Case Number 2402804/2019
Type V

EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**AND**	**Respondent**
Ms L Wood		**Pheonix Healthcare Distribution Limited**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL
(RESERVED JUDGMENT)

HELD AT Birmingham **ON** 17, 18 & 19 November & 15 December 2021

EMPLOYMENT JUDGE GASKELL

Representation
For the Claimant: **Mr J Singh (Solicitor)(17 - 19 November 2021) In Person (15 December 2021)**
For the Respondent: **Mr S Chowdhury (Solicitor)**

JUDGMENT

The Judgement of the tribunal is that:

1 The claimant was not dismissed by the respondent . Her claim for unfair is not well-founded and is dismissed.
2 The claimant was not dismissed by the respondent. Her claim for wrongful dismissal is dismissed.
3 The claimant's claim for unpaid holiday is dismissed upon being withdrawn by the claimant.

REASONS

Introduction

1 The claimant in this case is Ms Lisa Wood who was employed by the respondent, Phoenix Healthcare Distribution Limited, as a Delivery Driver, from 18 May 2009 until 24 December 2018 when she resigned.

2 By a claim form presented to the tribunal on 22 March 2019, the claimant claims that she was constructively and unfairly dismissed and that she was owed unpaid notice pay and holiday pay.

3 The respondent's case is that the claimant resigned; that at no time had it acted in fundamental breach of the contract; the claimant resigned without giving notice, she was not entitled to notice pay. And following the claimant's resignation, all outstanding holiday pay was paid. The position regarding the holiday pay is agreed. That claim is not pursued and it has been dismissed upon being withdrawn by the claimant.

The Evidence

4 The claimant gave evidence on her own account. On the morning of the first day of the hearing, the claimant also produced a witness statement from Mr John Madeley who had been her companion at a number of meetings. The respondent objected to Mr Madeley being called as a witness because his witness statement had not been served in accordance with directions given by the tribunal. After hearing argument between the advocates, and it having been pointed out that there was a discrepancy between Mr Madeley's evidence and that of the claimant, the claimant indicated that she did not intend to rely on Mr Madeley's evidence. Now that I have heard the entirety of the evidence, I am satisfied that Mr Madeley's evidence would not have had any material effect on my decision. I accept the claimant's case on that element of the facts dealt with by Mr Madeley.

5 The respondent relied upon the evidence of two witnesses: Mr Aftab Sultan – HR Delivery Manager; and Mr Lee Smith - Regional Transport Manager. The respondent also served a witness statement from Ms Cheryl Spratley - HR Delivery Manager, but Ms Spratley was not called to give evidence. I have taken no account of Ms Spratley's witness statement in reaching my decision. In any event, her evidence would have had no material effect on my decision.

6 I find that the evidence of the three witnesses who gave oral evidence was in all cases truthful and accurate to the best of their recollections. The issues in this case are determined on the basis of interpretation of the facts and of the respondent's Attendance Management Policy. There is only one significant factual dispute: namely, what was or was not promised to the claimant on 17 December 2018 with regard to payment of accrued holiday pay. For reasons which I explain in my conclusions, I prefer the evidence given by respondent's witnesses. But, for reasons which I also explain, it would make no material difference to the outcome were I to accept the claimant's evidence on this point.

7 In addition, I was provided with an agreed hearing bundle running to approximately 500 pages. I have considered the documents from within the bundle to which I was referred by the parties during the course of the hearing.

The Facts

8 On 18 May 2009, the claimant commenced employment with the respondent as a Delivery Driver. During the claimant's years of employment, until 2017, there were no disciplinary issues or grievances.

9 The respondent operates an Attendance Management Policy which includes use of the Bradford Factor. This scheme applies a formula to the regularity and length of an employee's sickness absences. The calculation includes all absences due to sickness whether medically certified or not. The scheme is set out in the respondent's Absence Management Policy, and its operation was explained in detail by Mr Sultan. One aspect of the application of the formula is that a number of short absences produces a higher Bradford Factor score than a single longer absence. Mr Sultan explained that this was because regular short absences were more disruptive to the respondent's business than a fewer longer absences even if the total number of days absence was the same.

