EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Ms Christine Hill Lilley	**v**	University of Northampton

Heard at: Cambridge **On:** 24 and 25 February 2022

Before: Employment Judge Tynan

Appearances
For the Claimant: Mr P Gorasia, Counsel
For the Respondent: Ms B Breslin, Counsel

RESERVED JUDGMENT

The Claimant's complaint that she was unfairly dismissed by the Respondent succeeds.

RESERVED REASONS

1. By a claim form presented to the Employment Tribunals on 14 January 2021, following ACAS Early Conciliation on 2 December 2020, the Claimant complains that she was unfairly dismissed by the Respondent.

2. The Claimant was employed by the Respondent as a full time Senior Lecturer in Footwear with effect from 30 November 2015. She gave notice resigning her employment on 15 October 2020 following receipt on or around 15 October 2020 of a letter dismissing her Appeal against the outcome of her Grievance. Her employment with the Respondent ended on 18 December 2020, the Respondent having placed her on garden leave with effect from 29 October 2020. As at the termination of her employment, and as I shall return to, the Claimant continued to be employed as a Senior Lecturer, albeit on a part time basis as part of a job share arrangement.

3. The Claimant asserts that she was constructively dismissed and that her dismissal was unfair.

4. The Claimant gave evidence in support of her claim. On behalf of the Respondent, I heard evidence from:

   a. Mr Chris Powis, Director of Library and Learning Services - Mr Powis heard the Claimant's Grievance in September 2020;
   b. Mr Mark Hall, Executive Director of Finance – Mr Hall considered the Claimant's Grievance Appeal dated 24 September 2020; and
   c. Ms Alison Ryan, HR Advisor – Ms Ryan became involved in relation to the Claimant in or around August 2019, attended Grievance Investigation meetings on 3 September 2020 and had some further involvement in the case following the outcome of the Grievance, albeit she was not involved in the Appeal process.

5. There was a single agreed Bundle of documents running to some 368 pages, supplemented in the course of the Hearing by some emails from June 2019 in relation to the 'Modatech' issue, the Respondent's Equality and Inclusion Procedure and a letter from the Claimant to Kate Williams in the Respondent's HR Team dated 11 August 2020.

6. At the heart of the claim are allegations by the Claimant that she was bullied by her Manager, Vicki Dean. Ms Dean did not give evidence to the Tribunal, though I was told she continues to be employed by the Respondent. It was not suggested that there were medical or other reasons that might explain Ms Dean's failure to give evidence. Notwithstanding her absence, it remains the Claimant's burden, on the balance of probabilities, to establish that she was constructively dismissed.

FINDINGS OF FACT

7. The Claimant submitted a detailed witness statement running to some 32 pages. Within the statement she acknowledges and explains its length. She was not challenged as regards her career history, including that during the 1980s she taught a generation of leading British footwear designers and that during her years in industry she managed and was managed by others, worked in teams and experienced challenging situations and individuals. During a career spanning over 40 years, the Claimant has never caused or been the subject of any disciplinary process, nor taken time off work for stress or related issues. I find that the Claimant is ordinarily a resilient individual and that her perception that she was bullied does not reflect over sensitivity on her part or a tendency to take offence. She was at pains to stress that she had no personal animus towards Ms Dean. In the course of giving her evidence, the Claimant actively listened to the questions asked of her, reflected, conceded various points and readily offered up that Ms Dean had a lot to offer as Subject Lead. In summary, I found her to be a credible witness, even if, as I shall come to, the available contemporaneous documents do not fully support her perception, or at least her description, of how she was treated by Ms Dean.

8. The complaint of constructive dismissal is essentially pursued with reference to the following matters:

   a. the Modatech trip;
   b. Ms Dean's actions in 2019 in questioning the Claimant's working arrangements;
   c. the allocation to the Claimant, in or around 2019 of responsibility for teaching the Contextual Studies module and, thereafter, what she alleges was a lack of support to enable her to discharge her responsibilities;
   d. Ms Dean's actions in autumn 2019 in questioning a proposed trip to Paris with students;
   e. Ms Dean's general bullying behaviour, including her conduct towards the Claimant during a meeting on 25 February 2020; and
   f. the Respondent's handling of the Claimant's 2020 Grievance

9. I accept the Claimant's unchallenged evidence, detailed at paragraphs 13 – 20 of her witness statement, regarding the circumstances in which she was persuaded to take up employment with the Respondent and about her working and lodging arrangements during the initial years of her employment, including after Ms Dean became her Line Manager in early 2019. The Respondent's template contract of employment was not amended to reflect the fact it had been agreed by Dr Julie King, on behalf of the Respondent, that the Claimant would work from home in Yorkshire most Fridays. Equally, however, as drafted, the contract was not inconsistent with such an arrangement and I can understand therefore why there was nothing on the face of the document that might have alerted the Claimant, nor indeed the Respondent, to the need for the arrangements to be further clarified. I also accept the Claimant's evidence that when she was appointed in 2015, the Footwear Course was in a poor state; there were limited student numbers and students on the course were demoralised. The Claimant brought much needed focus and expertise, leading to increased student numbers, performance and satisfaction levels, together with positive feedback from external examiners. As evidence of the high regard in which the Claimant was held, she was asked to mentor other members of staff.

10. The Claimant was initially managed by Dr Julie King, Subject Lead for Fashion. Dr King left the University in December 2018 to take up an appointment at another University. The Claimant understood from Dr King that she would be offered the role of Subject Lead on an interim basis. Whether or not this was the Respondent's intention, in the event Ms Dean assumed Dr King's responsibilities. If the Claimant was disappointed, I find that she did not manifest this in her interactions with Ms Dean. On the contrary, I find that she welcomed Ms Dean's appointment, believing that Ms Dean would bring significant organisational talents to the role. Some months later, in the context of raising concerns, she expressed the view,

> *"I can think of no one better able to run the department at this critical time"*

I accept that those sentiments were genuinely held and expressed by her.

11. The Claimant perceived Ms Dean to have a more *"vigorous and noticeable style of management"* but welcomed her more structured approach and was not troubled by her sometimes peremptory manner. The Claimant did not regard this as personal, but instead reflective of the pressures Ms Dean was operating under.

12. The Claimant perceives her relationship with Ms Dean to have deteriorated markedly not long after they returned from a business trip to India in February 2019, when she began to perceive Ms Dean as noticeably unfriendly and publicly dismissive of her, to the extent that it attracted comment from other staff members.

