EMPLOYMENT TRIBUNALS

Claimant: Miss D Fenton

Respondent: Tameside College

Heard at: Manchester **On:** 21-22 March 2022

Before: Employment Judge Phil Allen (sitting alone)

REPRESENTATION:

Claimant: In person
Respondent: Ms R Kight, counsel

JUDGMENT

The judgment of the Tribunal is that:

1. The claimant was not dismissed as she did not terminate her contract in circumstances in which she was entitled to terminate it by reason of the respondent's conduct, as provided by section 95(1)(c) of the Employment Rights Act 1996.

2. The claim for unfair (constructive) dismissal does not succeed and is dismissed.

REASONS

Introduction

1. The claimant was employed by the respondent from 5 January 2005 until 2 April 2021, latterly as a Progress Tutor. The claimant resigned on notice on 5 March 2021. The claimant contends that she was constructively dismissed. The respondent denies that she was dismissed and contends that, if she was, the dismissal was fair by reason of conduct or some other substantial reason.

Claims and Issues

2. A list of issues had not been prepared prior to the hearing. At the start of the hearing the issues to be determined were identified and agreed. Those issues are detailed at paragraphs 3 to 12 below.

3. Can the claimant prove that there was a dismissal?

4. The claimant contends that there was a fundamental breach of her contract by the respondent, relying upon a breach of the duty of trust and confidence. The following things are contended to be, either collectively or individually, such a breach. These were confirmed with the claimant at the start of the hearing:

   a. The way the claimant was addressed on 6 January 2021;

   b. The way that the grievances raised by the claimant were addressed;

   c. The conduct of the meeting on 15 March 2021;

   d. Redeployment was refused; and

   e. Not finding other reasonable adjustments, such as working in a different office or different part of the College.

5. Was any breach a fundamental one?

6. Was any fundamental breach of contract a reason for the claimant's resignation?

7. Whilst it was included in the list, the respondent confirmed at the start that delay/affirmation of the contract was not really an issue in this case.

8. Was the principal reason for the constructive dismissal/fundamental breach of contract found, conduct or some other substantial reason? The respondent's counsel confirmed at the start of the hearing that the some other substantial reason relied upon was the breakdown in relationship between the claimant and her team/peers.

9. If so, applying the test of fairness in section 98(4), did the respondent act reasonably in all the circumstances in treating that reason as sufficient reason to dismiss the claimant?

10. Is there a chance that the claimant would have been fairly dismissed anyway if a fair procedure had been followed? If so, should the claimant's compensation be reduced?

11. It was also confirmed that contributory fault remained an issue. That technically involves two different tests for the basic and the compensatory award. The issues to be determined are the following. Would it be just and equitable to reduce the basic award because of any conduct of the claimant before the dismissal? If so, to what extent? If the claimant was unfairly dismissed, did she cause or contribute to dismissal by blameworthy conduct? If so, would it be just and equitable to reduce the claimant's compensatory award? By what proportion?

12. Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply? Did the claimant unreasonably fail to comply with it by not appealing the outcome to the disciplinary process/grievances? If so, is it just and equitable to increase or decrease any award payable to the claimant?

13. It was identified and agreed at the start of the hearing that the issues as recorded at paragraphs 10, 11 and 12 would be addressed at the same time as the liability issues. Any other remedy issues were left to be determined later, only if the claimant succeeded in her claim.

Procedure

14. The claimant represented herself at the hearing. Ms Kight, counsel, represented the respondent.

15. The hearing was conducted in-person.

16. An agreed bundle of documents was prepared in advance of the hearing. This ran to 147 pages. I read the documents in the bundle which were referred to in the witness statements or to which I was directed by the parties. Where a number is included in brackets in this Judgment, that is a reference to a page number in the bundle. The claimant also brought some CCTV footage to the hearing, which I viewed on the tablet provided by the claimant. At the end of the first day the claimant also raised a contention that the respondent had undertaken disclosure later than had been required. When she did so, I emphasised that I was focussed on determining the issues before me. The claimant was asked to ensure that I had in front of me all of the documents required.

17. Witness statements had been prepared in advance of the hearing for all of the witnesses from whom I heard. I read each of the statements during the first morning of the hearing, together with the documents referred to. A statement was provided by the claimant. Statements were provided by the respondent for: Ms Emma Armitage, the director of learning and pastoral support; and Mr Leon Dowd, the vice-principal quality and people.

18. I heard evidence from the claimant, who was cross examined by the respondent's representative, before being asked questions. Each of the respondent's witnesses gave evidence, were cross examined by the claimant, and were asked questions.

19. After the evidence was heard, each of the parties was given the opportunity to make submissions. Each party made their submissions verbally.

20. Judgment was reserved and accordingly I provide the Judgment and reasons outlined below.

Facts

21. The claimant worked for the respondent as a Progress Tutor. Progress Tutors form part of the Tutorial Delivery Team and, in summary, work with a group of students and deliver tutorials to them during which they provide pastoral support.