10 If, in any rolling 12 month period, an employee's absences maintained a Bradford Factor score below 90, then no remedial action would be taken. However, following a return to work from absence if the score of 90 has been reached there would be an informal counselling process to ensure that the employee was aware of the potential consequences of further absences. Thereafter, if the score remains between 90 and 249, the informal approach will continue. The formal process is triggered once the score reaches 250 or more.

11 Once the formal process commences, managers have guidelines to follow which suggest that on the first instance there should be a verbal warning (remaining live for 6 months); leading on the second instance to a written warning (remaining live for 9 months); then to a final written warning (remaining live for 12 months); and then to possible dismissal. Although managers had these guidelines, they retain a discretion depending on circumstances to impose a greater or lesser penalty. Once in the formal process, any decision on penalty would be informed by any extant live warnings at the relevant time. Further, once the formal process had been triggered action was likely even if the score fell below 250 so long as it exceeded 90. In this regard, managers would be considering not merely the Bradford Factor score calculated by reference to absences during the rolling 12 month period but also whether any verbal or written warnings were extant.

12 The first of the claimant's absences which is factually relevant to this case was on 12 May 2015 for a single day. Following that absence, no action was appropriate. The claimant was then absent from 2 – 6 November 2015, a period of six days. Upon her return to work, her Bradford Factor score was 71, and

again no action was appropriate. She was then absent from 3 March – 16 April 2016, a period of 36 days. When she returned to work this her Bradford Factor score was 387. It was the first time in the relevant rolling 12 month period that the score had exceeded 90, and the claimant received counselling and advice.

13 The claimant was again absent from 26 September – 12 December 2016 a period of 67 days. When she returned to work her score was 412 but managers exercised their discretion and the claimant received further counselling and advice. The next absence was for a single day on 19 May 2017, when the claimant returned to work her score was 272 and on this occasion she was subject to disciplinary (absence management) proceedings and, on 19 June 2017, she received a verbal written warning. This disciplinary (absence) meeting was conducted by Mr Gary Hooker - Transport Manager. The claimant is particularly aggrieved by the issue of this verbal warning because, on 19 May 2017, she was willing to attend work but, because of her eye infection, she was unable to drive (her normal duties). Unfortunately, no alternative duties were available for her for that day.

14 The claimant's next absence from work was for a period of three days from 5 – 7 October 2017. When she returned to work her Bradford Factor score had reached 531. On this occasion, on 24 October 2017, Mr Hooker issued a written warning.

15 The claimant was again absent for a period of 13 days from 8 - 22 January 2022. When she returned to work, her Bradford Factor score was 153. On the basis of the operation of the scheme as explained in Paragraph 11 above, the claimant was again subject to disciplinary (absence management) proceedings. She attended this a disciplinary meeting conducted by Mr Hooker on 5 February 2018, and was issued with a final written warning. At that meeting the claimant was accompanied by Mr Madeley.

16 One of the claimant's principal concerns in this case is that she alleges that, prior to the meeting on 5 February 2018, Mr Hooker took her to one side and told her that, at the meeting, she would be receiving a final written warning. It is the claimant's case that this demonstrated that Mr Hooker had prejudged the forthcoming disciplinary meeting – potentially, a significant breach of the implied term of mutual trust and confidence. In his witness statement, Mr Madeley (who was not called to give evidence) stated that he had a similar conversation with Mr Hooker a few days before the meeting when it was known to Mr Hooker that Mr Madeley would be accompanying the claimant to the meeting.

17 On 20 February 2018, the claimant submitted a letter of appeal against the issue of the final written warning. The principal ground of appeal as set out in her letter is the alleged pre-judgement of the outcome by Mr Hooker.

18 The appeal hearing took place on 27 February 2018 and was conducted by Mr Carl Murray - Operations Manager. Mr Murray was supported by Mr Sultan. The claimant attended accompanied by Mr Madeley. The principal grounds of appeal discussed at the meeting were: -

(a) The alleged prejudgement by Mr Hooker.
(b) The fact that the claimant's absences were genuine and medically certified. In such circumstances, the claimant did not believe that her absences should have attracted disciplinary action at all.

At the conclusion of the meeting, Mr Murray indicated that he wished to conduct further enquiries and would confirm the outcome in due course.

19 Mr Hooker was interviewed, his explanation was: that, in advance of the meeting on 5 February 2018, the claimant had expressed anxiety as to the possible outcome. Mr Hooker refused to discuss the meeting, but did go through the process with the claimant in which he explained that the stage that she had reached if guidelines were followed was that of a final written warning. The claimant's anxiety about possible dismissal was misplaced.

