EMPLOYMENT TRIBUNALS

Claimant: Miss Maria Walls

Respondent: Loizou Restaurants Ltd

Heard at: Watford (by Cloud Video Platform) **On:** 4th – 6th May 2022

Before: Employment Judge Margo

Representation

Claimant: James Arnold of counsel

Respondent: Grace Nicholls of counsel

JUDGMENT

1. The claimant was subject to a constructive unfair dismissal by the respondent.

2. The Tribunal will determine remedy at a further hearing to be conducted by Cloud Video Platform at a date yet to be fixed. The parties are to provide the Tribunal with their dates to avoid for the period 1 August – 4 November 2022.

REASONS

Introduction

1. The claimant, Maria Walls, was employed by the respondent, Loizou Restaurants Ltd, until her resignation on 14 December 2020.

2. The claimant claims she was subject to a constructive unfair dismissal within the meaning of sections 94 and 95 of the Employment Rights Act 1996 ("**ERA 1996**"). The claimant relies on a breach or breaches by the respondent of the implied term of trust and confidence (the "**implied term**"). The conduct relied upon by the claimant took place from 2016 up to shortly before her resignation.

3. The respondent contests the claim. It says that the acts relied upon by the claimant do not either individually of cumulatively amount to breach of the implied term. In the alternative, it contends that the claimant affirmed the contract following any breaches of the implied term that took place in the period 2016-2019.

4. The issues were agreed between the parties and are set out at Annex A below.

Procedure, documents and evidence heard

5. The case was listed for three days for the determination of liability and remedy. Given the volume of documentary and witness evidence (referred to below), it was apparent from the start of the hearing that this listing was not long enough to allow time for deliberation and judgment. Accordingly, a timetable was agreed that provided for submissions to be completed by the end of the third day with judgment being reserved.

6. I was provided with an agreed Bundle of 1339 pages and a Supplementary Bundle provided by the claimant of 95 pages. In the course of the hearing I was also provided with documents from both parties designed to address the question of whether and to what extent the respondent's business had recovered from the effects of the Covid-19 pandemic by July 2020.

7. In addition to her own evidence, the claimant called one witness, Mr Ahmet Mustafa. The respondent called three witnesses: Mr John Loizou (majority owner of the respondent and McDonald's Franchisee), Mr Matthew Bennett (Human Resources and Business Manager at the respondent) and Zoe Wood (Associate at Ibex Gale, a company that provides employment law and people management support).

Findings of fact

8. The relevant facts are set out below. Any references to page numbers are to pages of the agreed Bundle of documents unless indicated otherwise.

9. The respondent is a franchisee of McDonald's, the restaurant chain.

10. The claimant began working for McDonald's on 14 September 1982, initially as a part-time, hourly paid server. She became a full-time (salaried) Assistant Manager on 24 October 1988 and was promoted to the position of Business Manager in around 1991.

11. In 1998, following the franchising of a cluster of restaurants, the claimant's employment transferred to Jonathan Barton t/a McDonalds. On 1 April 2004, the claimant's working week was reduced from five days to four days.

12. The claimant's employment transferred to the respondent on 5 April 2009 when the respondent purchased the Waltham Abbey branch of McDonald's where the claimant was working as a Business Manager.

13. Towards the end of 2009, the claimant was told by Lynn St. Ange, Franchisee Operations Consultant, that the restaurant only required one Business Manager and that the claimant's new role would be First Assistant Manager. There was no reduction in the claimant's pay.

14. The claimant worked for the respondent until her resignation on 14 December 2020.

15. During her time working for the respondent, the claimant worked at a number of different restaurants under different line managers. In the six year prior to her resignation she had worked at the restaurant in Marks Gate (2014-2016) where her Business Manager was Emma Askew, at Barkingside (2016-2017), where her Business Manager was Kam Kaberi and at Chingfod (2017-2019) where his Business Manager from September/October 2018 was Jon Simons. In Chingford, the claimant worked alongside another First Assistant Manager called Adetokundo Adeyemi, known as "Toks".

16. In September 2019, the claimant was moved back to the Waltham Abbey restaurant along with Mr Simons, who remained as the claimant's Business Manager until her resignation.

17. I was provided with a 'Hierarchy Chart' for the Waltham Abbey restaurant dated June 2020 (p.940). At the top of the Chart is Mr Loizou. Beneath him is Paul Howard (Operations Manager for four restaurants) and on the same level is Lynn St. Ange (Franchisee Supervisor for three restaurants). Below them is Mr Simons (Business Manager) and below him are three First Assistant Mangers: the Claimant, Tanver Chowdhury and Adam Kovacs. Other than Mr Loizou, all these individuals are salaried employees of the respondent. The other members of staff are Shift Managers and Crew who are paid at an hourly rate.

18. The Bundle also contained a document that set out the roles and responsibilities of a First Assistant Manager (p.631-632). The document was attached to the claimant's performance review dated 3 December 2019. Those responsibilities are wide-ranging and include, amongst other things, responsibility, no doubt along with the Business Manager, for business planning and the growth of sales, the creation of a positive working environment as well as contributing to staffing level plans and overseeing recruitment. Under the

heading 'Safety and Security' is a requirement to "*Follow up on compliance with security and cash control procedures"*.

Request for sabbatical

19. In July 2015, the claimant made a request for a sabbatical, to be taken the following summer. Mr Loizou met with the claimant and told her that the request was refused. The reason for the refusal was that Mr Loizou believed that the claimant had given up any entitlement to a sabbatical when she started working part-time (four days a week) in April 2005. Mr Loizou's belief was supported by a letter sent from Mr Barton to the claimant dated 31 March 2009. The letter, that had been provided to the respondent at the time that it purchased the Waltham Abbey restaurant, stated that the restaurant was to be sold and that "*it would be prudent to re-confirm your particulars of employment as per our conversation recently on the number of days that your worked".* The letter went on the say that, "*…when you went from full time to part time we agreed that you would no longer have a company car, PPP, life insurance and a sabbatical"*.

20. On 10 January 2015, the claimant wrote to Mr Loizou. She said she believed she was entitled to a sabbatical and that she wished to take it from 4 April – 31 May 2015.

21. Following receipt of that letter, Mr Loizou reviewed the claimant's employment file and noticed that, as well as the letter from Mr Barton dated 31 March 2009, it included a letter from Mr Barton 23 March 2004 which confirmed that the claimant would move to a four day week from 1 April 2004. This letter detailed a reduction in the claimant's holiday entitlement and confirmed that the claimant would no longer be provided with a car from 1 June 2004. The letter said nothing about the loss of the claimant's entitlement to a sabbatical. In addition, there was another letter dated 5 April 2009 written from Mr Barton to the claimant which stated, amongst other things, that the claimant was eligible for sabbatical "*every 10 years and the next falls due from September 2012"*.

22. Mr Loizou met with the claimant on 16 and 19 January 2015 and explained the confusion on the face of the available documentation. Ultimately, Mr Loizou decided to that the claimant had been entitled to take a sabbatical in September 2012 and that she should be permitted to take it. This was confirmed to the claimant in a letter from Mr Loizou dated 19 January 2015. The claimant was provided with an application form and told that her next sabbatical would be due in September 2022 and every 10 years thereafter.