22. The Government announced a Covid lockdown on 4 January 2021. Emails and texts were sent on the evening of 4 January about the implications of that lockdown for the respondent and its staff.

23. In an email sent at 8.56 pm (56) Ms Armitage (the Director responsible for the Progress Tutors) said that she would appreciate it if Progress Tutors came in the following day if they were happy to do so, and said "*I know some of you have already said you'd rather be in if possible but there is no obligation*". The claimant took this as meaning she did not have to attend work as there was no obligation to do so. Ms Armitage accepted that there was a lack of clarity about this email; explained by the need to respond to events quickly. The claimant saw the email that evening on 4 January.

24. At 9.13 pm an email was sent by the Principal (57). That was in more formal terms and made clear that Progress Tutors were required to attend work on 5 January. The claimant did not see this email at the time. The claimant had issues with her internet access at home and explained in evidence how she connected using her mobile phone hotspot, which was itself inconsistent.

25. That evening, Ms Armitage endeavoured to contact all the Progress Tutors by text message to ask them to come in to work the following day. She did not have a number for the claimant. The claimant's team leader, who would normally have been the person responsible for contacting the claimant, was herself absent at the time. A colleague, who did have the claimant's number, was asked to text the claimant. She did so.

26. I was shown the text messages exchanged between the claimant and her colleague on the evening of 4 January 2021. At 8.21 pm the claimant had texted the colleague to say "*whoop whoop!! See you February!!! Lol*". At 8.58 pm the colleague texted the claimant to say "*We have to go in tomorrow"* followed by a sad face emoji. At 9.15 pm that was followed by a message to the claimant "*Apparently Emma has asked to make sure we text everyone if possible to make sure we are in*". In one of her responses, the claimant said "*P.s. you don't have my number!!!!!, lol*". In one text the claimant was prompted to read the email sent from the Principal. She responded that she would, but she couldn't link to the internet. In her evidence to the Tribunal, the claimant asserted that she thought the colleague was joking in the texts she sent, explaining that what was said needed to be read in the context of their usual manner with each other when exchanging texts.

27. On 5 January 2021 the claimant did not attend work and did not make contact with anyone at the respondent (prior to being contacted during the afternoon). Ms Armitage's evidence was that on 5 January all the Progress Tutors were tasked with contacting students who needed to be contacted. The claimant did not undertake any work from home, as she was unable to do so. All the other Progress Tutors attended work.

28. On 6 January 2021 the claimant attended work. Shortly after arriving, she had an altercation with a colleague. The claimant's account was that the colleague said to her "*where were you yesterday*". There was no dispute that the claimant responded with the sarcastic or flippant comment "*organising an illegal rave at Daisy Nook*". The claimant alleged the other person said to her "*we had to do your work and we are not very happy about it*". The claimant's witness statement said that the other person continued to verbally attack the claimant, but did not describe what she was alleged to have said. The claimant accepted that she swore at the other person during the conversation. There was no suggestion that the other person swore at the

claimant. The parties disputed which of those involved in the conversation was the aggressor. The altercation took place in the student support hub, an open plan office which was accessible to all, including the respondent's students.

29. The CCTV footage provided by the claimant, showed the claimant and her demeanour during this disagreement, but not that of the other employee who was outside the area filmed by the camera. There was no sound. The footage did not show the colleague standing over the claimant.

30. The other person involved in the altercation complained to the respondent about the claimant's conduct towards her. She did this by speaking to the Principal's PA immediately after the altercation.

31. In her evidence, the claimant contended that she had been bullied over time by the other person, which she said explained why she had reacted as she did during the conversation on 6 January. The Tribunal was provided with some handwritten and typed parts of a journal kept by the claimant (60 and 63), which recorded the claimant being unhappy with the way in which the same colleague had spoken to her about: using personal mobile phones for authentication on 9 November 2020; the claimant's lunch hour on 30 September 2020; and a tea towel washing rota on 17 November 2020. The claimant did not provide a copy of this journal to Ms Armitage, but she did refer to it in the meeting on 13 January. There was a dispute about whether the claimant showed it to Ms Armitage on the screen during that virtual meeting.

32. The claimant's journal also contained a note made by the claimant on 6 January recording her account of the altercation (64). Unlike the evidence given by the claimant in her witness statement, that contemporaneous record made no mention of the colleague: pulling down her face mask; breaching social distancing; or standing over the claimant. In her witness statement the claimant stated that the colleague stood over her with a pulled down face mask, during the conversation.

33. Ms Armitage met with the claimant over Teams on 6 January. A member of the HR team also attended. Notes were taken and provided (70). The claimant confirmed that she had sworn in the conversation with her colleague and said that things had got heated. The notes recorded the claimant as saying at that time that she could not remember what had been said.