MODATECH

13. The Claimant complains that in 2019 Ms Dean intervened in the arrangements for students on the Footwear Course to attend a summer school course at Modatech, an Italian footwear design school. In previous years, the Claimant had organised similar trips partly using monies from an annual grant to the University from the Guild of Cordwainers. Her evidence was that suddenly, *"everything was now apparently controversial".*

14. That is not borne out by the exchange of emails from June 2019 that was added to the Hearing Bundle. Ms Dean was party to the exchange. It commenced with an email on 5 June 2019 in which the Claimant canvassed views from Ms Dean and another colleague. When the colleague put forward her thoughts she said,

"I look forward to hearing all your feedback and suggestions"

15. Ms Dean contributed to the exchange a few minutes later, asking how much the trip would cost and why three students were proposed if funding was only confirmed for two students to attend. This seems to me to be a legitimate question for Ms Dean to raise, particularly in circumstances where her feedback had actively been canvassed by two colleagues. Their ongoing exchange evidences additional feedback and increased challenge, with Ms Dean questioning how flights had been booked if she had not signed off on these and emphasising the need for these to go through the right channels. In a further email (the last in the chain provided to me) Ms Dean explained that she had to account annually for how the department used funds from the livery companies and alluded to a potential lack of transparency as to how other funds may have been used, a comment I do not understand to be critical of the Claimant rather reflecting Ms Dean's desire to explain to the Claimant why she was raising these issue when the Claimant was merely arranging the trip as she had done in previous years. I find that Ms Dean was seeking to reassure the Claimant that there was no implicit criticism of her, rather a desire on the

part of Ms Dean to ensure procedures were followed and that the University was transparent with its funders / donors.

16. Whilst Ms Dean's emails could be described as business-like rather than necessarily friendly, I do not accept the Claimant's description of them as evidencing a hostile and argumentative approach, or as the Claimant said in an email to Ms Dean dated 20 August 2019, that the emails were *"frankly aggressive".* Ms Dean's express concerns were not unwarranted since the Claimant herself accepted in her 20 August 2019 email that University procedures had not been followed. However, I find that the Claimant perceived these emails and Ms Dean's intervention at the time and over the following weeks as unwarranted and somehow personal. She came to believe that Ms Dean was questioning her judgement and felt undermined. I find that these, and other interactions between them at this time began to inform the Claimant's perception of a deteriorating working relationship and that by summer 2019 she concluded that Ms Dean was singling her out for treatment and effectively bullying her. In her 20 August 2019 email to Ms Dean the Claimant cited further matters which she felt evidenced unfair criticism of her by Ms Dean, as well as over detailed management. Although she refers to one matter in paragraph 43 of her witness statement, it was not explored further at Tribunal and I was not taken to any relevant emails. Whilst I am unable to make any specific findings in relation to those further matters, it evidences to me that the Claimant was seeking to identify what it was that had caused her to feel undermined. She was wanting to satisfy herself that there was some proper basis for how she felt.

17. At paragraph 44 of her witness statement, the Claimant alleges that by summer 2019 she, *"had clearly by then become unelected leader of the* 'Out Team'*"*. It is unclear to me how the Claimant came to this view. There is no evidence of anything said by Ms Dean to indicate or support that she had come to regard the Claimant as ring leader of a group of staff whom Ms Dean regarded as out of favour.

18. Whatever the Claimant's views at the time regarding Modatech, I note that she did not include this particular issue in her formal Grievance submitted on 20 August 2020.

THE CLAIMANT'S WORKING ARRANGEMENTS

19. At some point following Ms Dean's assumption of Dr King's responsibilities, the Fashion Department's weekly staff meeting was moved to 4pm on a Thursday. The Claimant alleges that the meetings would regularly run on for hours, hampering her ability to travel home to Yorkshire after they finished. She further alleges that Ms Dean began to schedule meetings on Fridays, her working from home day, and that during a meeting in June 2019 Ms Dean queried why the Claimant did not work on Fridays. The Claimant evidently felt Ms Dean was being disingenuous as the Claimant had specifically asked whether staff meetings might revert to the previous arrangements or, at the very least,

start earlier on Thursdays. I find that this was a further factor in her growing perception of a poor working relationship and that she was being bullied. She also heard from colleagues that Ms Dean would create a 'fuss' about her absence on Fridays, albeit she did not raise any concerns directly with the Claimant in this regard. It added to her impression that Ms Dean was being needlessly difficult and critical. She also experienced Ms Dean as creating an unnecessary 'fuss' when she was invited to speak at a panel discussion at UAL in London.

20. On 12 August 2019, Ms Dean emailed the Claimant about working from home. The Claimant refers to this email as *"cold"*. I can understand why she describes it thus, though not her further description of it as *"lofty"* and *"unpleasant"*. Whilst the Claimant acknowledged during her Grievance meeting with Mr Powis on 3 September 2020 that it may have been reasonable for Ms Dean to seek clarity in relation to her working arrangements, I find that the Claimant not unreasonably perceived Ms Dean's email as an unfriendly communication, particularly in the wider context.

21. Rather than acknowledge the reality of the Claimant's established working arrangements, which had been in place for nearly four years, Ms Dean referred to the Claimant's contract which she said made no mention of working from home. As I have noted already, the contract does not state in terms that the Claimant was expected to be present on campus five days per week. Ms Dean acknowledged that it may have been agreed with Dr King that the Claimant would work from home, but she cited the intervening move of campus and unspecified *"resulting changes"* to their way of working as meaning there was a greater need to be present on campus. Ms Dean then cited the Respondent's Working Off Premises Policy, overlooking that in the Claimant's case working from home had evidently been agreed (as she herself acknowledged). Ms Dean returned to the issue of the claimed greater need for the Claimant to be on campus and cited,

> *"in particular, the transition of the Footwear provision which will be staged and over multiple sites, this needs careful and mindfully managing to ensure a smooth transition for students".*

22. Expressed in those terms, it is unclear to me why the long-standing arrangement for the Claimant to work from home on Fridays could not continue, or why, specifically, she was required to be present on campus on a Friday. I agree with the Claimant's description in August 2019 of Ms Dean's rationale as, *"opaque".*

23. Whilst Ms Dean concluded her email by stating that she and the Claimant could discuss the matter further, she had made her views on the matter known. I understand why this added to the Claimant's perception that Ms Dean was increasingly discourteous towards her. The Claimant had been persuaded to join the University on the clear understanding that she could not commit to regular Friday attendance on campus and Ms Dean's email

lent the impression that she may be acting without good cause in a matter of considerable importance to the Claimant.