23. Mr Loizou's evidence was that there are roughly nine managers who have an entitlement to take a sabbatical and that taking sabbaticals is a normal part of the respondent's business. The claimant said in evidence that she would not know whether that was the case. I accept Mr Loizou's evidence on this point.

24. The claimant took the sabbatical from 25 July to 18 September 2016.

25. In her details of claim, her witness statement and her oral evidence the claimant drew a link between what she contended was a pattern of unfair treatment,

including bullying and harassment, and the fact that she had raised her entitlement to a sabbatical in 2015. In her oral evidence she said that she believed that it was her request for a sabbatical that led to all the events she has relied upon as amounting either individually or cumulatively to breaches of contract. I deal with that contention at paragraph 169 below.

Allegations of misconduct

26. On 31 July 2015, the claimant received a First Written Warning due to her failure to complete the accident book or give first aid when an employee injured their head. The claimant did not appeal the issuing of that warning.

27. On 3 January 2016 the claimant attended an investigation meeting with Mr Simons relating to the fact that the claimant's access code had been used to make changes to the records of the time worked by two shift managers. The result was that those managers, 'Nammy' and 'Saj', were paid for periods that they did not work. The loss to the respondent was in the region of £1,500.

28. This issue is referred to in the list of issues as 'Misconduct Allegation 1'.

29. The notes of the investigatory meeting record that Mr Simons introduced the meeting by saying as follows: "*So, what I know so far your access code has been gained and used to make adjustments to shift manager's clock cards meaning that they have been clocked in and paid for extra hours over a period of time."* Mr Simons proceeded to question the claimant as to how these managers could have obtained the claimant's password. The claimant said there were times that she may have left the restaurant whilst logged into 'my schedule'. Mr Simons observed that this left the system open to abuse. The claimant also stated that she thought the only way a shift manager could have gained access to her password was if they had "*looked over my shoulder and seen me typing in my password which I think is an easy password"*.

30. Mr Simons concluded the meeting by stating that "*because of the consequences and the amount that is has cost the business, and you have admitted to leaving your account logged in I do feel that there is a disciplinary case to answer"*.

31. The disciplinary hearing was conducted by Emma Askew on 5 January 2016. The notes to the meeting record Ms Askew as stating the disciplinary charge as being that the claimant "*allowed falsified clocks being entered under [her] access code which constitutes a breach of trust and confidence"* and that one of the options open to her was to dismiss the claimant. The claimant challenged the suggestion that she had "*allowed it to happen"* and Ms Askew said that the wording was incorrect and would be amended.

32. In the course of the meeting the claimant once again stated that anyone who had access to her password must have looked over her shoulder.

33. The meeting lasted a little under 20 minutes and Ms Askew adjourned for an hour to consider her decision. The notes record the decision as follows: "*I have*

reviewed the evidence and come to the conclusion, that because of the severity of what happened and the detriment that it has had on the business resulting in a substantial loss, I feel that formal disciplinary measures are necessary. Although you have denied knowingly giving out your access information the fact still stands that a security breach has occurred. I therefore feel that a warning is necessary."

34. Accordingly, Ms Askew issued the disciplinary sanction simply on the basis that (a) there had been a substantial loss to the respondent; and (b) there had been a security breach – which is a reference to the fact that Nammy and Saj had obtained the claimant's password. She did not find there to have been any actual misconduct on the claimant's part. In the alternative, if she did find there to have been misconduct on the claimant's part, she did not explain to the claimant the nature of that misconduct.

35. Due to the fact that the claimant had an active warning on her file, she was issued with a Final Written Warning.

36. The claimant appealed. The appeal was heard by Ms St. Ange.

37. The appeal hearing took place on 11 February 2016 and lasted six minutes. Ms St. Ange confirmed that she was overturning the decision and she told the claimant that "*it was never conclusive that you had given the code to Saj or Nammy and that didn't come out in the investigation with them…there is insufficient evidence to warrant a warning"*.

38. The notes record Ms St. Ange as saying that the claimant would receive confirmation of the decision in writing.

39. The claimant signed the notes of the investigation, disciplinary and appeal meetings and I find those notes to be an accurate record of what was said in those meetings.

40. The claimant was not sent written confirmation of the outcome of the appeal. I find that this was due to an oversight on the part of Ms St. Ange. Ms St. Ange had made a decision which was favourable to the claimant; namely, to overturn the original sanction. It is in my view unlikely that she would then purposefully fail to provide the claimant with written confirmation of the outcome.

41. I also find as a fact that the disciplinary process was, when viewed objectively, carried out in good faith and without any ulterior motive. There is no evidence to suggest that Mr Simons or Ms Askew were influenced by Mr Loizou or anyone else to reach a particular decision or that they had anything other than a genuine belief that it was appropriate for the claimant to proceed to a disciplinary hearing and to be issued with a disciplinary sanction.

42. On 17 March 2018, the claimant attended an investigation meeting conducted by Mr Bennett. The background to the investigation was that the respondent believed that between August and October 2017 the Business Manager at the

Chingford restaurant had stolen around £1,400 by declaring refunds to customers that were never made. The Business Manager was dismissed.

43. This issue is referred to in the list of issues as 'Misconduct Allegation 2'.

44. The investigation into the Business Manger did not conclude until mid-February 2018. It was at that point that the investigation into the claimant's conduct commenced.

45. The claimant was accused of negligence or carelessness that had resulted in the loss of the monies and inaccurate accounting. Toks, the other First Assistant Manager at the Chingford restaurant at the relevant time, was accused of the same misconduct and was also taken through a disciplinary process.

46. In the course of an investigation meeting with Mr Bennett, the claimant said that she knew that the safe was "*never correct"* in that there were always shortages. She said that the Business Manger would provide an explanation for the shortages and the claimant and the other managers "*were going by what [the Business Manager] said"*. In short, the Business Manager was concealing from the claimant and other managers the fact that he was stealing the monies. The claimant did not check the 'cash book' or ensure that the figures included in the cash book were accurate.

47. Mr Bennett decided there was a disciplinary case to answer. In his evidence, which I accept, he said that he had formed the view that the claimant had a disciplinary case to answer because she had not followed some basic cash policies.

48. The disciplinary hearing took place on 9 April 2018 and was chaired by Mr Simons. He decided that the claimant should receive a final written warning. The explanation given to the claimant in the meeting was as follows: "…*the main thing for us is the safe. It wasn't counted properly and if you did find discrepancies you didn't report to the right person. Even if you reported it to [the Business Manager] then it still continued to happen you should have reported it to someone higher and should have known from the data and reports that are available to you"*.

49. The claimant submitted an appeal to Ms St. Ange on 20 April 2018. One of the points made in her appeal letter, which was a point she had raised throughout the disciplinary process, was that it could equally said that Ms St. Ange herself had an opportunity to have identified the theft of the monies. In her witness statement the claimant stated that "*Those employees senior to [the Business Manager] were, in my view, more culpable of failing to take steps to prevent that theft"*.