20 On 8 March 2018, Mr Murray wrote to the claimant with the outcome of her appeal. The appeal was dismissed; the final written warning would stand. Mr Murray explained that in relation to the alleged prejudgement by Mr Hooker that he believed that there had been a misunderstanding. Mr Hooker's primary intention had been to reassure the claimant that she was not facing dismissal. As to the second ground of appeal, Mr Murray explained that the way in which the respondents absence management policy worked is that all absences were brought into account even if genuine and medically certified. Indeed, the process was founded on the assumption that absences were genuine (had they not been this would have raised other potentially more serious disciplinary issues).

21 In evidence before the tribunal, Mr Sultan explained that there were occasions where absences would be disregarded under the policy. The most likely occasions for such disregard being: -

(a) Cases of disability-related absence.
(b) Cases where it was demonstrably clear that an employee had returned to work too soon following a previous absence and it was felt unfair to penalise such an employee for a second absence shortly afterwards.

22 On 14 March 2018, the claimant was certified as unfit for work with stress and anxiety. In the event, it was the commencement of the period of sickness

absence from which the claimant did not return prior to her resignation in December 2018.

23 On 19 March 2018, the claimant raised a grievance. The grievance was initially considered by Ms Deborah Chamberlain - HR Delivery Manager. Ms Chamberlain concluded that the issues raised in the grievance had all been properly investigated and considered in the recent disciplinary appeal process and that the claimant was effectively attempting a second appeal. Accordingly, on 26 March 2018, Ms Chamberlain wrote to the claimant indicating that the grievance would not be considered and that the appeal process was concluded.

24 The documentation available in the bundle clearly demonstrates that the respondent made all reasonable efforts to keep in touch with the claimant during her absence: to make proper enquiries as to her welfare; and to encourage her return to work. Initially, there were communication problems in that the claimant indicated she had not received letters inviting her to welfare meetings. Ultimately, the respondent was sending communications to the claimant by first class mail; Royal Mail special delivery; and by email in order to ensure that they were received.

25 The respondent obtained an Occupational Health report and reports from the claimant's GP. The upshot of these reports was that the claimant would be fit to return to work with a phased return provided that, upon her return, mediation was arranged to try and improve the relationship between the claimant and Mr Hooker. The claimant remained adamant that Mr Hooker had wrongly prejudged the outcome of the disciplinary meeting and that he was somehow targeting her in the workplace.

26 The mediation could not be put in place until a return date was agreed. The initial date for the claimant return to work was agreed as 9 July 2019 but the claimant did not return. A second return date was agreed of 13 August 2018 - but again the claimant did not return. The claimant was still adamant that her grievance had not been dealt with - notwithstanding that from the respondent's point of view she had received a final response to the grievance from Ms Chamberlain on 26 March 2018. At Mr Sultan's suggestion, and with the intention of finding a solution, on 27 July 2018, the claimant submitted a second grievance.

27 The second grievance covered all of the ground included in the disciplinary appeal and the first grievance. But, in addition it raised matters relating to the claimant sickness absence. On 11 September 2018, there was a grievance hearing conducted by Mr Richard Flower - Depot Manager supported by Mr Sultan. The claimant attended accompanied by Mr Madeley. The matters of grievance which were discussed at the meeting were: -

(a) Mr Hooker's prejudgement.
(b) Alleged bullying and victimisation in the workplace.
(c) Lack of proper contact during the claimant's recent absence from work.

28 On 27 September 2018, Mr Flower wrote to the claimant dismissing the grievance. He was satisfied that the first point had been properly investigated and determined in the disciplinary appeal process. He found no evidence to support any allegations of bullying or victimisation. And he believe that all proper efforts have been made to maintain contact with the claimant during her absence.

29 On 2 October 2018, the claimant appealed the outcome of the second grievance. On 18 October 2018, the appeal hearing was conducted by Mr Smith supported by Ms Spratley. The claimant attended, accompanied by Mr Madeley. I did not hear evidence from Mr Hooker, Mr Murray, or Mr Flower and in reaching my determination have relied largely on notes and documents created by them. But, I did have the advantage of hearing direct oral evidence from Mr Smith. Evidence which I fully accept.