24. In the context of other interactions which had caused the Claimant to feel uncomfortable, I can again understand why the Claimant concluded that she was being bullied by Ms Dean.

25. On 20 August 2019, the Claimant sent a detailed email to Ms Dean setting out her concerns. She started by reiterating her unqualified support for Ms Dean. The focus of her email was the immediate issue of her working arrangements, though she went on to detail what she felt was a deterioration in their working relationship. Citing the matters referred to above, she identified Ms Dean's conduct as bullying and that she found it very distressing to deal with.

26. The Claimant and Ms Dean met on 23 August 2019. Ms Ryan also attended the meeting. I accept the Claimant's evidence that Ms Dean took issue with the various concerns being raised and find that the Claimant experienced this as Ms Dean being dismissive of her concerns. In the course of the meeting Ms Dean complained that the Claimant was not sufficiently *"available"*. There is no evidence in the Hearing Bundle that Ms Dean had voiced any concerns in this regard to the Claimant prior to 23 August 2019, and her complaint does not readily fit with what she wrote to the Claimant in her email of 12 August 2019. The Claimant's "availability" or otherwise was not put forward in that email as a reason why her working arrangements were under review. I accept the Claimant's evidence that Ms Dean claimed during the meeting to have only recently become aware of the Claimant's working arrangements and further accept without reservation the Claimant's explanation as to why this could not be the case. The Fashion Department was a small department of seven staff and the Claimant's working arrangements were widely known and openly discussed, including the fact the Claimant lodged with a colleague Monday to Thursday. The fact that she worked from home was noted in her calendar which was available on a group share basis, an initiative introduced by Ms Dean following Dr King's departure. I accept that the Claimant was in the habit of making comments to the effect, *"see you next week"* at the end of the Thursday staff meetings. I find that Ms Dean was fully aware of the Claimant's established and agreed working arrangements, but for some reason became irritated with them when the Claimant was not immediately available or contactable on one occasion. The fact she reacted as she did in such circumstances is revealing in terms of Ms Dean's attitude and approach towards the Claimant, and I find it is consistent with bullying. Having acted, as I find, arbitrarily in the matter of the Claimant's working arrangements, I find Ms Dean made matters worse by how she conducted herself on 23 August 2019.

27. I also accept the Claimant's evidence that she was seemingly singled out for treatment and, for example, that another member of staff in the department who worked from home on Mondays did not have her arrangements questioned in the same way that the Claimant did.

28. In the event, the issue of the Claimant's working arrangements was resolved by her submitting a flexible working request which was then granted. I agree with the Claimant that this was unnecessary in circumstances where the arrangements had been in place a number of years since the start of her employment with the Respondent. I have come to the conclusion that Ms Dean was needlessly asserting her authority on an issue where there was no reason for her to do so and without proper regard to the detrimental impact upon the Claimant. It served to create a hostile environment and avoidable stress for the Claimant.

CONTEXTUAL STUDIES

29. In summer 2019, prior to their meeting regarding the Claimant's working arrangements, the Claimant and Ms Dean met to discuss her workload for the forthcoming academic year, 2019 / 20. Budget cuts meant that Visiting Lecturers would no longer be employed and the Claimant was therefore anticipating taking on the responsibilities of the Visiting Lecturer for Pattern Cutting. The Claimant alleges that she was told instead by Ms Dean that she would be taking over all three years of the stand-alone Contextual Studies course, with the result that her teaching hours on the second year Footwear Course would be cut from 34 to 7.

30. Contextual Studies was part of the overall curriculum for the Fashion Department, meaning that the Claimant would be teaching students across all subject areas in all three years. The Claimant has an MA in Footwear Manufacture and Technology. She regards herself as a specialist in leather and footwear, rather than a generalist, and she was not entirely confident therefore of her suitability for the task. Ms Breslin took the Claimant to a comment in her formal Grievance that she *"relished the challenge"*. However, that fails to reflect the full context, since the Claimant set out in some detail in the preceding passages of the Grievance why she felt aggrieved in the matter, having regard to her suitability, the workload involved, a lack of readily available course content, challenges around assessments, a lack of additional support from colleagues, issues around delegation and the knock on effect on students on the Footwear and Accessories course.

31. The Claimant's point is that once it was clear that she would be expected to teach Contextual Studies, she threw herself into the task notwithstanding the challenges and even if she believed others were better suited to the task. During her Grievance meeting on 3 September 2020, the Claimant told Mr Powis that the issue was not the workload, rather her suitability and what was best for students. However, that comment also has to be understood in its proper context, namely the Claimant clearly describing being under pressure, working weekends and that the quality of her specialist module was slipping. I find the Claimant's comment that the issue was not the workload reflects her professionalism and dedication to her students and that she put their experience ahead of her own needs in

the matter. I accept her evidence that the workload was in fact excessive, that her colleagues were not always supportive, that the tutoring and marking lacked specialist input, and that the Claimant perceived she was not listened to when she raised concerns.

32. By early 2020, the Claimant was experiencing work related stress, exacerbated by her perception that she was being bullied by Ms Dean. The Claimant accepts in terms of her contract of employment that she was required to work flexibly and that the makeup of her duties was a matter for the Head of Department in consultation with her. Her complaint, however, when she raised her Grievance was that she had been assigned an excessive workload and that she was unsupported, indeed obstructed, in performing the role.

THE PARIS TRIP

33. Towards the end of 2019, the Claimant learned that the Musée des Arts Décortifs Paris was to hold an exhibition covering the history of shoes called, "Marche et Démarche". It coincided with Premier Vision, an annual global event for fashion professionals.

34. Throughout the Claimant's employment with the Respondent there had been an annual student trip to Premier Vision. Mindful of Ms Dean's concerns in relation to Modatech, the Claimant requested that a sum of £1,500 that was ring fenced for Trade Fair visits should be divided between the five fashion students to support their attendance.