50. The appeal letter also highlighted, amongst other things, the length of time it had taken to complete the investigation, the fact that meetings had been arranged at inappropriate times and then cancelled and that the investigation into her was only pursued after the Business Manager had been dismissed.

51. Additionally, the claimant stated that she felt that "*This incident further contributes to my belief that I am being forced out of my position through continued pressure and harassment which has increased in intensity since January 2015"*.

52. The claimant was invited to a hearing with Paul Howard which took place on 21 May 2018. Mr Howard explained to the claimant that, as some of the points she had raised were more akin to a grievance than an appeal, he was proposing a postponement of the appeal process to deal with those points as a grievance.

53. Ultimately this approach was not followed because, following the meeting on 21 May 2018, the claimant emailed Mr Howard to say she wanted to continue to an appeal hearing and that she had not raised a grievance.

54. The appeal hearing took place on 8 June 2018 and was chaired by Mr Howard.

55. The hearing was relatively brief because Mr Howard had concluded that the appeal should be upheld and the warning removed from the claimant's file. Amongst Mr Howard's reasons for upholding the appeal were the fact that the investigation had gone on too long and that only two managers had been investigated i.e. the two First Assistant Managers (the claimant and Toks). He provided some words of advice to the claimant which were that she should "*challenge up more often"* and "*Be curious, ask more questions"* and said in conclusion that "*I could go through every point but ultimately as an appeal officer I have to check the process, which I am not happy with and I will remove the warning from your file"*.

56. Toks also received a final written warning that was overturned on appeal.

57. I find that the disciplinary process was, when viewed objectively, carried out in good faith and without any ulterior motive. As with Misconduct Allegation 1, there is no evidence to suggest that the relevant managers, in this case Mr Bennett and Mr Simons, were influenced by Mr Loizou or anyone else to reach a particular decision or that they had anything other than a genuine belief that it was appropriate to issue the claimant with a disciplinary sanction.

<u>December 2017 Christmas meal</u>

58. Both the claimant and Toks were told not to attend the Christmas meal held for managers in December 2017. The reason given by Mr Howard to the claimant was that Mr Loizou had lost a significant amount of money and it was therefore best that she did not attend. This was at a time when investigations had begun into the theft of £1,400 from the Chingford restaurant, referred to above. Neither the claimant or Toks had been accused of any misconduct in relation to the stolen monies.

59. In determining the claimant's appeal against the grievance outcome (referred to below), Ms Wood described the exclusion of the claimant from this Christmas

meal as "*not a neutral act"* and upheld the appeal against the grievance outcome on this point.

Conversation between Mr Loizou and Mr Ahmet Mustafa in summer 2018

60. Mr Loizou and Mr Mustafa have known each other for nearly thirty years. Before becoming Franchisees they had both worked for McDonald's Restaurants Ltd.

61. They met at a McDonald's Franchisee event in late June or early July 2018. One of England's matches at the football World Cup was screened. Both men were drinking alcohol.

62. An initial conversation took place between them that was heated. Mr Loizou was unhappy that Mr Ahmet had employed the Business Manager who had been dismissed by the respondent for stealing monies from the Chingford restaurant. Mr Mustafa explained that his business had been expanding, he was desperate for more managers and that, had he not been, he would not have recruited the Business Manager from the respondent.

63. I note at this point that I accept evidence given by Mr Mustafa that at the time he appointed the Business Manager in question he did not know the outcome of the respondent's disciplinary case against him.

64. As the evening progressed their interaction proceeded in more friendly terms. In the context of a discussion about the challenges Mr Mustafa's business was facing the question arose as to whether the claimant and one other manager could move from the respondent to work for Mr Mustafa.

65. There is a conflict of evidence between Mr Mustafa and Mr Loizou as to who introduced the claimant into the conversation. Mr Loizou says that Mr Mustafa told him that the claimant's partner, Rob Wood (at that time a consultant with McDonald's but latterly an Operations Consultant for Mr Mustafa) had spoken to Mr Mustafa about the possibility of the claimant working for Mr Mustafa. Mr Loizou says that Mr Mustafa asked him (Mr Loizou) if he could facilitate the move and that he (Mr Loizou) then asked Mr Howard to speak to the claimant to see if she was interested in the move.

66. In contrast, Mr Mustafa says that Mr Loizou told him that if he was desperate for managers he could take the claimant and that if he were to take the claimant "*off his hands*", Mr Loizou would continue to pay her salary for a month. Mr Mustafa says that Mr Loizou made that offer as a way of belittling Mr Mustafa and showing that he was in a position of strength and wealth. He says there had been no conversation between himself and Mr Wood about the claimant coming to work for Mr Mustafa.

67. Mr Loizou also says that Mr Mustafa called him at a later date to ask if he could contact the claimant directly about the transfer. Mr Loizou says that he asked Mr Howard to relay that message.

68. Mr Mustafa says that no such phone call took place.

69. The factual dispute is relevant because at some point in late 2020 Mr Mustafa's account of events was communicated to the claimant and she refers to that account in her letter of resignation dated 14 December 2020.

70. Given the passage of time and the fact that both men were drinking on the day in question, I think it is highly unlikely that either of them have an accurate memory of exactly what was said.

71. The only contemporaneous documentation that is of assistance is an email exchange between the claimant and Mr Howard in July 2018.

72. In an email to Mr Howard sent on 18 July 2018 the claimant says that she wanted to put into writing two conversations that she had recently had with Mr Howard.

73. The first conversation to which the claimant refers in the email is said to have taken place on 3 July 2018. She says that Mr Howard asked her a number of questions including "*was [she] happy working with John Loizou as the Franchisee owner and the group and is there anything that [he] needed to know"*. She continues: "*You stated that you had been made aware that Ahmet Mustafa had made contact with John regarding me leaving Loizou restaurants and moving across to Ahmet's organisation. You stated that should I be considering to leave [sic] I should give more than two weeks' resignation notice so the restaurant in not left short of managers."*

74. The second conversation is said to have taken place on 14 July and in the email the claimant describes it in the following terms:

> "…*You…stated once again that Ahmet Mustafa had asked John for permission to speak with me. I informed you that I knew no reason why he would contact me, you stated that maybe I should speak to John to find out more. You informed me that Ahmet had again called John asking if he could speak with me, however you was unable to answer what it was regarding.*
>
> *I am an employee of Loizou restaurants and I am concerned that you are making me aware that another Franchisee is making contact with John, when I ask why? you are unable to tell the reason for this.*
>
> *My reason for putting this in writing to you is that I am extremely uncomfortable with the way this is being approached by yourself and I feel it's a further tactic in forcing me out of my job…"*

75. I accept that the claimant's account of what Mr Howard said to her in the two conversations in July 2018 is accurate.

76. Mr Howard replied by email on 23 July 2018. He said he was sorry if the conversation had caused the claimant concern and he was "*passing on a message"*. He said "*You are and remain to be a valuable member of Loizou Restaurants Limited"*.