30 The ground covered the grievance appeal meeting once again, in the main, related back the alleged predetermination by Mr Hooker and the fact that it was fundamentally unfair to be subjecting employees to final written warnings when their absences from work were legitimate and medically certified. Overall, Mr Lee was satisfied that Mr Hooker had reached a correct decision with the imposition of the final written warning. However, he could see that there might be legitimate criticisms of Mr Hooker in his conversation with the claimant in advance of the meeting which at the very least may have created misunderstandings. He also felt that Mr Hooker's notes of the meeting were inadequate and he was concerned that they had not been produced to the claimant for agreement and signature. Mr Lee was satisfied that the grievances had been properly dealt with. There is no doubt that Mr Lee believes that he could quite legitimately have dismissed the grievance appeal. But uppermost in his thinking was a desire to create circumstances in which the claimant would feel able to return to work.

31 The fact of the final written warning followed by the claimant's absence from work which had now been ongoing since March 2018 meant that, upon her return, the claimant's Bradford Factor score would trigger a further disciplinary meeting. The claimant was now already subject to a final written warning and this further meeting would place her in real jeopardy of dismissal. To try and ease the situation, Mr Hill decided to partly uphold the claimant's grievance. He overturned the final written warning, and directed that the life of the previous written warning would be extended by six months. The effect of this would be that the claimant

could return to work knowing that she would face a further disciplinary meeting but that the likely outcome would be a final written warning rather than dismissal. On 8 November 2018, Mr Lee wrote to the claimant advising her of his decision.

32 When the claimant gave evidence before the tribunal, she confirmed that whilst she remained concerned about the practices adopted by Mr Hooker, she accepted that the final written warning was appropriate. She also indicated that she now fully appreciated that all absences should be taken into account under the policy even when they were genuine and medically certified. The claimant indicated that she was pleased with Mr Hill's decision which was fair.

33 In the hope that matters could now progress towards the claimant's return to work, Mr Lee and Mr Sultan arranged a welfare meeting with the claimant for 17 December 2018. The claimant attended with Mr Madeley. It was agreed in the meeting that the mediation with Mr Hooker would be arranged for 3 January 2019 in the hope of the claimant's return to work soon thereafter. At the meeting, the claimant requested that the holiday pay which had accrued during her long absence should be paid to her rather than allowing the annual leave to carry forward. Mr Sultan agreed to look into this. The claimant's evidence was that Mr Sultan agreed that the holiday pay would be paid in December 2018. This is disputed by Mr Sultan.

34 December's wages were paid to the respondent's workforce on 20 December 2018. Mr Sultan explained, and I accept, that it would not have been possible, following a meeting on 17 December 2018, to arrange for anything then to be included in the salary run to be paid on 20 December 2018 - it was simply too late. But, in an appropriate case arrangements could have been made for a special one-off payment before the end of December 2018. Mr Sultan does not believe that this would have been an appropriate case for such a one-off payment and strongly denies ever promising such a payment.

35 On 24 December 2018, by an email to Mr Smith, the claimant resigned with immediate effect.

36 On 31 December 2018, Mr Smith replied to the claimant asking her to reconsider her resignation - believing that what had been agreed at the welfare meeting provided an opportunity for the claimant to return to work. In a subsequent telephone conversation, the claimant confirmed her intention to resign. Accordingly, on 10 January 2019, Mr Smith formally accepted the claimant's resignation in writing effective from 24 December 2018.

37 In her evidence before the tribunal, the claimant confirmed that, at the time of the welfare meeting on 17 December 2018, it was still her intention and wish to return to work. When asked what changed her position, she replied that the "final

straw" for her was the failure of the respondent to pay her accrued holiday pay on 20 December 2018.

The Law

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

Section 94 - The right not to be unfairly dismissed

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

Section 95 - Circumstances in which an employee is dismissed

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

(a) the contract under which he is employed is terminated by the employer (whether with or without notice) - *Direct dismissal,*
(c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct - *Constructive dismissal.*

Section 98 - General Fairness

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

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

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

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

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

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

39 **Decided Cases**

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

Western Excavating (ECC) Ltd, -v - Sharpe **[1978] IRLR 27 (CA)**
An employee is entitled to treat himself as constructively dismissed if the employer is guilty of conduct which is a significant breach going to the root of the contract of employment; or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract. The employee in those circumstances is entitled to leave without notice or to give notice, but the conduct in either case must be sufficiently serious to entitle him to leave at once.

