outcome without making any attempt to explain or even acknowledge this. The conclusion I reached on Mr Stefani's evidence, including his vagueness about what documents he had considered, was that he had not paid proper attention to the content of the report, did not consider it in any meaningful sense and simply assumed that none of the allegations were upheld. I found Mr Stefani's attempts to explain the discrepancy between the outcome letter and the report's conclusions to be unconvincing.

87. I do not accept that it was inappropriate for Mr Stefani to act as a involved as a decision maker and that was not a breach of the implied term of trust and confidence. It would not be breach of the term of trust and confidence simply because Mr Stefani could be said to have acted unfairly but in this case the failing was such as to amount a failure to properly consider the grievance at all and I find that was breach of the implied terms of trust and confidence.

88. The fourth alleged breach was the suspension of the claimant. The claimant alleges that her suspension had no credible basis and was manifestly unreasonable and she points to a number of grounds including that she was never warned that suspension was a possible outcome and her suspension was a knee-jerk reaction when there should have been a proper investigation first. I accept that an employer is entitled to suspend an employee suspected of wrong-doing if that is necessary to protect an investigation or because of the seriousness of the allegations. Her suspension was not a breach of contract. However, the claimant's concerns about her suspension should have been addressed as part of her grievances or addressed in the disciplinary process and they were not. That reinforces that the grievance was not properly considered.

89. The fifth alleged breach was the lack of clarity as to the individuals and their roles in the disciplinary and grievances procedures. The claimant was not initially told who would conduct the grievance process, the letter dated 11th June referred only to an unnamed HR specialist and unnamed business partner and the claimant had to clarify this via her solicitor. Mr Stefani attended grievance hearing as a notetaker but in due course took the initial grievance decision. Mr Stefani then was appointed to take the disciplinary decision but did not attend the disciplinary hearing. In his witness evidence he said he took these decisions very seriously but his evidence was vague,

for example he could not say what documents he reviewed in his decision making. Following his lack of engagement with the grievance outcome already referred to, he appears to have simply rubberstamped Ms Vickers' decision on the disciplinary decision. The letter of 30 July 2019 suggests that Ms Vickers took a decision on the grievance appeal but she did not write to the claimant and instead wrote to Mr Munir.

90. Mr Fuller submitted that despite the sometimes confusing answers in cross examination given by Mr Munir and Mr Stefani about who made decisions, the claimant had been told through her solicitor that decisions would be taken by Mr Stefani and Ms Vickers and Ms Adams and the claimant and her solicitors had not raised objections. To comply with good employment practice the position during the process should have been made clearer to the claimant. Ms Vickers should have provided a grievance outcome to the claimant which explained her decision not simply written to Mr Munir given here she was not making a recommendation but reaching her own decision. The respondent fell well short of good practice in how these things were handled but I do not find that these were so serious that they could be said to go to the heart of the employment relationship and so amount to a breach of the implied terms of trust and confidence.

91. The sixth alleged breach is a lack of independence of the individuals involved in the disciplinary and grievance procedures. The claimant objected to Mr Stefani being involved in her grievance and disciplinary decisions and the basis for her objections is raised by her solicitors several times. Those objections were rejected by the respondent. Mr Munir conceded that he did not consider appointing anyone else. I accept that the respondent faced a particularly difficult dilemma. There was no one within the respondent who could deal with the decisions impartially due to the connections of all the directors to Mr Munir. There was nothing inappropriate in Mr Stefani being appointed to deal with the grievance but the decision Mr Stefani reached on the grievance raised concerns for the claimant about his decision making which were legitimate. When the grievance appeal was partially upheld it must have raised questions about the appropriateness of Mr Stefani dealing with the disciplinary stage. The claimant's concerns about how Mr Stefani would deal with the discipline were well founded.