77. In my opinion, the claimant's account of what Mr Howard said to her on 3 July 2018 supports the conclusion that Mr Loizou thought that the claimant was interested in working for Mr Mustafa. If the idea of the transfer had come entirely from Mr Loizou then it is very hard to understand why Mr Howard, upon instructions from Mr Loizou, would ask the claimant if she was happy working for the respondent or why Mr Howard would seek to ensure that the claimant provided sufficient notice before leaving.

78. Accordingly, I find as a fact that Mr Loizou did not ask Mr Mustafa to take the claimant off his hands and that the possibility of the claimant moving into Mr Mustafa's employment was raised by Mr Mustafa as a possible way of alleviating the pressures on his business. Further, I find that Mr Loizou did not offer to pay the claimant's wages for a month after the transfer. Mr Mustafa explained in his evidence that he was keen for the claimant to come and work for him. Given that fact there would be no reason for Mr Loizou to make such an offer and I accept his evidence that no such offer was made.

79. The claimant did not know about Mr Mustafa's version of the conversation with Mr Loizou at the Franchisee event until it was set out by Mr Mustafa in an email to the claimant on 18 September 2020 (p.426).

Warnings for poor performance

80. The respondent operates a four point grading system for performance:

    4 – Exceptional performance
    3 – Significant performance
    2 – Some improvement needed
    1 – Unacceptable Performance

81. Pay rises are tied to the grade awarded for performance at an annual review. The percentage increase, if any, that attaches to each particular grade is set out in the Annual Performance Review document that is designed to be completed by both the manager and the employee and signed by both.

82. A 'Performance Management Policy' is set out in the Salaried Managers Handbook. There were various iterations of the Salaried Managers Handbook included in the Bundle. The 2014 Handbook provides for the sanctions that can be given for poor performance which range from a caution (informal action) at one end of the spectrum to dismissal at the other. A First Written Warning is described as "*A First Warning for misconduct or 'some improvement required' (poor performance)…"*. It was this version of the Handbook that was in force at the time the claimant received the warnings that are detailed below.

83. Mr Bennett explained in evidence that a manager has discretion as to whether to enter the employee into a Performance Improvement Plan ("**PIP**") if they receive a grade of 1 or 2 at their Annual Performance Review. PIPs are not referred to in the Salaried Managers Handbooks but they are referred to in a document entitled 'Year End Rating Definitions' (pp.319 – 321). The document states that it is for use in rating performance for the year-end 2018 and states

that action for addressing a grade of 1 or 2 "*often includes a Performance Improvement Plan"*.

84. In an email dated 24 December 2019 (which post-dates the warnings for poor performance that are in issue in this case) and circulated to all managers, including the claimant, Mr Bennett stated that:

> "… - *If an employee achieves a 2 on their annual performance review, repeat the attached annual PR for their quarterly review.*
>
> - *If an employee achieves a 1 on their annual performance review, employee enters Performance Improvement Process (PIP), repeat the attached Annual PR for their quarterly review supported by 30 day goals*."

85. Mr Bennett said in evidence that this was not intended to change to the procedure in respect of when an employee can enter a PIP. However, the clear implication of this email is that an employee automatically enters a PIP when they achieve a grade 1 on their Annual Performance Review but does not if they receive a grade 2.

86. The respondent does not have a policy that provides for PIPs to be entered into at quarterly reviews.

87. In evidence, Mr Bennett said that if you enter a PIP with a grade 1 you automatically receive a First Written Warning whereas if you enter a PIP on a grade 2 you would receive a caution. This policy is not set out in the Salaried Managers Handbooks nor in any other policy document that I was directed to in the course of the hearing.

88. The claimant was subject to a quarterly review for the period from 1 June 2018 to 31 August 2018. It was completed on a document specifically designed for quarterly reviews. Her manager at the time was Ms Thomas. She received two grades of 1 and six grades of 2 against the various competencies. She received an overall grade of 1.

89. Mr Simons became the claimant's Business Manager in September / October 2018. A performance review took place on 4 October 2018 and the claimant was given a grade of 1. She was invited to a disciplinary meeting that took place on 23 November 2018.

90. At the 23 November 2018 meeting the claimant said that she thought it was harsh that she had been given an overall grade of 1 by Ms Thomas given that she had only received two grades of 1 against the eight competencies. Mr Simons said he could not answer for Ms Thomas and that it was "*a fair point"*.

91. Mr Simons provided the claimant with goals for the next 12 months and indicated that this was part of the performance improvement process. I find that the claimant entered a PIP process at this time. The claimant also received a caution.

92. The claimant and Mr Simons had a series of How's it Going chats (referred to by the respondent as 'HIG chats') from 7 January 2019 onwards. At the 7 January chat Mr Simons confirmed that he had reviewed the claimant's grade and changed it to a 2.

93. The claimant's Annual Performance Review took place on 4 March 2019. The claimant received detailed but largely very negative feedback and was awarded and overall grade of 1.5.

94. On the basis of Mr Simon's detailed analysis of the claimant's performance contained in the Annual Performance Review I find that she was underperforming at this time.

95. A disciplinary meeting in respect of the grade of 1.5 took place on 9 April 2019. In Mr Simon's introduction to the meeting he said that the claimant had been issued with "*a Grade 1.5, Unsatisfactory Performance"*. As noted above, there is no provision for half-grades within the Salaried Managers Handbook and so no policy as to whether a grade of 1.5 should be treated as unacceptable performance or some improvement needed.

96. In the course of the meeting the claimant said that since she had requested the sabbatical in 2015 she had been the subject of a witch hunt to get her out of a job, that she found the workplace an uncomfortable place to be and that it was affecting her "*both mentally and physically"*. She accepted, however, that she had been underperforming.

97. Mr Simons said to the claimant that his only intention was "*to get you to be a performing first assistant to the level that I would expect from someone with your experience"*.

98. The claimant received a First Written Warning for poor performance.

99. I find that, when viewed objectively, this warning was given in good faith, without any ulterior motive and on the basis Mr Simons genuinely believed that the claimant was underperforming. The issues with the claimant's performance had pre-dated the time that Mr Simons became the claimant's manager and the detailed analysis of the claimant's individual performance contained in the Annual Performance Review is not indicative of a manager who was in some sense fabricating the outcome of the review for some other purpose.

100. The claimant appealed against the issuing of the First Written Warning. As part of the appeal she challenged the award of a half grade and said that some of the goals that had been set for her were really goals for the restaurant as a whole rather than for her individually. She said that she was being blamed for the poor business results that were being achieved by the restaurant and that, contrary to her comment in the disciplinary meeting, she did not believe that she was an underperformer.

101. The appeal was heard by Mr Howard on 14 June 2019. At the hearing the claimant reiterated many of the same points she had raised previously about both the performance review process, the fairness of the goals and her concerns about being forced out of the business.

102. Mr Howard wrote to the claimant with his decision on 25 June 2019. He said that the appeal was not upheld. He said that he had spoken to Mr Simons about the award of a grade of 1.5 and explained that Mr Simons thought this was the fairest grade to give in light of the fact that he would have scored the claimant as a 1 for the period she had worked for him but that she had received a grade of 2 at the half year. Mr Howard said "*If the PR was graded at either 1 or 2 the discipline outcome would have been the same."*. This was in fact incorrect as acknowledged by Mr Howard in his letter of 19 February 2020 in which he determined the claimant's appeal against the First Written Warning that she received on 29 December 2019.