The employee must make up his mind to leave soon after the conduct of which he complains if he continues the any length of time without leaving, he will be regarded as having elected to affirm the contract and will lose his right to treat himself as discharged.

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

Woods -v- WM Car Services (Peterborough) Ltd. **[1981] IRLR 347 (EAT)**
It is clearly established that there is implied in a contract of employment a term that employers will not, without reasonable and proper cause, conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee. Any breach of this implied term is a fundamental breach amounting to repudiation since it necessarily goes to the root of the contract. To constitute a breach of this implied term, it is not necessary to show that the employer intended any

repudiation of the contract. The employment tribunal's function is to look at the employer's conduct as a whole and determine whether it is such that it's cumulative effect, judged reasonably and sensibly, is such that an employee cannot be expected to put up with it.

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

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

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

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

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

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

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

Fereday –v- South Staffordshire Primary Care Trust **UKEAT/0513/10/ZT**
The claimant considered she was treated in a way which was in fundamental breach of the contract of employment. She invoked grievance procedure, which resulted in a decision adverse to her on 13 February 2009, but she only resigned by a letter dated 24 March 2009. The employment tribunal was entitled to hold that the claimant had affirmed the contract. The six-week delay between 13 February 2009 and 24 March 2009 was evidence of such affirmation.

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

Waltham Forest LBC -v- Omilaju **[2005] IRLR 35 (CA)**
This case clarified the position where a complainant was lying on the "final straw" principle: if the final straw is not capable of contributing to a series of earlier acts which may cumulatively amount to a breach of the implied term of trust and

confidence, then there is no need to examine the earlier history. If an employer has committed a series of acts which amount to a breach of the implied term; but the employee does not resign his employment In response thereto; he cannot subsequently rely on those acts to justify a constructive dismissal in the absence of a later act which enables him to do so. If the later act is entirely innocuous It is entirely unnecessary to examine the earlier conduct as the later act will not permit the employee to invoke the final straw principal. An entirely innocuous act on the part of the employer cannot be a final straw.

Hadji -v- St Lukes Plymouth **(2013) UKEAT 0095/12**
This case provides a recent re-statement of the law on affirmation:-

(a) The employee must make up his/her mind whether or not to resign soon after the conduct of which he/she complains. If he/she does not do so he/she may be regarded as having elected to affirm the contract, or as having lost the right to treat himself/herself as dismissed.
(b) Mere delay of itself, unaccompanied by express or implied affirmation of the contract, is not enough to constitute affirmation; but it is open to the Employment Tribunal to infer implied affirmation from prolonged delay.
(c) If the employee calls on the employer to perform its obligations under the contract or otherwise initiates an intention to continue the contract; the Employment Tribunal may conclude that there has been affirmation.
(d) there is no fixed time limit in which the employee must make up his mind; the issue of affirmation is one which, subject to these principles, the Employment Tribunal must decide on the facts.

The Claimant's Case

40 The acts/omissions which, cumulatively or individually, the claimant claims amounted to a fundamental breach of the employment contract entitling her to resign and claim constructive dismissal are the following: -

(a) The misapplication of the Bradford Factor system: there are three potential elements to this:

(i) Firstly, the claim as originally presented by the claimant was to the effect that absences which were genuine and medically certified should be excluded from the calculation of the Bradford Factor score. If they had been, in her case, she would never have reached any of the relevant thresholds.
(ii) Secondly, and introduced by Mr Singh in closing submissions which he prepared (but did not present on 15 December 2021), it is suggested that the Bradford Factor calculation should include only short term absences

(less than four weeks). Longer absences should be dealt with differently. Again, if the claimant's longer absences were disregarded she would not have reached any of the relevant thresholds.

(iii) By the time the claimant reached the meeting in February 2018, her Bradford Factor score had reduced considerably since the issue of the written warning on 24 October 2017. Management should have exercised a discretion to take no action, or possibly to extend her existing written warning (which was done eventually), rather than proceed to the issue of a final written warning.

(b) Mr Hooker predetermined to outcome of the meeting: the claimant's case on this is fully explained above. She believes that to predetermine the meeting was potentially a serious breach of the implied term of mutual trust and confidence.