34. A letter dated 6 January was sent to the claimant by Ms Armitage informing the claimant that the respondent would be conducting a disciplinary investigation (72). That letter explained the complaint about the incident on 6 January, which it described as being about "*your manner and offensive language*". The letter also stated that there would be an investigation into the claimant's absence from work on 5 January. The letter contained specific allegations arising from those two matters.

35. A third issue was also raised in the letter. In summary, in autumn 2020 the respondent had introduced a process where an individual's log-in was verified using a code sent to their personal mobile phone. Ms Armitage's evidence was that this occurred only three or four times a year. When it was introduced, the claimant had objected. She did not use her mobile phone in the same way as everyone else and it was her evidence that she did not routinely take it to work (albeit she did

sometimes). A landline authentication alternative had not worked. The respondent had disapplied the authentication for the claimant. It had worked effectively for everyone else. The third allegation in the letter was "*Refusal to carry out duties or reasonable instructions or to comply with College rules*". The claimant's evidence was that she did not, at the time, know what the allegation related to, and it was not clear from what was said in the letter. Ms Armitage's evidence was that this was included because it was something raised by the colleague involved in the altercation. The statement taken from the colleague on 6 January referred to the issue and what the claimant had said about it to those with whom she worked. When the claimant identified what this allegation related to, she was aggrieved that this issue was raised as part of the investigation when she considered it closed. She was adamant that she had not refused to carry out an instruction.

36. Ms Armitage met with a number of other employees as part of the investigation and notes were taken/provided of those interviews. One of the interviewees emphasised that the claimant swearing was quite out of character for her. In one of the statements the interviewee described the way that the claimant spoke to the other employee as being disgusting; he said he was shocked.

37. On 11 January the claimant raised a grievance about the colleague with whom she had the disagreement on 6 January. She stated that this was for bullying and harassment in the workplace (81).

38. On 13 January Ms Armitage met with the claimant virtually. Ms Berry of HR attended. The claimant was accompanied at the meeting by her trade union representative. It is notable from the notes that the trade union representative's active involvement in the meeting was limited, albeit he was asked at the end whether he had any questions, and he said he had no questions at that moment. The claimant's evidence was that he said at the start of the meeting that he wouldn't be involved. She described him as just sitting and watching. Nonetheless, notably, the trade union representative did not raise, at any point either during the meeting or after it, any dissatisfaction with how it was conducted. I accept the respondent's contention that had there been a problem with the way Ms Armitage conducted the meeting (at least one which might have been sufficient to constitute a breach of the duty of trust and confidence), the trade union representative would have been expected to have raised it.

39. The Tribunal was provided with notes of the meeting (84), albeit that the claimant disputed that they were complete or accurate. The notes record the meeting as lasting from 1pm until 2.10 pm. Ms Armitage explained the allegations at the start of the meeting, including explaining that the management instruction allegation related to the use of the verification code. Two and a half of the six pages of notes, record the claimant explaining her position regarding the events of 5 and 6 January. In the claimant's account of the altercation on 6 January, the claimant described the other person as being aggressive and raising her voice. She accepted it was okay for someone to enquire about their colleague. The claimant accepted that she had said the phrase alleged which included the swear word.

40. A large part of the meeting, as recorded in the notes, addressed the multi-factoral authentication issue. This was something about which the claimant was unhappy. She had considered the issue to be resolved. In particular, the claimant

highlighted the absence of a relevant policy such as a Bring Your Own Device to work policy. The claimant's evidence was that she referenced a BYOD policy in the meeting and Ms Berry asked what the letters stood for. This was also highlighted by the claimant as being an example of something which she evidenced was said in the meeting, but which was omitted from the notes provided.

41. The claimant's own grievance was mentioned in the meeting. The notes did not record that it was expressly said to the claimant during the meeting that it was an investigation into the claimant's grievance, as well as the disciplinary issues. Towards the end of the meeting, the claimant was asked if she wished to add anything else. The claimant described the tea-towel issue which had been referred to in her journal. That was, in summary, that there had been a rota for washing tea-towels which the claimant thought was not appropriate during a pandemic, and she objected to the colleague referencing that the claimant was rota'd to do the washing on an occasion. The claimant referred to being told it was weird not to bring her phone to work every day. She explained that the mobile device issue had created anxiety for her.

42. On the morning of 19 January Ms Armitage sent the claimant an email about her grievance (146). The claimant was asked whether she wished the respondent to use the notes of the meeting of 13 January and the two examples of other incidents which the claimant had given, as part of the claimant's grievance. The claimant responded that she did.