103. Mr Howard said he took on board the fact that some of the goals were more along the lines of overall restaurant goals and that going forward he would ensure that the claimant and Mr Simons agreed any targets and that the claimant has sufficient time to influence these areas. He concluded the letter by stating that he would ensure that he and Mr Simons were providing the claimant with as much support as they could to ensure that she succeeded in the business.

104. Once again, I find that, viewed objectively, Mr Howard acted in good faith and without any ulterior motive in the conduct of this appeal and, indeed, in respect of the appeal that took place in relation to the First Written Warning that the claimant received for poor performance on 29 December 2019. I note in particular that Mr Howard overturned that latter warning.

105. Regular HIG chats with Mr Simons continued thereafter.

106. On 10 September 2019 the claimant and Mr Simons moved to the Waltham Abbey restaurant.

107. The claimant and Mr Simons had a HIG chat on 30 October 2019, Mr Simons said he was happy that everything on the agreed action plan had been signed off and noted that the claimant had achieved her goal in terms of complaints. Mr Simons said "*In terms of your goals we are getting somewhere. Well done."*

108. Mr Simons said nothing in the meeting of 30 October to indicate that he remained very unhappy with the claimant's overall performance or that she was on track to receive a poor grade at the next performance review.

109. On 3 December 2019, Mr Simons completed an Annual Performance Review document for the purposes of conducting what was, or should have been, a quarterly review. I find as a fact that the claimant had not been told at any point prior to this date that quarterly reviews were to be conducted on Annual Performance Review documents. Mr Simons referred in the document to incidents of poor performance in August 2019 including a Customer Experience

Visit at which a manager assessed the experience a customer would have had in the restaurant. The restaurant scored 42% (a very low score).

110. Understandably, it appeared to the claimant that Mr Simons was conducting an Annual Performance Review. There was no good reason for doing so given that the respondent conducts the annual reviews towards the end of the first quarter of the calendar year and the claimant's previous Annual Performance Review had taken place on 4 March 2019.

111. Mr Simons was highly critical of the claimant's performance. In the summary box at the end of the document he said "*You generally complete the goals I set you, but your performance is not just on goal completion, but on the way you work your shifts…Your people have openly told me they don't want to work with you…this is all down to whether your people respect you and the way you run your shifts. I don't get this feedback about any other salaried manager."*

112. The claimant was invited to a disciplinary meeting that took place on 23 December 2019. She was accompanied by a Trade Union Representative – Trevor Knowles-Olowu. The meeting took four and half hours. The claimant and her representative raised numerous complaints about the performance management process that had been followed since the claimant's move to the Waltham Abbey restaurant. At the end of the meeting Mr Simons confirmed that he would need some time to consider his decision.

113. On 29 December 2019, Mr Simons wrote to the claimant with the outcome of the disciplinary hearing. He stated: "*A decision was taken at the meeting to issue you with a First Written Warning for Poor Performance. The reason for the warning is that your performance failed to meet the standards required of you…"*.

114. A decision had not in fact been taken at the meeting.

115. The letter did not address any of the issues or concerned that had been raised at the meeting by the claimant and her Trade Union Representative.

116. I find that, viewed objectively, Mr Simons acted in good faith and without any ulterior motive and that he genuinely had concerns about the claimant's performance that he was trying to address.

117. The claimant appealed the imposition of the disciplinary sanction. The appeal was heard by Mr Howard on 29 January 2020.

118. Mr Howard upheld the appeal and overturned the written warning but he decided that the claimant should remain in the PIP process. In reaching his decision, Mr Howard acknowledged that there had been "*anomalies with the process"*. I find that to be a reference to the fact the claimant was placed on a PIP at a quarterly review, that she should not have received a grade of 1.5 and to the fact that Mr Simons had conducted what should have been a quarterly review on an Annual Performance Review document.

119. Mr Howard referred back his previous decision to uphold the claimant's First Written Warning for poor performance and stated "*I admit and apologise for saying that whether you got a grade 1 or grade 2, the disciplinary outcome would have been the same as this is not what we follow"*. Once again, I have not seen a policy document that sets out in clear terms what the relationship is between the receipt of a grade 1 or a grade 2 and any sanctions that may be applied through the disciplinary process. I note, however, that Mr Bennett did compile a flowchart as part of the grievance outcome that he said "*demonstrates the steps that should be followed and the difference between entering [the PIP process] on a Grade 1 of Grade 2 PR*" (pp.437-438).

120. Mr Howard also acknowledged that when the claimant moved to the Waltham Abbey restaurant he had not ensured that the new Franchisee Operations Consultant that the claimant began working under (Ms St. Ange) knew of the commitment that Mr Howard had made to supporting the claimant following her appeal against the First Written Warning issued on 9 April 2019.

121. I find that there were the failings in the performance management process as acknowledged by Mr Howard. Further, the award of a grade 1 and the sanction of a Final Written Warning that followed was always likely to come as a surprise to the claimant given the relatively positive HIG chat that had taken place on 30 October 2019 at which there was no suggestion from Mr Simons that the claimant might be in line for receipt of a grade 1.

<u>The manager's rota for December 2019</u>

122. The claimant's name was left off the manager's rota for the week commencing 16 December 2019. Her name was included in the rota for the for the following weeks. When the omission was pointed out to Mr Simons her wrote the claimant's name on in pen.

123. Given the fact that the claimant's name was only missing from the rota for one week and that it was corrected promptly when the issue was raised, I find that the omission of the claimant's name was simply an error on the part of Mr Simons.

<u>Mr Simon's use of WhatsApp</u>

124. Mr Simons made use of two WhatsApp groups at Waltham Abbey. One group was for the Salaried Managers and one group was for all managers – including those that were paid at an hourly rate. Based on the hierarchy chart at p.945 I find that the WhatsApp group for all the managers at Waltham Abbey included approximately 18 people.

125. The claimant relies in particular upon the WhatsApp messages that were sent to the group for all managers between November 2018 and March 2020 and appeared at pp.923, 924, 925, 930 and 937.

126. These messages were sent to the managers as a group and were aggressive in tone. Two of these messages contained direct threats of disciplinary action

due to poor performance and in another Mr Simons said he would be "*dealing with*" managers due to performance related issues. For example, the message at p.924 said "*If FFT is not above 70 this month expect me to take action against you"* and the message at p.930 said "…*Have 90%+ on our [Brand Standard Visit]. Anyone that doesn't understand this can come and talk to me about it. But make no mistake, you will be disciplined now if these figures do not improve"*.

127. In evidence, Mr Bennett agreed with the suggestion that these messages were examples of how a manager should not communicate.