35. The Claimant alleges that this was *"peremptorily rejected"* by Ms Dean without obvious good reason. This led the Claimant to believe that Ms Dean was simply making a point. It is difficult to reach a clear view from the emails in the Hearing Bundle, though, as the Respondent itself accepts, the discussions were protracted over a period of two or three months. Such a delay, in the context of a relatively modest amount of money and in circumstances where students had been financial supported in previous years, called for some explanation. In his decision on the Claimant's Grievance, Mr Powis stated that he could not find any evidence of deliberate obstruction, rather that,

> *"caution, workload, Christmas and personal issues played a part".*

ALLEGED BULLYING

36. The Claimant met with Ms Dean on 25 February 2020 to discuss her concerns in relation to Contextual Studies. She emailed Ms Dean prior to the meeting summarising concerns and referred to a *"huge strain"* on her workload. Her email concluded with her requesting to be given sufficient hours the next year to run the Footwear Course properly and that one or more of the Contextual Studies modules should be taken off her to allow for this.

37. As to what transpired at the meeting on 25 February 2020, I have the Claimant's account in her witness statement and about which she was cross examined. As noted already, Ms Dean did not give evidence. As I shall come to, Ms Dean was barely asked about the matter by Mr Powis in the course of his Grievance Investigation. I have an email that Ms Dean sent the Claimant on 26 February 2020 following the meeting (pages 129 and 130 of the Hearing Bundle) that references what she said had been discussed between them.

38. I accept the Claimant's evidence that Ms Dean indicated during the meeting that she was under pressure of time, that she did not have the Claimant's proposed Agenda to hand, that her laptop remained closed throughout the meeting and that she did not take any notes. That said, Ms Dean's email of 26 February 2020 indicates she came away from the meeting with an understanding of the Claimant's concerns.

39. Notwithstanding Ms Dean's subsequent email of 26 February 2020, I accept that, as when they had met on 20 August 2019, Ms Dean was not receptive to the Claimant concerns and gave the impression that she was not actively listening to what the Claimant had to say. The Claimant experienced this as her concerns being dismissed out of hand and it reinforced her established sense of grievance as to the way she was being treated by Ms Dean. I accept that when the Claimant tried to explain that she was struggling, she experienced Ms Dean as increasingly cold, indeed seemingly angry. I further accept the Claimant's evidence that when she began crying, Ms Dean's response was not to soften her tone or show empathy or concern, instead I accept she said,

"I knew we should have had the meeting in a private office".

40. I find that the Claimant is not someone who is prone to tears. I conclude that her tears on 25 February 2020 were an expression of distress rather than a defensive response on her part.

41. I have come to the conclusion that Ms Dean recognised that she had not conducted the meeting appropriately and that she sought to retrieve the situation the following day with a more conciliatory response that engaged with the Claimant's concerns.

42. I do not agree with the Claimant's description of Ms Dean's email of 26 February as dishonest, unhelpful and patronising. It was business-like and factual, even if it lacked warmth, though I can understand why the Claimant might have viewed it as self-serving insofar as it evidenced a concern that had seemingly been lacking during their meeting the previous day. The Claimant's concerns were further reinforced when she spoke to a colleague who contradicted at least one aspect of Ms Dean's email.

43. On or around 28 February 2020 (the Fit Note at page 133 of the Hearing Bundle is not entirely legible in this regard), the Claimant consulted her GP who diagnosed her with a stress related disorder and offered her

antidepressant medication, which the Claimant declined. She was initially signed off work for two weeks.

44. The Claimant resolved to pursue a formal Grievance. However, global events intervened; on 20 March 2020 the University announced that it had effectively entered lockdown and all teaching went online. This coincided with the end of the Claimant's Fit Note. I can understand why, during what was an unprecedented time, and given her dedication to her students, that the Claimant decided not to take any immediate further action. She was working from home and no longer in daily contact with Ms Dean and it is understandable therefore, why she stepped back from pursuing a grievance.

45. The Claimant relies upon two further specific matters as evidence that she was being bullied by Ms Dean. She complains that during the Paris trip, Ms Dean did not respond to 'tweets' on Twitter in which the Claimant had posted pictures and updates about the trip, until the Claimant posted a photograph of a large pair of shoes outside the Exhibition. Ms Dean had responded to the Claimant's observation,

> *"Why can't we make shoes this big!"*

with the comment,

> *"Why can't you? As creatives you can do anything you want!"*

46. That comment could be seen as supportive in the sense of a 'call to arms' to students to have the self-confidence to realise their full potential. I accept that the Claimant perceived it otherwise given Ms Dean's apparent failure to comment on or re-tweet other tweets during the trip, and against the backdrop of delay in securing approval for the funding for the trip. IN the absence of hearing evidence from Ms Dean I do not have the benefit of her first-hand account of the reasons she may not have responded to earlier tweets, for example, whether she was on leave or simply dealing with pressures of work.

47. Similarly, I do not have the benefit of Ms Dean's first-hand account as to the timing and content of tweets in June 2020 that the Claimant felt undermined her efforts to celebrate particular student successes. Equally, however, the precise nature of the Claimant's complaint was difficult to discern from her evidence.

THE GRIEVANCE

48. By June 2020, the Respondent had brought forward proposals to restructure the Fashion Department, having already suspended 2020 entry onto the Footwear Course in April 2020. The Respondent's plan was to remove 0.4 FTE academic posts as part of a wider proposal to remove 9.7 FTE posts across the organisation. The Claimant and her colleague were

placed at risk of redundancy. The proposal was for just one full-time post entitled Senior Lecturer in Footwear and Accessories.

49. Formal consultation commenced on 25 June 2020. The Claimant and her colleague proposed a job share on the basis her colleague would continue as a 0.4 FTE and the Claimant would reduce to 0.6 FTE (3 days). The Respondent confirmed its agreement to their proposal on 11 August 2020 and accordingly that the Claimant and her colleague would no longer be at risk of redundancy. The Claimant was issued with a contract of employment to sign. In its covering letter of 11 August 2020, the Respondent referred to *"this change"* being effective from 1 September 2020. Notice of termination of employment was never issued to the Claimant and there is no reference in the Respondent's letter of 11 August 2020 or elsewhere to the Claimant's employment under her existing contract having been terminated.

50. Before she signed the contract issued on 11 August 2020, the Claimant asked to meet with Kate Williams, Deputy Dean to discuss her ongoing concerns. Ms Williams suggested that Ms Ryan attend as she had been present at the meeting on 23 August 2019.