(c) The conduct of the meeting on 5 February 2018: said to have been conducted in a somewhat peremptory fashion; following a predetermined script; with inadequate notes kept; and no opportunity given to the claimant to read, confirm or amend, and sign the notes.

(d) The failure to deal with the claimant's first grievance: 19 March 2019. And then taking six months to recognise that there was a proper grievance to be investigated.

(e) The failure to pay the claimant's accrued holiday entitlement by 20 December 2018.

The Respondent's Case

41 In summary, the respondent does not accept that any of the above, either taken individually or cumulatively, amount to a fundamental breach of the employment contract. Accordingly, there cannot have been a constructive dismissal.

42 Considering elements (a) – (d) above only, the respondent's case is that, even if one or more of these acts/omissions constitute a breach of contract, then the claimant's failure to resign until 24 December 2018 together with her participation in the second grievance process; the welfare meeting on 17 December 2018; and the stated intention to return to work, clearly show that she had affirmed the contract following such breaches. The claimant cannot now rely on those breaches save in the case of a further breach amounting to the "last straw".

43 The only candidate for the "last straw" is the failure to pay accrued holiday pay by 20 December 2018 - element (e) above. However, it is submitted by the respondent that, even on the claimant's own account (which is not accepted by the respondent), the commitment to pay the accrued holiday pay was to make

the payment before the end of December 2018. Accordingly, the respondent was not in breach of any such commitment when the claimant resigned on 24 December 2018.

44 In these circumstances, the respondent's case is that there has been no fundamental breach. Any breach there may have been has been followed by affirmation of the contract. Accordingly, there can be no viable claim for constructive or wrongful dismissal.

Discussion & Conclusions

45 I have considered each of the alleged breaches of contract which are relied upon by the claimant as set out in Paragraph 39 above: -

(a) The misapplication of the Bradford factor system

(i) During the hearing, whilst the claimant was giving evidence, she was taken to the written Absence Management Policy. She accepted that it clearly stated that the operation of the policy depended upon it applying to all absences. The policy states that it is assumed that all absences are genuine. There has never been any suggestion from the respondent's managers, at any stage, that the claimant's absences were anything other than genuine. Further, the policy is clear: the fact that an absence is medically certified does not prevent its inclusion in the calculation. Mr Sultan gave some clear examples as to the relatively limited circumstances in which an absence might be disregarded. The claimant accepted all of this: she agreed that, in taking account of her absences, the managers were applying the policy correctly. I had understood her, in evidence, to accept therefore that taking account of her absences was not a breach of contract. I was extremely surprised to see this point pursued during closing submissions. In my judgement, bringing all of the claimant's absences into account was clearly within the manager's proper application of the policy and it is not capable of constituting a breach of contract.

(ii) Mr Singh set out a very subtle argument that absences over 28 days should be disregarded. I can see how such an argument can be constructed from the wording of the policy. However, for myself I disagree with the proposed interpretation. However, my agreement or disagreement is irrelevant. What is clear is that managers were applying this policy in good faith believing that it was correctly applied. Even if it transpired that they were mistaken, in my judgement, this could not amount to a fundamental breach of the employment contract. Most damaging to the claimant's case however, is the fact that this difference of interpretation of the written policy did not at any stage form part of the reason for her resignation. For a viable constructive dismissal claim, the claimant must

have resigned in response to the breach – and such is clearly not the case with this alleged breach. The claimant's beliefs were confined to the points raised at Paragraph 39(a)(i) and (iii) only. It follows that even if Mr Singh is correct on this point (which I do not accept to be the case), this could not provide grounding for a constructive dismissal claim.

(iii) The claimant is right to point out that her Bradford Factor score had reduced after the issue of the written warning and before the issue of the final written warning. But, again, Mr Sultan explained that as she had entered the formal part of the process it was appropriate for the manager to continue with the disciplinary process. Again, whilst Mr Hooker may have had a discretion to deal with this matter in another way. On the evidence available, there is no reason to suppose that he exercised his discretion other than in good faith. Accordingly, his decision, in my judgement, cannot be in breach of contract.

(b) Mr Hooker predetermined to outcome of the meeting

If Mr Hooker predetermined the outcome of a disciplinary meeting then potentially this would be a serious breach of the employment contract. But there are factors here which suggest to me that this is not what happened: -

(i) Firstly, the alternative explanation provided by Mr Hooker of seeking to reassure the claimant is credible and has an obvious ring of truth.