Events from July 2020 onwards

128. Following the outbreak of the COVID-19 pandemic, the claimant was furloughed on 26 March 2020.

129. On 13 May 2020 Mr Simon sent a WhatsApp message to the salaried managers at Waltham Abbey saying "*…we will be required to work very soon. As soon as I know more we will have a conference call to discuss. I should know more tomorrow"* (p.781). Mr Simons did not call the claimant. She messaged him on 22 May to ask for confirmation of what was happening in respect of her return to work. Mr Simons subsequently called the claimant and told her that only five managers were returning across the business and that he would be in contact when the respondent could afford to bring back more managers.

130. McDonald's restaurants reopened at the beginning of June with a drive-through service. On 1 June, Tanver Chowdhury returned from furlough. It was necessary to bring Mr Chowdhury back at that time because he was the most competent to deal with planned maintenance work that was taking place.

131. On 12 June, Ms St. Ange contacted the claimant and asked if she would take two weeks' annual leave starting on 24 June.

132. On 17 June, Mr Simons told the claimant that he would be contacting some of the management team over the next few days because McDonald's would start serving breakfasts again from 8 July.

133. On 8 July, Adam Kovacs returned to work. He was brought back ahead of the claimant because he was able to relieve the Business Manager of the responsibility of completing the crew schedule.

134. The claimant accepted in evidence that Mr Chowdhury and Mr Kovacs were un-furloughed before her because of their skillsets. She also accepted that she did not know when salaried managers at other restaurants were un-furloughed.

135. On 9 July 2020, Ms St. Ange contacted the claimant again and told her that she was to remain on furlough. The claimant asked why the respondent was not considering using the flexible furlough scheme and Ms St. Ange said that it would create a significant amount of work for Mr Bennett. Ms St Ange gave no indication as to when the claimant might be able to return to work.

136. On 17 July, the claimant raised a grievance. The grievance included a complaint relating to the fact that the claimant remained on furlough.

137. On 31 July, the claimant was called by Ms St. Ange and told that she would be un-furloughed from 12 August. The claimant did not return to work at that time as she was not fit to do so. Indeed, she did not return to work prior to her resignation.

138. The respondent's contention, that I accept, is that there were business reasons for not bringing the claimant back from furlough at an earlier date. Although sales for July 2020 were comparable to sales in January 2020, the number of customers was significantly reduced with the 'guest count' for July 2020 being 38,251 compared to a guest count of 52,491 in January 2020. In addition, I accept evidence given by Mr Loizou that the respondent had suffered significant losses as a result of the pandemic and that there were legitimate business reasons for them to take a staged approach to bringing back the full management team.

139. As set out above, the claimant submitted a grievance on 17 July 2020. The claimant's grievance was 14 pages of closely typed text. It covered all the matters set out above and covered each in signification detail. In respect of the warnings the claimant had received for misconduct and poor performance, a central strand of her complaint was that she had been the subject of unfair and unreasonable sanctions that, even though overturned on appeal, should not have been imposed in the first place. She said that this indicated an "*aggressive and unfair approach to applying the most sever sanction to me"*.

140. In addition, the claimant stated that bonus payments to which she had been entitled were withheld, that she had not been paid her 25 year and 30 year service awards and that she had not received pay rises to which she was entitled.

141. On 11 August 2020, Mr Loizou called Mr Mustafa. He did so because as part of her grievance the claimant had raised the conversation about the provision of notice that she had with Mr Howard in July 2018. Mr Loizou wanted Mr Mustafa to provide confirmation of the discussion they had had at the Franchisee event.

142. Once again there is a dispute between Mr Mustafa and Mr Loizou as to what was said in the course of this conversation. Mr Loizou says that Mr Mustafa did not want to put anything in writing because he was concerned that it might cause issues with Mr Wood, who was the claimant's partner and Mr Mustafa's Operations Consultant. Mr Loizou says that Mr Mustafa was interested in offering the claimant a role in his franchise but that he told Mr Mustafa not to approach to the claimant because she had raised a serious grievance and was on sick leave.

143. Mr Mustafa says that Mr Loizou asked him to confirm that it was Mr Wood who had first approached Mr Mustafa in respect of a possible vacancy for the claimant in Mr Mustafa's franchise. Mr Mustafa says is was clear to him that Mr

Loizou wanted him to provide a false account of events. He says that he asked whether Mr Loizou still wanted him to employ the claimant and that Mr Loizou said that the claimant was "*a problem"*, that she was "*always sick"* and "*she was trying to take me to a tribunal for hundreds of thousands of pounds."*

144. I find that Mr Loizou did not ask Mr Mustafa to lie about the conversation at the Franchisee event in 2018 or imply that he should do so. In my opinion, Mr Loizou and Mr Mustafa had different recollections of the conversation at the Franchisee event and that Mr Loizou hoped that Mr Mustafa would corroborate his genuine memory of events.

145. I do find, however, that in the conversation on 11 August 2020, Mr Loizou said that the claimant was " *a problem"*. In my opinion, Mr Loizuo probably did regard the claimant as a problem given the lengthy grievance she had submitted and the time and resources it would take to determine it and he was venting his frustration to a fellow Franchisee who he had known for many years.

146. Given that Mr Mustafa's Operations Consultant was the claimant's partner, it was likely in my opinion that this comment would make its way back to the claimant.

147. I do not find that Mr Loizou said that the claimant was always sick. The simple fact was that the claimant had taken very little sickness absence. I think it is more likely that Mr Loizou referred to the fact that the claimant was currently off on a period of sickness absence.

148. Mr Mustafa's account of the 11 August conversation with Mr Loizou was relayed to the claimant by Mr Wood, and she referred to it in her resignation letter.

149. Mr Bennett conducted a grievance hearing with the claimant on 11 September 2020 and sent the Claimant his grievance outcome on 11 October 2020.

150. Mr Bennett put significant time and effort into determining the claimant's grievance and I find as a fact that, viewed objectively, he did so in good faith and without any ulterior motive.

151. In respect of the claimant's complaints about the withholding of bonuses, Mr Bennett identified that the claimant should have been paid a bonus in respect of the first quarter of 2018. His conclusion was that the non-payment of the bonus was the result of an administrative error arising from the fact that the claimant had received a Final Written Warning on 9 April 2018 prior to the payment being processed. Mr Bennett upheld this aspect of the appeal and instructed payroll to pay the bonus of £375.

152. The explanation that the bonus was withheld due to the warning the claimant had received is not entirely convincing given that the warning was dated 9 April and the bonus related to the first quarter of the year. However, the fact that an administrative error was made remains, in my view, the most likely explanation, and I find as a fact that it was such an error. I take into account the fact that there is no evidence of a direction from any manager that the bonus should be

withheld and the fact that the claimant was paid her full bonus entitlement in 2017.

153. Mr Bennett did not uphold the claimant's complaint relating to pay rises. He explained that pay rises for any given year are set out in the Annual Performance Review document and relate to the grade received in the relevant year. Mr Bennett provided the claimant with a table detailing the rises that applied to each of the years in question, the grade received by the claimant and the pay rise that she was entitled to as a result.

154. I find as a fact that Mr Bennett's explanation of the claimant's entitlement to pay rises was accurate and that the respondent did not fail to provide the claimant with any pay rises to which she was entitled.