51. When they met on 19 August 2020, the Claimant requested a change of Line Manager and was told by Ms Williams that the only way to achieve this outcome (by which, I find, she meant as a temporary measure) would be to raise a Grievance. Ms Ryan suggested workplace mediation in the alternative. When the Claimant was informed that mediation was to facilitate mutual understanding and would not result in the Claimant no longer being line managed by Ms Dean, she resolved, having reflected further on the matter, that she would pursue a formal Grievance. Her Grievance was submitted on 23 August 2020 and only having done so, on 1 September 2020, the Claimant then signed the contract she had been sent by the Respondent to give effect to the reduction in her hours and change to her job title.

52. I am critical of the way the Grievance was handled. Neither Mr Powis nor Mr Hall were particularly impressive witnesses, though in fairness to Mr Powis, he ultimately recognised why criticisms could be made of the process. Mr Hall showed no such reflection or insight.

53. In summary, my criticisms in relation to Mr Powis' investigation are as follows:

    53.1 He approached the investigation on the basis that it was one person's word against another and, in the final analysis, that it was for the Claimant to prove her case, overlooking that he had a responsibility as the investigating manager to undertake a reasonable investigation which might involve speaking with others and / or verifying aspects of the parties' respective accounts by reference to contemporaneous documents and records.

53.2 He proceeded on the basis that it was reasonable for Ms Dean, as the Claimant's Line Manager, to review and challenge her working arrangements without probing further as to her timing or potential motives. He accepted, without challenge, Ms Dean's account that she had reviewed others' working arrangements without seeking to establish who she was referring to, when this had happened or how those other cases had been dealt with, to enable him to reach an informed view as to whether the Claimant was being bullied. Critically, in my view, he failed to examine the reasons why Ms Dean had proposed that the Claimant should have an increased presence on campus. As the Claimant said in her Grievance,

> *"One of the most significant matters about this incident was the fact that it had no basis at all in any reality concerning the job I do, or the education of the students, or the effective administration of the University."*

The Claimant was alleging that she was being bullied. In the circumstances, the fact that her Manager had the right to review and challenge her working arrangements begs the question why she had done so in the Claimant's case and whether she was being consistent in her approach. This was barely considered by Mr Powis and certainly not tested with Ms Dean.

53.3 During cross examination, Mr Powis acknowledged that the Claimant's description of the meeting on 25 February 2020 was potentially an account of bullying behaviour. Given Mr Gorasia's persistent efforts to secure that acknowledgement, I am not confident that Mr Powis recognised this in September 2020, rather that from the outset he simply viewed the meeting as "unfortunate" and that each participant had found it unpleasant. Again, under cross examination he accepted that the fact the Claimant was saying she had become tearful for possibly the first time in her professional career and had been made ill, required more careful investigation.

53.4 He failed to ask Ms Dean when she first became aware of the Claimant's working arrangements notwithstanding the Claimant's point that the timing was inexplicable and was therefore evidence of bullying.

53.5 He failed to consider whether Ms Dean's action in challenging the Claimant's established working arrangements provided evidence of bullying, insofar as it might indicate Ms Dean was raising concerns unnecessarily and exercising her authority in order to make the Claimant feel uncomfortable. This seems never to have occurred to Mr Powis, notwithstanding the Claimant said during her Grievance meeting with him there was no need for it to happen. On the contrary, the fact the arrangements were subsequently agreed and continued in place, notwithstanding the evident stress caused to the

Claimant, seemingly provided evidence to Mr Powis that Ms Dean had not bullied the Claimant. Mr Powis failed to grasp the point at the time and initially at Tribunal. Even once he understood the point at Tribunal, his position was that he did not see it as an unnecessary challenge albeit he did not explain why. His evidence was that he assumed anyone in Ms Dean's position would look at staff working arrangements. That rather misses the point.

53.6 He failed to speak to Jane Schaffer or Caroline Southernwood for their perspective in relation to the Paris trip. The fact the expenses were approved and the trip went ahead was what mattered to Mr Powis. He failed to grasp the point at the time and initially at Tribunal, before conceding that they might each have provided insight to the matter. At Tribunal he went on to acknowledge that he could understand why it could be said he had answered the wrong question insofar as his focus was on whether or not the expenses for the trip had been approved.

53.7 He failed to look into whether the Claimant was 'under hours', which the Claimant told him was the reason offered by Ms Dean when the Claimant had questioned being allocated Contextual Studies. Indeed, during his interview with Ms Dean on 3 September 2020, she said the Claimant was, *"way under hours"*. This was disputed by the Claimant. When pressed by Mr Gorasia as to whether it had been incumbent upon him to investigate this further, Mr Powis acknowledged the point being made but said it was the right of the Subject Lead to allocate these duties to the Claimant. As with Ms Dean's challenge to the Claimant's working arrangements, Mr Powis missed the point. Given the Claimant considered she was being bullied, he ought to have considered the effect of her actions on the Claimant. Furthermore, in his outcome letter he failed to address the issue of whether the Claimant had been consulted.

53.8 He failed to consider why, early in his meeting with Ms Dean, she had made allegations regarding the Claimant's alleged conduct in her interactions with others. He said he regarded her comments as irrelevant without considering whether they potentially evidenced an animus towards the Claimant or were otherwise a crude attempt by Ms Dean to deflect attention from her own behaviour.

53.9 He failed to review the shared calendars to see if these potentially evidenced that Ms Dean was in fact aware of the Claimant's working arrangements some months before she challenged them. He acknowledged this would have been a very easy matter for him to check.

53.10 As regards the disputed meeting on 25 February 2020, at which it was accepted by Ms Dean that the Claimant had become upset and following which she had gone sick, Mr Powis barely explored this

matter with Ms Dean. The extent of their documented discussion in his three page detailed minutes is as follows,

> *"VD said that CH was visibly upset and kept leaning forward in quite an aggressive way, VD suggested that they reconvene when CH was less stressed, but she then went off sick"*

I find this evidences an inadequate investigation into a key meeting that the Claimant was saying had caused her to become ill and which had ultimately triggered her Grievance. Mr Powis failed to put the Claimant's account of the meeting to Ms Dean. His explanation for this was that there were no witnesses to corroborate what had happened at the meeting. I do not understand how that explains his failure to put the Claimant's account to Ms Dean as a minimum. He told the Tribunal he did not believe or disbelieve either side. I consider that to have been an abdication of his responsibility to consider the evidence and come to a conclusion. It equates to him saying that he found it too difficult to get to the truth of the matter. He accepted towards the end of cross examination that he had failed to analyse the matter or make specific findings.