43. The claimant was sent the notes which had been prepared of the 13 January meeting, on the afternoon of 19 January. The claimant responded very shortly afterwards to raise issues with the notes, outlining some elements of the wording with which she disagreed (94). My view of the issues raised was that they showed that the notes were not a complete and accurate record of everything which had been said (as is often the case with notes of a meeting), but the issues raised did not indicate numerous or serious errors in the notes (even if I accept what the claimant said about what was incorrect/missing). Ms Armitage responded at 5.20 pm on 19 January, that is after the claimant had left for the evening, and accepted that there may be some corrections needed to the notes and outlining her response to what the claimant had said.

44. On 9.32 pm on 19 January the claimant sent an email (93) from her mother's house in which she stated she wished to raise a grievance about her line manager, Ms Armitage, "*for unprofessional conduct. Not followed procedure*". The claimant accepted that this grievance was predominantly about the way Ms Armitage had conducted the meeting of 13 January. The claimant could not recall whether she had seen Ms Armitage's email regarding the notes before raising her grievance, as there were issues with the claimant sending and receiving emails from her own home, but in any event the fact that she could not recall indicated that the response received was not a factor of any importance in the claimant's decision to raise a grievance about Ms Armitage.

45. Ms Armitage prepared a report following her investigation (96). In summary she concluded that each of the three allegations should be considered by the disciplinary panel to decide if there was a case to answer. Ms Armitage had viewed the CCTV footage as part of her investigation, and she referred to conclusions which

she had drawn from it in her report. The claimant was not provided with a copy of the CCTV footage nor had she seen it. The reasons for this Ms Armitage was not fully able to explain during the Tribunal hearing, but they appeared to be related to data protection issues.

46. The respondent took the view that the claimant's grievances were intrinsically linked to the matters being addressed as part of the disciplinary process. Accordingly, the decision was made that the grievances would also be considered at the disciplinary hearing.

47. An occupational health report was provided for the claimant dated 10 February 2021. Nothing in that report advised that the claimant had a disability or that the respondent was under a duty to make reasonable adjustments as a result. The claimant was recorded as not being fit for work at that time, but it was stated that she was fit to attend any necessary management meetings. There were stated to be no clinical barriers to prevent the claimant from returning to work and being able to carry out all her duties; redeployment was not addressed or recommended. The report did recommend that the claimant should not be expected to attend any meetings at which the manager about whom she had raised a grievance was present (that is Ms Armitage). The respondent did not follow that recommendation.

48. In a letter dated 24 February (121) the claimant was sent a copy of the investigation report and invited to a disciplinary hearing on 4 March. The attendees were described. Mr Dowd was the person appointed to chair the panel at the hearing, with two other appointees. It was stated that Ms Armitage would attend to present the investigation report. There was no dispute that the meeting was subsequently re-arranged at the claimant's request. The allegations to be determined were confirmed. The letter also explained that the claimant would be able to raise any concerns she had about the process during the panel meeting, with reference to her grievance regarding Ms Armitage.

49. On 28 February the claimant emailed Ms Berry a fit note recording that she was not fit for work (128A) and said she would be unable to attend the meeting arranged. She stated that she felt that it would be impossible for her to work under such conditions of hostility from her team, and requested alternate options. Mr Dowd's evidence was that, following this email, Ms Berry had spoken to the claimant. The claimant had sought redeployment or redundancy. Mr Dowd's response, which he believed had been passed on by Ms Berry, was that redundancy was not an option, but that redeployment might be however that would need to be addressed at, or following, the formal process. The claimant's evidence was that she understood what she was told to be that redeployment had been refused.

50. The claimant accepted that she had no contractual right to be redeployed. When it was put to the claimant that the College had no contractual obligation to redeploy her or to offer reasonable adjustments, she said no, but she said that she thought a fair manager would have given her the opportunity for redeployment or adjustments. The claimant explained that she wanted a complete change of role, perhaps to move to a role she had done previously. Mr Dowd's evidence was that redeployment would have been possible, as the respondent has three sites and the claimant could have moved to a student support role at another site.

51. On 1 March the claimant emailed Mr Dowd a lengthy document (dated 28 February) (123) which started by explaining that the claimant viewed Mr Dowd as someone who would acknowledge her comments with an unbiased and non-judgemental approach. That document made no reference to redeployment or adjustments. On 1 March in an email (122A) Mr Dowd responded to the claimant's email and explained that her grievances had not been ignored, but would form part of the matters to be addressed at the hearing as they were intrinsically linked to the matters being investigated. The email advised the claimant to continue to obtain support from her trade union official. It was Mr Dowd's evidence that the approach he outlined of considering the matters together at the hearing, had resulted from discussions with others including a senior member of the HR team and the claimant's trade union representative.

52. The claimant resigned on 5 March 2021. She gave four weeks notice. Her letter of resignation (130) said that it was in response to a breach of contract by her employer. She referred to the duty of trust and confidence and said that her working relationship was no longer tenable, and her working conditions were intolerable. She referred to bullying in the workplace and said that she was still waiting to hear the result of a grievance she had raised on 11 January. She stated that reasonable adjustments to get the claimant back to work had not been offered by the respondent.