155. As for the 25 year and 30 year service awards, Mr Bennett did not uphold the grievance in respect of the former because it predated the claimant's employment with the respondent. In respect of the latter, Mr Bennett said that the award is not provided by the respondent and, as a result, the claimant's entitlement to such an award (that had arisen in 2012) had been overlooked. He instructed payroll to effect a payment of £1,000 to the claimant.

156. No other aspect of the grievance was upheld.

157. In respect of Misconduct Allegation 1, Mr Bennett stated: "*I do not see that there is sufficient evidence to find that you were unreasonably or unfairly disciplined in this instance…merely that the sanction issued was incorrect in the view of the Appeal Officer."*

158. Mr Bennett took a similar approach in relation to Misconduct Allegation 2. He said: "*…whilst I appreciate that in accordance with the Company's disciplinary process, you appealed the sanction issued and that it was overturned, this is not evidence to suggest that the disciplinary process itself should not have taken plan or that you were unreasonably and unfairly disciplined, merely that there were some flaws in the procedure followed in investigating this matter."*

159. Exactly the same conclusion was reached by Mr Bennett in respect of the Final Written Warning for poor performance that was issued on 29 December 2019 but subsequently overturned by Mr Howard on appeal.

160. Mr Howard did not interview Mr Simons as part of his investigation into Mr Simons' motivation when investigating disciplinary offences with which the claimant was charged or when issuing disciplinary sanctions.

161. The claimant appealed the outcome of the grievance. She said that her grievance had not been considered impartially or in good faith and that Mr Bennett had failed to carry out a reasonable investigation. She stated that the treatment she had been subjected to amounted to harassment and that it all began following Mr Loizou's resistance to her taking her sabbatical leave. The claimant provided 15 bullet points in support of that assertion.

162. The respondent appointed Ms Wood, an independent HR professional, to hear the appeal.

163. A grievance appeal hearing took place on 26 November 2021.

164. Ms Wood wrote to the claimant on 10 December 2020. The letter provided a detailed explanation of Ms Wood's findings divided into headings that related to each of the 15 grounds of appeal.

165. Based on the detailed nature of Ms Wood's findings, her independent status and the fact that Ms Wood upheld one of the claimant's grounds of appeal, I find that, viewed objectively, the appeal was conducted in good faith and without any ulterior motive on the part of Ms Wood.

166. The ground of appeal that was upheld was in relation to the exclusion of the claimant from the 2017 Christmas meal that Ms Wood described as "*not a neutral act"*.

167. On 14 December the claimant emailed Mr Loizou and resigned. She said that she had been "*left with no alternative due to the way in which I have been treated over recent years. As you know, I raised a grievance regarding that treatment"*. She referred to the grievance being a "*whitewash"* that "*failed to properly address the harassment that I have suffered"*. She continued as follows:

> "*I have also discovered that you have spoken to another franchisee, firstly, requesting that they "take me off your hands" and that you will continue to pay my wages for several months if they do so, and subsequently, requesting that person write a letter in order to provide a false account of that conversation. I further understand that when that person refused to do so, you told him that I was "a problem" and "was always sick*
> *…*
> *I am not willing to tolerate this behavior any longer, and therefore confirm my resignation with immediate effect…"*

168. The claimant notified Acas of the claim on 18 December 2020 and received the Acas early conciliation certificate on 20 January 2020. The claim was issued on 1 April 2021 and therefore was brought in time.

<u>The relevance of the sabbatical</u>

169. I do not accept that claimant's contention that her request for a sabbatical led to the alleged breaches of the implied term or, indeed, that there was any plan to force her out of the business following that request. I base my decision upon the fact that this would have required coordinated action by a number of the respondent's senior management team across a number of years and I have seen no evidence to support the finding that there was such coordination. Further, I take into account the fact that the claimant was successful in over-

turning disciplinary sanctions on three occasions. This is inconsistent with the existence of a plan to push the claimant out of respondent's business.

The Law

170. A termination of the contract by the employee will constitute a dismissal within section 95(1)(c) of the ERA 1996 if he or she is entitled to so terminate it because of the employer's conduct. That is a constructive dismissal.

171. For the employee to be able to claim constructive dismissal, the employee must establish that the following four conditions are met:
    a. There must be a breach of contract by the employer.
    b. That breach must be sufficiently important to justify the employee resigning, or else it must be the last in a series of incidents which justify his leaving.
    c. The employee must leave in response to the breach and not for some other, unconnected reason.
    d. The employee must not delay too long in terminating the contract in response to the employer's breach, otherwise he or she may be deemed to have waived the breach and agreed to the variation of the contract or affirmed it.

172. A repudiatory breach of contract is a significant breach, going to the root of the contract: see *Western Excavating (ECC) Ltd v Sharp* [1978] ICR 221. That is to be decided objectively by considering its impact on the contractual relationship of the parties: see *Millbrook Furnishing Industries Ltd v McIntosh* [1981] IRLR 309. The fact that the employer may genuinely believe that the breach is not repudiatory is irrelevant.

173. The employee must resign in response, at least in part, to the repudiatory breach. If there is more than one reason why the employee has resigned, the correct approach is to examine whether any one of them is a response to the breach rather than to examine which amongst them is the effective cause of the resignation: see *Meikle v Nottinghamshire County Council* [2005] ICR 1, per Keane LJ and *Wright v North Ayrshire Council* UKEAT/0017/13/BI per Langstaff P.

174. It also follows that there will be no breach simply because the employee subjectively feels that such a breach has occurred no matter how genuinely this view is held. If, on an objective approach, there has been no breach, then the employee's claim will fail: see *Omilaju v Waltham Forest London Borough Council* [2005] IRLR 35.

175. Employment contracts contain an implied term of mutual trust and confidence. The parties to the contract will not, without reasonable and proper cause, conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust which should exist between employer and employee: see *Malik v BBCI SA (in liq)* [1998] AC 20.

176. It is not simply about unreasonableness or unfairness. The question is whether the conduct complained of was likely to destroy or seriously damage the relationship of trust and confidence. The unvarnished test in *Malik* should be applied: see the decision of the Court of Appeal in *Buckland v Bournemouth University Higher Education Corporation* [2010] IRLR 445.

177. It is not necessary in each case to show a subjective intention on the part of the employer to destroy or damage the relationship, a point reaffirmed by the EAT in *Leeds Dental Team Ltd v Rose* [2014] IRLR 8, EAT. As HHJ Burke put it:

> *"The test does not require a Tribunal to make a factual finding as to what the actual intention of the employer was; the employer's subjective intention is irrelevant. If the employer acts in such a way, considered objectively, that his conduct is likely to destroy or seriously damage the relationship of trust and confidence, then he is taken to have the objective intention spoken of…"*

178. The Court of Appeal in *Lewis v Motorworld Garages Ltd* [1986] ICR 157 held that a course of conduct can cumulatively amount to a fundamental breach of contract entitling the employee to resign and claim constructive dismissal following a "last straw" incident, even though that incident by itself does not amount to a breach of contract. In *Omilaju v Waltham Forest London Borough Council* [2005] ICR 481,CA, it was stated that the last straw does not have to be of the same character as the earlier acts in the series, but it must contribute something to the breach of trust and confidence.