92. Mr Stefani conceded in cross-examination that Mr Burrows should have been asked about the creation of the calendar appointments to answer the points raised by the claimant if he was to fairly consider the question of whether the calendar appointments showed the claimant was guilty of gross misconduct and the investigations undertake did not do that. He conceded that he should have considered the implications of the claimant's agreed autonomy over her working hours. Mr Fuller submitted that the first and final warning was based on a reasonable belief in the claimant's guilt of misconduct justified by the claimant's conduct and there was no reasonable basis for any belief that she would be dismissed later. However those submissions are not consistent with the concessions made by Mr Stefani. I accept Ms Levene's submission that that the most probable explanation for these flaws is that Mr Stefani was biased and was not doing a thorough job because his intention was always to go along with what Mr Munir wanted. I accept Ms Levene's submissions that

Mr Stefani's lack of independence and bias in favour of MR Munir was such that this amounted to a breach of the implied term of trust and confidence.

93. The "last straw" relied upon by the claimant was the disciplinary outcome which the claimant says showed that her employer by its conduct in this regard and the earlier matters, had demonstrated that it no longer intended to be bound by the terms of the claimant's contract of employment.

94. Mr Fuller suggested that even if it was the final straw there is no evidence from which it could be concluded the respondent or Mr Munir had demonstrated an intention to no longer be bound by the terms of the contract. He acknowledged that the claimant might have felt upset having seen Mr Munir's emails to Citation but Mr Munir had taken the advice given to him. Even if the relationship with the claimant was strained after the claimant was suspended Mr Munir had made a decision to step away from the process and allowed decisions to be taken by others and he pointed out that the respondent had not suggested the claimant should be dismissed because she had gone off sick. In short there was no final straw for the claimant to rely upon.

95. I do not accept those arguments. I find that the flaws in the disciplinary process and Mr Stefani's lack of impartiality were such that that they amounted to a final straw which justified the claimant resigning and claiming constructive dismissal. I accept that the claimant was entitled to reach the conclusion that her employer had breached her contract of employment and to treat the final warning as a repudiation of her contract of employment and as a last straw. In any event the claimant had never waived the respondent's earlier breaches of the implied terms of trust and confidence or otherwise affirmed her contract of employment and she was entitled to rely on those earlier breaches of contract in any event.

Issue 2: did the claimant resign, at least in part, in response to such breach?

96. Mr Fuller argued that because the claimant had decided some time earlier that she was going to resign, the outcome of the disciplinary process, the final straw relied upon, was not the reason for her resignation.

97. I do not accept that submission. I accept that the claimant was previously unhappy and had wanted the respondent to agree terms to allow her to leave. It is clear from comments in the grievance process that both sides believed the employment relationship had broken down but nevertheless neither side had taken any steps to end the employment contract. I accept the trigger was the final warning given by Mr Stefani and that was part of the reason set against the context of the earlier issues, some of which were breaches of contract and some not, which had led the claimant to believe it was impossible for her to continue in her employment. I find nothing in the evidence to suggest that there was any other reason for the claimant's resignation other than the respondent's conduct.

Issue 3: Did the Claimant delay/affirm the breach?

98. Mr Fuller made much of the fact that the documents show that the claimant had indicated a willingness to enter into settlement negotiations with the respondent before the disciplinary process. However, those discussions arose out of the respondent's earlier breaches of her contract following the meeting on 20 March. The claimant chose not to leave at that time but I do not accept that by not leaving at that time the claimant affirmed her contract of employment and waived her right to rely on those breaches at a later date. The claimant had never waived the previous breaches of contract as demonstrated by her continued raising of those matters in the grievance and disciplinary process.

99. I accept Ms Levene's submissions that the claimant neither delayed her resignation too long nor that she affirmed the contract. I accept that the claimant decision to resign, given the impact on her relationship with her sister and her mother, was a difficult one which the claimant had to make when she was unwell. As a result of terminating her employment with the company in which her sister is a director, the claimant has suffered a rift from her family. In those circumstances it would not be surprising that the claimant did not rush to accept the respondent's repudiation of her contract. In any event leaving a job is not a decision which is an easy one for any employee to make. The law recognises that. Employees are not required to act immediately or with haste. Mr Fuller's criticisms of the claimant in this regard are not well founded.

Issue 4: Did the Respondent prove a potentially fair reason of conduct and was there a fair dismissal applying section 98(4) ERA?