53. When it was put to the claimant that she resigned to avoid having to go through the disciplinary hearing, she denied that was the case. The claimant's evidence was that she resigned because she was refused redeployment and no adjustments were offered to get her back into work. She asserted she resigned following those two facts.

54. The claimant was asked why she did not wait and why she resigned before the hearing at which Mr Dowd would consider the issues. She explained that it was probably because she was so worked up and upset and did not give that any thought. She said she had been refused redeployment and, did not await the outcome, as her view was that the redeployment had already been refused.

55. The hearing of the disciplinary issues and grievances took place on 8 March 2021. The claimant did not attend. Her trade union representative attended on her behalf. It was Mr Dowd's evidence that at the hearing the claimant's trade union representative stated that he felt the process had been conducted in a fair manner (albeit there was no record of him having done so, there being no notes of the hearing).

56. The outcome of the hearing was that the claimant was given a written warning. Her grievances were not upheld. The decision letter dated 12 March 2021 (132) explained the reason for the decision and the sanction which had been imposed. At the end of his letter, Mr Dowd addressed redeployment. He said that had the claimant not resigned, the respondent would have looked to support the claimant's return to work and to have facilitated some mediation within the team. He also said that the respondent may have been able to consider redeployment.

57. Following that decision, but before the end of the claimant's employment, the claimant exchanged emails with Ms Berry, a member of the respondent's HR team.

The claimant was offered the opportunity to discuss any wish to reconsider her resignation (135). On 23 March 2021 the claimant asked what the respondent could offer and asked about redeployment. After receiving an email which confirmed that the respondent was prepared to discuss options such as redeployment, the claimant confirmed on 25 March that she would be happy to discuss redeployment (134). That email appeared to have ultimately not been answered. In evidence, the claimant said that she was interested and was open to what the respondent would suggest.

The Law

58. The unfair dismissal claim was brought under Part X of the Employment Rights Act 1996. An unfair dismissal claim can be pursued only if the employee has been dismissed as defined by Section 95. Section 95(1)(c) provides that an employee is dismissed by her employer if:

> **"the employee terminates the contract under which [s]he is employed (with or without notice) in circumstances in which [s]he is entitled to terminate it without notice by reason of the employer's conduct."**

59. As the respondent's counsel submitted, the principles behind such a constructive dismissal were set out by the Court of Appeal in **Western Excavating (ECC) Limited v Sharp [1978] ICR 221**. The statutory language incorporates the law of contract, which means that the employee is entitled to treat herself as constructively dismissed only 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.

60. The term of the contract upon which the claimant relied in this case was the implied term of trust and confidence. In **Malik and Mahmud v Bank of Credit and Commerce International SA [1997] ICR 606** the House of Lords considered the scope of that implied term and the Court approved a formulation which imposed an obligation that the employer shall not:

> **"…without reasonable and proper cause, conduct itself in a manner calculated [or] likely to destroy or seriously damage the relationship of confidence and trust between employer and employee."**

61. In emphasising the formulation used in **Malik**, that the conduct must be calculated or likely to destroy or seriously damage the relationship of confidence and trust, the respondent's counsel also relied upon **Baldwin v Brighton and Hove City Council UKEAT/0240/06**. As she also submitted, and as is clear from the decision of the House of Lords in **Malik,** the test is an objective one. The subjective perception of the employee can be relevant but is not determinative. Lord Nicholls put the matter this way:

> **"The conduct must, of course, impinge on the relationship in the sense that, looked at objectively, it is likely to destroy or seriously damage the degree of trust and confidence the employee is**

> **reasonably entitled to have in his employer. That requires one to look at all the circumstances."**

62. The objective test also means that the intention or motive of the employer is not determinative. An employer with good intentions can still commit a repudiatory breach of contract.

63. The claimant's counsel relied upon **Claridge v Daler Rowney Ltd [2008] IRLR 672** as authority for the fact that the test to be applied is whether the actions of the employer fell outside the range of reasonable responses which a reasonable employer might consider to be appropriate. What LJ Elias (as he now is) said in that decision (when in the Employment Appeal Tribunal) is:

> "**It is necessary that the conduct must be calculated to destroy or seriously damage the employment relationship. The employee must be entitled to say "You have behaved so badly that I should not be expected to have to stay in your employment". It seems to us that there is no artificiality in saying that an employee should not be able to satisfy that test unless the behaviour is outwith the band of reasonable responses."**

64. Not every action by an employer which can properly give rise to complaint by an employee amounts to a breach of trust and confidence. The respondent's counsel relied upon **Tullett Prebon plc v BGC Brokers LP & Ors [2011] IRLR 420** as authority for the proposition that it is not enough for the claimant to subjectively believe there is a fundamental breach, no matter how genuinely she does so. The test is objective. In **Frenkel Topping Limited v King UKEAT/0106/15** the EAT put the matter this way:

> **"We would emphasise that this is a demanding test….The test of what is repudiatory in contract has been expressed in different words at different times. They are, however, to the same effect. In Woods v W M Car Services (Peterborough) Ltd it was "conduct with which an employee could not be expected to put up". In the more modern formulation, adopted in Tullett Prebon plc v BGC Brokers LP & Ors, is that the employer (in that case, but the same applies to an employee) must demonstrate objectively by its behaviour that it is abandoning and altogether refusing to perform the contract. These again are words which indicate the strength of the term."**

65. In the course of the hearing neither party made any reference to a last straw, nor did the claimant suggest that she was relying upon circumstances in which a last straw would apply. Nonetheless I was mindful to consider that, in some cases, the breach of trust and confidence may be established by a succession of events culminating in a "last straw" which triggers the resignation. In such cases the decision of the Court of Appeal in **London Borough of Waltham Forest v Omilaju [2005] ICR 481** demonstrates that the last straw itself need not be a repudiatory breach as long as it adds something to what has gone before, so that when viewed cumulatively a repudiatory breach of contract is established. However, the last straw cannot be an entirely innocuous act or be something which is utterly trivial. I was

also aware of the decision in **Kaur v Leeds Teaching Hospitals NHS Trust [2019] ICR 1** which sets out the approach which I should take in determining such issues.

66. The respondent's counsel, acknowledging that the claimant was unrepresented, also raised the decision of the Employment Appeal Tribunal in **Wright v North Ayrshire Council UKEATS/0017/13** which confirms that if someone has mixed reasons for resigning, it is sufficient if the fundamental breach relied upon played a part in that decision.

67. The respondent also contended that even if the claimant was constructively dismissed, her dismissal was fair. The respondent bears the burden of proving, on the balance of probabilities, that the dismissal was for misconduct or some other substantial reason. If the respondent does prove it dismissed for a fair reason, the dismissal is only potentially fair. I must then go on and consider the general reasonableness of the dismissal under section 98(4) Employment Rights Act 1996. That section provides that the determination of the question of whether a dismissal is fair or unfair depends upon whether in the circumstances (including the respondent's size and administrative resources) the respondent acted reasonably or unreasonably in treating the misconduct as a sufficient reason for dismissing the claimant. This is to be determined in accordance with equity and the substantial merits of the case. The burden of proof in this regard is neutral.

68. In conduct cases, when considering the question of reasonableness, I am required to have regard to the test outlined in **British Home Stores v Burchell [1980] ICR 303**. It is important that I do not substitute my own view for that of the respondent (as emphasised in **London Ambulance Service NHS Trust v Small [2009] EWCA Civ 220**). I am also required to have regard to the ACAS code of practice on disciplinary and grievance procedures.

Conclusions – applying the Law to the Facts

69. As recorded at paragraph 4, the claimant relied upon five matters as constituting (either individually or collectively) the fundamental breaches of the duty of trust and confidence which led her to resign. These were: the way the claimant was addressed on 6 January 2021; the way that the grievances raised by the claimant were addressed; the conduct of the meeting on 15 March 2021; redeployment being refused; and the respondent not making other reasonable adjustments, such as the claimant working in a different office or different part of the College.

70. As a result of this list of alleged fundamental breaches, it is not necessary for me to determine whether or not the claimant deliberately ignored what she knew to be a request to attend work on 5 January 2021. Nonetheless, I would observe, that the messages sent to the claimant from 8.58 pm onwards on 4 January did not appear to support the claimant's asserted view that they were sent as a joke. They appeared to appropriately inform the claimant of a change to the position which had been outlined in the 8.56 pm email and to make clear that she was expected to attend work. I accept that the decision to investigate the claimant's non-attendance at work on 5 January 2021, was one which a reasonable employer could make (albeit certainly not one all employers would have). The decision to decide the relevant allegation at a disciplinary hearing based upon the text messages and

emails, was also one which a reasonable employer could take (even though many reasonable employers would not have proceeded to a hearing with this allegation, particularly in the light of the lack of clarity which resulted from the statement made by Ms Armitage in her first email of 4 January).

The 6 January issues

71. In respect of the altercation on 6 January, it was not denied that the claimant swore at her colleague. The things which the claimant recalled the other person said to her during the conversation, were not notably unreasonable or offensive. It was clear that the claimant took offence to what was asked of her and, obviously, the colleague could have chosen not to engage in such a conversation. From viewing the CCTV footage, my view of the claimant's demeanour was that it appeared to be confrontational or, at least, forthright. I do not find that the colleague stood over the claimant as alleged, as that was not supported by the footage or any of the other statements obtained in the course of the investigation. I also do not find that the other person pulled down her mask or failed to adhere to social distancing. Whilst the claimant did include those allegations in her statement for the Tribunal, I find it important that they were absent from the claimant's journal, the record she made shortly after the event (when important matters would have been expected to have been recorded if they had occurred), and they do not appear to be supported by what could be seen on the CCTV footage.