53.11 Mr Powis refers in his witness statement to Ms Dean having alleged during their meeting on 3 September 2020 that the Claimant may have made some unpleasant comments back to her. In fact, as he acknowledged under cross examination, Ms Dean made no such allegation. As noted in paragraph 54.10, she said the Claimant had leaned forward in an aggressive way. Not only therefore did Mr Powis fail to explore adequately with Ms Dean what had happened on 25 February 2020 and fail to put the Claimant's account to her, he misinterpreted Ms Dean's limited comments about the Claimant's body language as evidence that the Claimant had made unpleasant comments towards Ms Dean. It reinforces my view that he approached the matter on the basis it was 'six of one and half a dozen of the other'. Mr Powis acknowledged at Tribunal that it had been his responsibility to explore this issue with Ms Dean but that he had failed to do so. He compounded his error by failing to deal with the allegation in the Grievance outcome letter.

53.12 He failed to investigate the extent, if at all, to which Ms Dean had consulted the Claimant before allocating Contextual Studies to her.

53.13 He failed to examine critically Ms Dean's stated objection to the Claimant's proposal that Ms Dean should no longer line manage her. He acknowledged during cross examination that the only evidence in this regard was a single email evidencing, at most, minor irritation on the part of Ms Dean in September 2020, when she realised from an out of office message that the Claimant was not working that day. He accepted it was a relatively minor issue, yet accepted it at the time as evidence that any such arrangement

would not work in practice as it would muddy communication and potentially put the designated Line Manager into a position of conflict with Ms Dean as Subject Lead.

53.14 He understood that in order for bullying to be established, there must be a deliberate intent to target someone. That does not reflect the widely accepted definition of bullying, nor indeed the Respondent's own policy which Mr Powis readily conceded he had not consulted.

53.15 He did not share the minutes of his meeting with Ms Dean with the Claimant, or at the very least revert to the Claimant to secure her comments on any issues arising from their meeting. It was only in the outcome letter that the Claimant learned for the first time that Ms Dean had made comments that were critical of her conduct towards others.

THE GRIEVANCE APPEAL

54. The shortcomings above were not rectified on appeal. The documentation evidences that when the Claimant and Mr Hall met on 8 October 2020 for the Appeal Hearing the Claimant was able to elaborate upon her grounds of appeal. However, other than a few isolated comments, Mr Hall asked just two or three questions of the Claimant. He did not follow up the meeting by investigating any of the issues raised on appeal notwithstanding he had the power to do so. He never spoke to Ms Dean. His decision on the Appeal is confirmed in a two-page letter (pages 287 and 288 of the Hearing Bundle). I would describe it as evidencing a broad brush approach. For example, Mr Hall said that he understood the Claimant's concerns as to how Mr Powis had approached the Grievance, but that he deemed the outcome letter to have effectively distilled and summarised the issues. With those comments he effectively dismissed the Claimant's detailed concerns as to why she felt Mr Powis had failed to deal with her Grievance appropriately. I find that Mr Hall was reluctant to be drawn into the detail of the Grievance or the Appeal, preferring a high level approach. That is further evidenced by how he structured his decision; it does not follow either the structure of the Appeal or Mr Powis' Grievance outcome letter. The shortcomings in that approach are evidenced for example in relation to the 25 February 2020 meeting which, again, was not addressed. In effect, Mr Hall glossed over the issues.

55. I would make the following further observations in relation to the Appeal:

55.1 In response to a question from Mr Gorasia, Mr Hall accepted that a hostile working environment can be created even though this may not be deliberate or malicious. He was then taken to his decision on the complaint that Ms Dean had unnecessarily challenged the Claimant's working pattern, in which he had stated that there was no evidence to suggest it was deliberate or malicious on Ms Dean's part. He could not or would not acknowledge that, as Mr Powis

had, he seems to have approached his task with the understanding that bullying necessarily involves deliberate or malicious conduct.

55.2 Mr Hall conceded that Mr Powis had failed to address the meeting on 25 February 2020 in his outcome letter. He acknowledged that the Claimant had complained that, "*No consideration at all has been given to these detailed matters and I was reduced to tears in public and made seriously unwell*". He was also referred to various minutes including a lengthy section at page 275 of the Hearing Bundle in which the Claimant described being in tears in public and being made unwell. Like Mr Powis, he failed to meaningfully engage with the question of what had happened during the meeting on 25 February 2020. It is not referred to in the Grievance Appeal outcome letter. He said in his evidence that he accepted the Claimant had become distressed during the meeting, but I find he did not actively turn his mind to why she was distressed. He made the same mistake that Mr Powis did, namely, to regard it as simply one person's word against another's. At the time, he observed, *"it is difficult to see it through evidence"*.

55.3 Mr Hall failed to follow up when the Claimant indicated there were potential witnesses, albeit they would have to "put their heads above the parapet". He did not offer to speak to them in confidence, or discuss with the Claimant how else they might be supported to speak up, nor did he follow the matter up in writing with the Claimant before he made his decision on the Appeal. The fact potential witnesses were said to be reluctant to speak up for him meant that this particular avenue of enquiry was closed.

55.4 Mr Hall was referred to the Claimant's concerns regarding what she described as Ms Dean's "*entirely unsupported allegations*" regarding the Claimant's own alleged behaviours. He acknowledged that he had not given thought to providing the notes of Mr Powis' interview with Ms Dean to the Claimant regardless of whether or not she had asked for them. He failed to follow up when the Claimant told him that Ms Dean and others had asked her to act as a mentor to others, something she felt would not have happened if, as Ms Dean was suggesting, she was difficult.

55.5 Mr Hall acknowledged that he did not follow up with Ms Williams to establish whether she had told the Claimant that the only way to secure a change of line manager was to submit a Grievance.

LAW and CONCLUSIONS

56 Subject to any relevant qualifying period of employment, an employee has the right not to be unfairly dismissed by her employer - Section 94 of the Employment Rights Act 1996.

57 Dismissal for these purposes includes where the employee terminates a contract under which she is employed, with or without notice, in circumstances in which she is entitled to terminate it without notice by reason of the employer's conduct - Section 95(1)(c) of the Employment Rights Act 1996. I return to this in view of Ms Breslin's submissions as to the effect of this section in terms of an employee's ability: (a) to resign in response to breaches of an earlier contract between the parties (notwithstanding their continuing employment relationship); and (b) to rely upon the employer's cumulative actions under the 'last straw' doctrine where reliance is placed upon matters occurring prior to a new contract being entered into.