100. This argument was not pursued before in Mr Fuller's submissions. In any event whilst I accept Mr Fuller's argument that Mr Munir and Mr Stefani thought that the claimant was guilty of misconduct, that belief was not well founded nor did it justify their treatment of the claimant. The claimant's dismissal was unfair.

101. In the circumstances the claimant's claim of unfair dismissal is upheld. This case will now be listed for a remedy hearing on the next available date.

Remedy and orders

102. The parties are encouraged to seek to resolve the issue of compensation between themselves without a further hearing if that is possible. The parties are reminded that the services of ACAS remain available to them. If that is not possible the issue of remedy will be determined before me on a date to be advised after hearing any relevant evidence and submissions from the parties. I estimate that a three-hour remedy hearing will be required. If the arties believe longer is needed they must inform the tribunal as soon as possible.

103. I consider that the following orders are appropriate to ensure the efficient conduct of the remedy hearing if it is required and **Accordingly the parties are ordered as follows (pursuant to the Employment Tribunal Rules of Procedure):**

104. **Statement of remedy / schedule of loss**

a. The claimant must provide to the respondent, copied to the tribunal, by **4pm on 27 February 2022** an updated "Schedule of Loss" – setting out what remedy is being sought and how much in compensation and/or damages the tribunal will be asked to award the claimant at the final hearing in relation to each of the claimant's complaints and how the amount(s) have been calculated, together with copies of any documents and/or statement of evidence that she wishes to rely upon at the remedy hearing.

105. **Counterstatement of remedy / counter- schedule of loss**

a. The respondent must provide to the claimant, copied to the tribunal, a counter schedule of loss if it disagrees with the Claimant's schedule by **4pm on 11 March 2022** together with copies of any documents and/or statements of evidence that it wishes to rely upon at the remedy hearing.

106. **Remedy bundle and statements**

a. The claimant must prepare a paginated file of documents ("remedy bundle") relevant to the issue of remedy and in particular how much in compensation and/or damages she should be awarded and provide the respondent with a 'hard' and electronic copy of it and any witness statement of any additional evidence relied upon by **18 March 2022**. The documents must be arranged in chronological or other logical order and the remedy bundle must contain the up to date schedule of loss and any counter schedule of loss at the front of it.

b. If the respondent is producing evidence to suggest the claimant is failing to mitigate her loss it must reduce its own bundle in this regard and provide the claimant with a 'hard' and electronic copy of it by and any witness statement of any additional evidence relied upon **18 March 2022**. The documents must be arranged in chronological or other logical order and the remedy bundle must contain the up to date schedule of loss and any counter schedule of loss at the front of it.

c. **5 working days before the remedy hearing** (but not before that day)

i. The claimant must lodge with the Tribunal an electronic copy of the remedy bundle(s);

ii. if either party is relying on witness statements, an electronic copy of each statement by that party;

iii. An electronic copy of any written opening submissions / skeleton argument must be lodged by whichever party is relying on them / it.

107. The parties may by agreement vary the dates specified in any order by up to 14 days without the tribunal's permission except that no variation may be agreed where that might affect the hearing date. The tribunal must be told about any agreed variation before it comes into effect.

Public access to employment tribunal decisions

108. The parties are reminded that all judgments and reasons for the judgments are published, in full, online at *www.gov.uk/employment-tribunal-decisions* shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.

109. **Any person who without reasonable excuse fails to comply with a Tribunal Order for the disclosure of documents commits a criminal offence and is liable, if convicted in the Magistrates Court, to a fine of up to £1,000.00.**

110. **Under rule 6, if any of the above orders is not complied with, the Tribunal may take such action as it considers just which may include: (a) waiving or varying the requirement; (b) striking out the claim or the response, in whole or in part, in accordance with rule 37; (c) barring or restricting a party's participation in the proceedings; and/or (d) awarding costs in accordance with rule 74-84.**

_____

Employment Judge Cookson

Date: 19 January 2022

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON

4 February 2022

FOR THE TRIBUNAL OFFICE

Public access to employment tribunal decisions
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