72. I accept that the decision to investigate the altercation on 6 January following the other employee's complaint, was one which a reasonable employer could make. Indeed, I find that most employers would have done so. The decision to determine the relevant allegation at a disciplinary hearing following the investigation, was also one which a reasonable employer could take. There was nothing in the way in which the altercation was investigated which fell outside a reasonable approach or one which a reasonable employer could take.

The way the grievances were addressed

73. It would certainly have been open to the respondent to have addressed the claimant's grievances separately outside the disciplinary process, or to have endeavoured to determine them before the disciplinary issues were heard. However, the respondent was right in its view that the issues raised in the grievances were intrinsically linked to the matters being addressed in the disciplinary hearing. The first grievance was essentially the claimant's explanation for her out of character conduct on 6 January. The second grievance was a complaint about how the investigation and investigatory meeting had been conducted. Those matters were relevant to, and indeed linked to, the issues to be considered at the disciplinary hearing. I accept Mr Dowd's evidence that the approach was one which was discussed with the claimant's trade union representative and which he did not object to. As was submitted by its representative, the respondent's decision to hear what was to be said about all the issues together, and to determine the grievances and disciplinary issue at the same time, was one which a reasonable employer could reasonably take (albeit that not all reasonable employers would have chosen to do so).

74. It is certainly the case that the approach taken was not entirely clear from the documents, particularly early in the process. I accept that the claimant did not fully

understand what Ms Armitage was saying (with regard to the grievance) in the 13 January meeting, when the claimant was offered the opportunity to say anything which she wished to. Nonetheless, in the subsequent exchange of emails it was clearly spelt out to the claimant that the notes were being considered as part of the grievance and, at that stage, the claimant neither objected to this approach nor did she provide further information about the first grievance. She subsequently provided some information about the second grievance. Most importantly, prior to her resignation, Mr Dowd spelt out in clear terms the respondent's proposed approach to the grievances in his email of 1 March (122A). Accordingly, at the time she resigned, the claimant was fully aware of the proposed approach of hearing and determining the grievances at the hearing on 8 March. That hearing was to be chaired by Mr Dowd, someone who the claimant at the time described as being unbiased and non-judgemental (123). In practice, the claimant's opportunity to fully explain her grievances and to have them addressed was the meeting on 8 March, but the claimant resigned prior to that opportunity.

The conduct of the meeting on 13 March 2021

75. The meeting on 13 March was an investigatory meeting. The three allegations being investigated were confirmed to the claimant and the one, which she did not understand, was explained in more detail. The claimant was then given the opportunity to respond to each of the matters alleged. It is, perhaps, unfortunate that the majority of the time in the meeting was spent in discussing the multi-factoral identification issue, but nonetheless it was one of the allegations being investigated. I fully understand and appreciate that for a long-serving employee with no experience of disciplinary allegations, such a meeting can be difficult. I have no doubt that the claimant was affected by the process. I also fully understand that the claimant did not agree with what had been said by others in the statements taken from them. However, there was nothing which was identified in the Tribunal hearing which showed that the way in which the investigatory meeting was conducted fell outside the way in which a reasonable employer could or would have conducted such a meeting. I draw support, in reaching this decision, from the absence of any objection to the way it was conducted by the claimant's trade union representative.

Redeployment refused

76. There was no obligation on the respondent to give consideration to, or to facilitate, redeployment for the claimant. It was something which it was open to the respondent to do. However, an employer does not have an obligation to redeploy an employee because they request it, or because they have raised a grievance about one of their colleagues. The claimant accepted that there was no contractual obligation and whether or not she was right to consider that a fair manager would have considered it, does not mean that it constituted a breach of the duty of trust and confidence. Even if the claimant was informed that redeployment had been refused as she said, that refusal was not a breach of contract and was not a breach of the duty of trust and confidence (and certainly not a fundamental one).

77. I accept Mr Dowd's evidence that he had not in fact rejected redeployment. He considered it to be something which was best discussed with the claimant at the meeting which had been arranged to consider the claimant's grievances and to hear the disciplinary allegations. That was a decision that a reasonable employer was

able to take. It is unfortunate that the claimant elected to resign before she had the opportunity to explain why she wanted to be redeployed to a panel including Mr Dowd. Had she done so, redeployment might have been arranged.