58 The Claimant claims that she resigned by reason of the Respondent's conduct. It is not every breach of contract that will justify an employee resigning their employment without notice. The breach must be sufficiently fundamental that it goes to the heart of the continued employment relationship. Even then the employee must actually resign in response to the breach and not delay unduly in relying upon the breach in bringing the employment relationship to an end.

59 Section 95 of the 1996 Act recognises that an employee may elect to resign on notice. What is important is that the employer's conduct must be such as to warrant summary termination. In this case the Claimant resigned on notice. Though not strictly necessary given the wording of section 95, I am satisfied that she resigned on notice because she believed this would minimise any adverse impact upon her students. She continued to put their interests and experience first.

60 In resigning, and I refer in this regard to page 289 of the Hearing Bundle, the Claimant cited both how the grievance procedure had been handled and "other matters concerning my employment". It is clear elsewhere in the letter, but in any event I accept her evidence in this regard, that this is a reference to the substantive matters raised within the grievance and that these are pursued as claimed breaches of the implied duty of trust and confidence.

61 It is an implied term of all contracts of employment that the parties will not, without reasonable and proper cause, conduct themselves in a manner calculated or likely to destroy or seriously damage the essential trust and confidence of the employment relationship. This stems from the well known decision of Malik v Bank of Credit and Commerce International SA [1997] UKHL 23.

62 In the context of an employer's ability to dismiss for alleged breach of trust and confidence, it has been observed that the implied term is not a mantra that can be relied upon whenever an employer is faced with difficulties in establishing more conventional reasons for dismissal. The same is true where an employee resigns. It is not a convenient label to be placed on any situation. In Frenkel Topping Limited v Ms G King UKEAT/0106/15, a case in which an employer was found to have discussed with an

employee's son, without her knowledge, her performance and ability to do the job, the EAT emphasised the high threshold that is required to establish a breach of trust and confidence. The test, the EAT said, is demanding and stringent.

63 In my findings above I have identified that Ms Dean acted arbitrarily and unreasonably in June 2019 in challenging the Claimant's established working arrangements, in writing to the Claimant in the terms she did, and by effectively compelling the Claimant to pursue a flexible working request unnecessarily. Whilst Ms Dean was entitled under the terms of the Claimant's contract to allocate the Contextual Studies modules to the Claimant, I consider that she acted without reasonable and proper cause in the matter, effectively brushing aside the Claimant's concerns and failing to put in place the support reasonably required by the Claimant in order to discharge her responsibilities effectively, leading the Claimant to become overworked and stressed. Furthermore, I consider that Ms Dean's treatment of the Claimant on 25 February 2020 was without reasonable and proper cause, that she was dismissive of the Claimant's concerns and then cold and indifferent, indeed passively aggressive, when the Claimant became distressed. In my judgement, Ms Dean's actions, of themselves or in combination, were such that the Claimant could no longer have continued trust and confidence in the Respondent as her employer.

64 I further consider that the Respondent acted in breach of trust and confidence in terms of how it handled the Grievance and Grievance Appeal. I briefly mention two decisions in relation to the handling of grievances. In WA Gould (Pearmak) Limited v McConnell & Anor [1995] IRLR 516 EAT, the Employment Appeal Tribunal held it was an implied term of a contract of employment that the employer will reasonably and promptly afford a reasonable opportunity to its employees to obtain redress of any grievance they may have. That was then subsequently followed in Hamilton v Tandberg Television Limited [2002] UKEAT, in which the EAT suggested that the Gould case might be of limited scope because the Gould case had involved circumstances where no procedure had been made available to employees, whereas in Hamilton the criticism was of the quality of the employer's investigation which was considered to meet the standard of the "band of reasonable responses".

65 The Respondent's Grievance Policy is expressly stated not to confer contractual rights or to form part of an employee's contract of employment. Be that as it may, for the reasons outlined in paragraphs 54 to 56 above, the Grievance and Grievance Appeal process were respectively handled by Mr Powis and Mr Hall in a way that fell some way short of what might reasonably be expected of a fair and reasonably minded employer acting within the band of reasonable responses and seeking to maintain essential trust and confidence.

66 An employee will be regarded as having accepted an employer's repudiation only if their resignation has been caused by the breach of

contract in question. It is plain to me that the Claimant did not leave the Respondent's employment voluntarily.

67 Where an employee leaves a job as a result of a number of actions by the employer, not all of which amount to a breach of contract, she can nevertheless claim constructive dismissal providing the resignation is partly in response to a fundamental breach. That was made clear by the Court of Appeal in the case of Meikle v Nottinghamshire County Council [2004] IRLR 703. According to the Court of Appeal, once an employer's repudiation of the contract has been established, it is for the Tribunal to ask whether the employee has accepted that repudiation by treating the contract of employment as at an end.

68 The fact that an employee has objected to other actions or inactions by the employer, that did not amount to breaches of the contract, does not vitiate the acceptance of the repudiation. It is enough that the employee resigns in response, at least in part, to the employer's fundamental breach of contract. Which is what happened here. I refer to the letter of resignation in this regard.

69 The next question is whether the Claimant may have waited too long after some or all of the breaches of contract before she resigned and whether she might be taken to have affirmed the contract. In Western Excavating (ECC) Limited v Sharp [1978] IRLR 27, the House of Lords said that an employee must make up their mind soon after the conduct about which they complain and that if they continue in employment for any length of time without leaving they may lose the right to treat themself as dismissed.

70 The issue is principally one of conduct rather than passage of time. I draw support in that regard from the decision of the Employment Appeal Tribunal in Chindove v William Morrisons Supermarket Plc UKEAT/0201/13/BA. According to Mr Justice Langstaff what matters is whether in all the circumstances the employee's conduct has shown an intention to continue in employment rather than resign and that the employee's situation must be considered as part of the overall circumstances. The more serious the consequences for an employee, the longer they may need to take before reaching a decision. According to Mr Justice Langstaff, another important fact is whether the employee was actually at work in the interim. Where an employee is on sick leave at the relevant time, it may not be so easy to infer that they have decided not to exercise their right to resign.