(ii) Secondly, when giving evidence, the claimant agreed that Mr Hooker had correctly exercised his discretion to proceed; and that, bearing in mind the history, a final written warning was appropriate.

In any event, the claimant did not resign in response to this conduct. She raised an appeal and the matter was investigated by Mr Murray. The claimant has never suggested that Mr Murray acted other than in good faith - it is simply that she does not agree with him. By her first grievance, the claimant attempted a second appeal - but there is no provision for such in the respondent's disciplinary procedure. When the matter was considered further by Mr Flower and ultimately by Mr Lee, they too rejected the claimant's interpretation of what had happened. And, even after all of this, the claimant indicated that, as at 17 December 2018, it was still her intention and wish to return to work.

(c) The conduct of the meeting on 5 February 2018

Mr Lee found that there were deficiencies in the manner in which Mr Hooker had conducted the meeting. When the claimant gave evidence however she was asked to be specific as to what information she could have conveyed to Mr Hooker had the meeting been conducted differently it came back only to the issue that had absences were genuine and once she accepted that this really

made no difference then the claimant also accepted that the outcome of the meeting was not adversely affected by Mr Hooker's conduct of it. Further, as explained above the claimant did not resign in response to this conduct.

(d) The failure to deal with the claimant's first grievance

It is simply not the case that the respondent failed to deal with the grievance submitted by the claimant on 19 March 2018. The grievance was dealt with by Ms Chamberlain who provided a response on 26 March 2018. The effective complaint here is that it was not the response the claimant wanted. Ms Chamberlain reached a conclusion, which was clearly available to her, that the ground to be covered by the grievance had already been considered and determined in the recent disciplinary appeal and that the use of the grievance procedure was therefore inappropriate. The fact that the claimant disagrees with this conclusion does not mean that Ms Chamberlain's actions were in breach of the claimant's employment contract. In my judgement, there clearly was no breach in this regard.

(e) The failure to pay the claimant's accrued holiday entitlement by 20 December 2018.

The claimant's case is that at the welfare meeting on 17 December 2018 she was promised that her accrued holiday pay would be paid by 20 December 2018. Mr Sultan and Mr Lee gave a different account: namely, that they would look into the question of making a payment of accrued holiday pay (rather than the usual practice in such circumstances of allowing untaken holiday to be carried forward) and get back to the claimant on this point. My judgement is that the account given by Mr Sultan and Mr Lee is more likely to be correct. They could not have promised payment by 20 December 2018 because there was too little time between the welfare meeting and the payment of salary to put the necessary arrangements in place. They do agree that it might have been possible to make a special additional payment; although their evidence is that they gave no undertaking so to do. In any event, on careful examination of the claimant's own evidence, her account of what transpired at the meeting, at its height, contains an undertaking by Mr Sultan to pay the accrued holiday pay "this month" - namely in December 2018. Even if, which I do not accept to be the case, such an undertaking had been given, there had been no breach of that undertaking when the claimant resigned on 24 December 2018. It follows from this that, whichever account of the meeting is accepted, the claimant cannot establish a breach of any aspect of her employment contract including the implied term of mutual trust and confidence by the failure of the respondents to pay her accrued holiday pay before her resignation.

46 The question of affirmation really does not arise because I find that there was no breach of the employment contract at any stage. For the avoidance of doubt however, I record that if any of the allegations set out at Paragraph 39(a) – (d) were in fact serious breaches of the employment contract, then it is clear that the claimant had affirmed the contract after the breach since, as late as 17 December 2018, it was still her intention and her wish to return to work. For any of those alleged breaches therefore to be brought into play there would have to be a further breach - the “last straw”. It is the claimant’s case that the last straw came with the failure to pay the holiday pay on 20 December 2018. However, for the reasons I have set out in Paragraph 45(e) above I find there was no such breach.

47 Accordingly, and for these reasons, I find that at no stage did the respondent act in breach of the claimant’s contract of employment. Absent a breach of contract, there can be no constructive dismissal.

48 The claimant was not dismissed by the respondent. Her claims for unfair and wrongful dismissal are not well founded and are dismissed.

Employment Judge Gaskell
17 February 2022