Reasonable adjustments

78. As the reasonable adjustments which the claimant suggested were working in a different office or different part of the College, my decision on it is the same as that I have explained for redeployment. The claimant did not have a disability. A disability creates a legal obligation to make reasonable adjustments (and the language is more usually used in that context). Had there been such a legal duty, the outcome may well have been different. Nonetheless there was no legal obligation on the respondent to make adjustments to the claimant's place of work or to the team in which she worked, and the respondent not doing so was not a breach of the duty of trust and confidence. In any event, as I have explained for redeployment, a reasonable employer was able to consider this to be an issue which could be discussed at the meeting which had been arranged (prior to which, the claimant resigned).

Other issues

79. I would emphasise that, in reaching my decision, I have considered the matters identified by the claimant as being the things which led her to resign and which she asserted individually or cumulatively amounted to the fundamental breach of the duty of trust and confidence. In any constructive dismissal claim what is relevant is why the individual themselves resigned. It Is not for me to identify or address other matters in respect of which an ideal process was not followed. Examples are: the decision to conduct the disciplinary/grievance meeting on 8 March 2021 with Ms Armitage in attendance (in spite of what was said in the occupational health advice); and the decision not to show the claimant the CCTV footage during the investigation (despite it being referred to in the report). The respondent's representative submitted that the claimant was not relying upon the first of these issues as being a fundamental breach of contract (or part of a fundamental breach), and she was right to do so.

The constructive dismissal claim

80. The claimant was clear in explaining that what triggered her resignation was the respondent's failure to redeploy her or to make reasonable adjustments (or at least her perception that redeployment had been refused). As I have explained, those decisions were not a repudiatory breach of contract. I also do not find those decisions to be a part of a course of conduct which, viewed cumulatively, amounted to a repudiatory breach of the duty of trust and confidence. They did not add anything to any alleged prior breaches, even had I found that any breaches existed. In fact, I have found that none of the matters relied upon, whether individually or cumulatively, amounted to a breach of the duty of trust and confidence.

The discussion of redeployment

81. It was submitted that the claimant's willingness to explore redeployment in her emails with Ms Berry following her resignation, demonstrated that there could not

have been a fundamental breach of the duty of trust and confidence. Whilst I understand the submission, I do not agree with it in the circumstances of this case for two reasons: the thing which the claimant emphasised as being the reason why she resigned (at least when she did) was because of the refusal to redeploy her, and therefore a willingness to engage with redeployment was entirely consistent with that position (if, in fact, redeployment had not been refused); and the emails do not evidence a process which had advanced sufficiently for the claimant's engagement in it to genuinely show that the contract had not been fundamentally breached.

A fair dismissal?

82. As a result of my decision on the issues I have already addressed, it was not necessary for me to go on to decide whether any dismissal would have been fair. Nonetheless I am able to address the issue fairly briefly. I found the respondent's contentions that the dismissal would otherwise have been fair for reasons of conduct and/or due to a breakdown in relations, to have no merit whatsoever. The disciplinary panel concluded that the claimant's conduct merited a written warning. If anything, I viewed that decision as somewhat harsh. In any event, the decision of the respondent's own disciplinary panel demonstrated that dismissal for the conduct alleged was clearly not fair in all the circumstances of the case (and was not one within the range of responses which a reasonable employer could have reached). Mr Dowd's sensible and appropriate willingness to consider reintegration, mediation, and/or redeployment, also evidence that the relationships had not broken down to anything like the extent required for a some other substantial reason dismissal to be fair, and there were other alternatives available to be explored which meant that a dismissal for that reason would not in any event have been fair in all the circumstances. Had I found there to have been a dismissal, I would not have found it to be fair.

83. It is not necessary or appropriate for me to go on to make findings on the issues regarding whether a fair dismissal could otherwise have occurred (known as *Polkey*), contributory fault, or non-compliance with the ACAS code (see paragraphs 10, 11 and 12). That is why I have not addressed the law which applies to those issues in the legal section of this Judgment. As I have not found that the claimant was dismissed in any event, such findings would be speculative. It is unlikely that there would have been any finding of contributory fault, as the matters relied upon were not of the seriousness which would merit such a reduction for the reasons I have already explained when addressing the argument that any dismissal was otherwise fair.

Summary

84. For the reasons explained above, I have not found that any of the matters relied upon by the claimant amounted to a fundamental breach of the duty of trust and confidence. I have also not found that collectively they did so. The particular last straws which led to the claimant's resignation (her perception that redeployment had been refused and reasonable adjustments not being made) were not only not fundamental breaches, but were also not sufficient, applying **Omilaju,** to add something to what had gone before (even if I had found the earlier events to have been a fundamental breach, which I did not). I fully accept that the claimant found the events of early 2021 to be difficult and she was affected by the need to go

through a disciplinary process after her lengthy service with the respondent. However, the fact that she did so was not sufficient to amount to constructive dismissal. For the reasons I have explained, I have not found that the claimant was constructively dismissed, and therefore her unfair (constructive) dismissal claim has not succeeded.

Employment Judge Phil Allen

8 April 2022

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON

26 April 2022

FOR THE TRIBUNAL OFFICE