71 Having raised concerns initially in August 2019 regarding the difficulties she was experiencing in her working relationship with Ms Dean, I conclude that the Claimant resolved to continue in the Respondent's employment. I think it particularly relevant in this regard that the Claimant took legal advice on her situation (as confirmed in her email of 20 August 2019). It is reasonable to infer that she was advised then as to the potential courses of action available to her. Whether or not she took further legal advice following the meeting on 23 August 2019, in my judgement she affirmed

the relationship. For better or worse, she threw herself back into her work and embraced her new responsibilities.

72 Ms Dean's conduct on 25 February 2020 amounted to a further repudiatory breach. The Claimant was on sick leave immediately following these events and, with effect from 20 March 2020, she was working and tutoring remotely with relatively few interactions with Ms Dean. She finally progressed her concerns in August 2020 once it became clear that she would not be made redundant and that a return to the workplace, including face to face interactions with Ms Dean, was likely that autumn. In my judgement she did not affirm the contract or waive her right to resign notwithstanding nearly six months had elapsed by the time she filed her grievance, nor in my judgement did she do so by agreeing to a reduction in her hours and change to her job title in order to mitigate the risk of redundancy. In my judgement, the contract issued to the Claimant in August 2020, which she signed on or around 1 September 2020, constituted an amendment to her existing contract of employment even if a new contract, using the University's latest template form agreement, was issued for her to sign. Her status and remuneration as a Senior Lecturer, and her essential job responsibilities were essentially unchanged.

73 In any event, whilst an employee's actions in agreeing a variation to their contract or entering into a new contract may provide evidence that the employee has affirmed the employment relationship, it does not do so here. In submitting a grievance before agreeing to the changes embodied in the contract the Claimant reserved her rights.

74 In the circumstances, whilst it may not be strictly necessary for me to reach any conclusion on Ms Breslin's first and second submissions (developed in detail under three numbered submissions at paragraphs 15 to 21 of her skeleton argument, and in her oral submissions at Tribunal), namely that where an employee accepts continued employment with an employer under a new contract the effect of s 95 of the 1996 Act, confirmed also by case law, is that the Claimant is precluded from relying upon any breaches of contract committed by the Respondent under any previous contract governing their relationship, nevertheless I do not agree with the submissions. Putting aside whether the submissions potentially offend against the statutory prohibition in s203 of the 1996 Act, I do not read paragraph 43 of Lord Justice Underhill's Judgment in Kaur v Leeds Teaching Hospitals NHS Trust [2018] EWCA Civ 978 as Ms Breslin does (paragraphs 2 and 15 to 17 of her skeleton argument). At paragraph 43 of his Judgement, Underhill LJ cited a passage from Lord Justice Glidewell's Judgment in Lewis v Motorworld Garages Ltd [1986] ICR 157 in which the latter referred to an employee "… who does not leave and accepts the altered terms of employment". He went on to answer in the affirmative the question whether such an employee (who has accepted altered terms of employment) can nevertheless rely upon the employer's original actions (presumably under the previous terms of employment) in combination with its more recent actions as cumulatively amounting to a breach of the implied term of trust and confidence. In Motorworld Garages, Mr Lewis

was demoted, lost the use of an office to himself, was given a smaller car for business use, saw his responsibilities reduced, had his salary structure changed and did not receive the increase in salary which others did. Notwithstanding these unilateral changes to his terms of employment which effected a significant change to the relationship between the parties, Mr Lewis was later able to rely upon them when he resigned his employment.

75 Although Underhill LJ said in Kaur that it was apt to refer to an employer's further acts as 'reviving' an employee's right to terminate, in a last straw case the focus is still on the immediate events that have triggered the resignation, albeit viewed through the prism of what has gone before which may explain why the last straw, though not of itself a repudiatory breach, sufficiently evidences an employer who no longer intends to be bound by the essential obligations of the contract. Underhill LJ cited Dyson LJ's Judgment in London Borough of Waltham Forest v Omilaju [2004] EWCA Civ 1493, in which Dyson LJ had approved the following formulation in Harvey on Industrial Relations and Employment Law:

> "[480] Many of the constructive dismissal cases which arise from the undermining of trust and confidence will involve the employee leaving in response to a course of conduct carried on over a period of time. The particular incident which causes the employee to leave may in itself be insufficient to justify his taking that action, but when viewed against a background of such incidents it may be considered sufficient by the courts to warrant their treating the resignation as a constructive dismissal. It may be the "last straw" which causes the employee to terminate a deteriorating relationship."

"It", namely the 'last straw' warrants resignation because it can only be understood in the context of what has gone before in the relationship, regardless of the contractual arrangements in place between the parties from time to time.

76 Ultimately, the point may be an academic one, since in my judgment the Respondent's handling of the Grievance process through to conclusion of the Appeal was in fundamental breach of contract, entitling the Claimant to resign her employment. These breaches all occurred after the Claimant had signed the contract giving effect to the variation in her hours and job title. They were not waived by her, on the contrary she resigned promptly on receipt of the Grievance Appeal outcome having exhausted her appeal rights. Ms Breslin places emphasis on the Grievance Appeal outcome as the 'last straw' and analyses the case on that basis. Whilst the Claimant's List of Issues refers to the Grievance Appeal outcome as the last straw, in fact it is clear from paragraph 3 of the Claimant's List of Issues that the Claimant additionally relies upon the Respondent's conduct of the Grievance and Grievance Appeal, in each case, as a fundamental breach of contract. I am satisfied that the Claimant relies upon the last straw

doctrine in the alternative, but that her primary contention is that this is a case that falls within the ambit of the "whole extra bale of straw" referred to at paragraph 46 of Underhill LJ's Judgment in Kaur, namely one that of itself breaks the proverbial camel's back. In my judgement, this is such a case.

77 In all the circumstances, I conclude and it is my Judgment that the Claimant was dismissed for the purposes of Section 95(1)(c) of the Employment Rights Act 1996. There was no reason for the Respondent to treat her as it did, certainly no reason within the ambit of Section 98(2) of the 1996 Act. As I have noted already, the Respondent acted in this matter without reasonable and proper cause. In the circumstances, I conclude that she was unfairly dismissed.

78 The case will be listed for a Remedy Hearing, notice of which will follow in due course, together with case management orders for the Hearing.

25 March 2022

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Employment Judge Tynan

Sent to the parties on:…….....

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For the Tribunal Office