179. An employee who is the victim of a continuing, cumulative breach of contract is entitled to rely on the totality of the employer's acts, notwithstanding a prior affirmation: see *Kaur v Leeds Teaching Hospitals NHS Trust*, [2019] ICR 1, CA In that case guidance is given on the approach for Tribunals:

    a. What is the most recent act (or omission) triggering resignation?
    b. Has he or she affirmed the contract since that date?
    c. If not, was that act or omission itself a repudiatory breach of contract?
    d. If not, was it part of a course of conduct which viewed cumulatively amounts to a repudiatory breach of trust and confidence?
    e. Did the employee resign in response – or partly so – to that breach?

180. If the most recent conduct relied upon by a claimant as forming part of a cumulative breach is not capable of contributing something to a breach of the implied term of trust and confidence, then the tribunal may need to go on to consider whether the earlier conduct itself entailed such a breach, has not since been affirmed, and contributed to the decision to resign. As long as there has been conduct which amounts to a fundamental breach, the right to resign in response to it has not been lost, and if the employee does resign at least partly in response to it, constructive dismissal is made out. That is so even if other more recent conduct has also contributed to the decision to resign: see *Williams v Governing Body of Alderman Davies Church in Wales Primary School* [2020] IRLR 589 per Auerbach J.

181. The general principles of contract law applicable to a repudiation of contract are that if one party commits a repudiatory breach of the contract, the other party can choose either to affirm the contract and insist on its further performance or he can accept the repudiation, in which case the contract is at an end. The innocent party must at some stage elect between these two possible courses: if he once affirms the contract, his right to accept the repudiation is at an end, but the election to affirm is not required within any specific period.

182. Delaying too long or, by conduct, indicating acceptance of the change, can point to affirmation. It is not simply a matter of time, in isolation. In *WE Cox Toner (International) Ltd v Crook*, [1981] IRLR 443, it is established that mere delay by itself (unaccompanied by any express or implied affirmation of the contract) does not constitute affirmation of the contract; but if it is prolonged it may be evidence of an implied affirmation.

183. In *Cantor Fitzgerald International v Bird and others* [2002] IRLR 867, QBD, McCombe J described affirmation as, "*essentially the legal embodiment of the everyday concept of letting bygones be bygones*".

Conclusions

184. The first issue is whether the Respondent, without reasonable and proper cause, conducted itself in a manner calculated or likely to destroy or seriously damage its relationship of mutual trust and confidence with the claimant?

185. The claimant relies on 14 acts as either individually or cumulatively constituting a breach of the implied term. I consider them in turn below under headings that are taken from the list of issues.

<u>Misconduct Allegation 1 – issued with a Final Written Warning on 5 January 2016, which was overturned on appeal on 11 February 2016, without a written explanation</u>

186. The claimant was issued with a Final Written Warning by Ms Askew simply because (a) there had been a substantial loss to the respondent; and, (b) there had been a security breach i.e. Nammy and Saj had obtained the claimant's password. In the absence of an actual finding of misconduct – i.e. a finding as to what it was that the claimant had actually done wrong – the issuing of a disciplinary sanction was unfair. Indeed, this was exactly the point Ms St. Ange was acknowledging on appeal when she observed that it was not conclusive that the claimant had given her password to Nammy or Saj.

187. Given my finding that the disciplinary process was, when viewed objectively, carried out in good faith and without there being any ulterior motive, allied to the fact that the claimant had the right to appeal the issuing of the sanction, I do not find that the issuing of the Final Written Warning amounted to a freestanding breach of the implied term. However, given that the issuing of the sanction was unfair, I do find, as set out at paragraph 231 below, that it contributed to a breach of that implied term.

188. I find that the failure of the respondent to provide the claimant with a written outcome of the appeal did not contribute to a breach of the implied term. Ms St. Ange had upheld the claimant's appeal and in the appeal meeting had explained to the claimant why she had upheld the appeal.

Misconduct Allegation 2 – issued with a Final Written Warning on 9 April 2018, which was overturned on appeal on 8 June 2018

189. In light of the fact the claimant's role required her to ensure that cash procedures were bring enforced, I find that there was a proper basis for an investigation to be initiated into the claimant in relation to Misconduct Allegation 2.

190. However, I find that the disciplinary sanction that was issued by Mr Simons was unfair in light of the fact that (a) it was the claimant's line manager who was stealing the monies and concealing that fact from both the claimant and other managers (b) there were delays in the investigatory process; and, (c), consideration had not been given to the question of whether and to what extent more senior managers were responsible, or were indeed more responsible than the claimant, for not identifying the theft of the monies. Accordingly, it was right for the sanction to be overturned on appeal.

191. Given my finding that the disciplinary process was, when viewed objectively, carried out in good faith and without there being any ulterior motive, allied to the fact that the claimant had the right to appeal the issuing of the sanction, I do not find that the issuing of the Final Written Warning amounted to a freestanding breach of the implied term. However, given that the issuing of the sanction was unfair, I do find, as set out at paragraph 231 below, that it contributed to a breach of that implied term.

Prohibited from attending the Christmas meal – informed in December 2017 by Paul Howard that the Claimant should not attend the Salaried Manager's Christmas Meal

192. I agree with Ms Wood that the exclusion of the claimant from the Christmas meal was not a neutral act. It was unfair of the respondent to exclude the claimant from the meal simply because the business had lost money.

193. In light of the fact that the claimant was not actually accused of any wrongdoing at this time, I do not find that this conduct on the part of the respondent was sufficient on its own to amount to a breach of the implied term. I do however find that, as set out at paragraph 231 below, it contributed to a breach of that implied term.

Asked to provide sufficient notice if leaving the business – the claimant was told on two occasions in July 2018 by Mr Howard that if she wanted to leave the business, she should ensure that she gave 'sufficient notice'

194. In respect of this alleged breach of the implied term the claimant relies entirely upon what Mr Howard said to her in the course of the two conversations in July 2018. She does not rely on anything said between Mr Loizou and Mr Mustafa

at the Franchisee event. The claimant did not in fact know Mr Mustafa's version of what was said by Mr Loizou at the at the Franchisee event until Mr Mustafa emailed her on 18 September 2020.

195. In the course of these conversations, Mr Howard did not indicate that he or the respondent wanted the claimant to leave the business. In fact, Mr Howard was expressing concern about the possibility that the claimant might leave without providing sufficient notice thereby leaving the respondent short of managers. The claimant would reasonably have been confused about why Mr Mustafa had made contact with Mr Loizou but, based on what Mr Howard had told her, there was no reasonable basis for the claimant to think that it was, as she said in her email of 18 July 2018, a "*further tactic in forcing me out of my job"*.

196. Accordingly, I find that Mr Howard telling the claimant that if she wanted to leave the business she should provide sufficient notice did not amount to a freestanding breach of the implied term nor did it contribute to a breach of the implied term.

<u>Allegation of Poor Performance 1 – on 9 April 2019, issued with a First Written Warning by Mr Simons and upheld on appeal</u>

197. The fact that the claimant had entered into a PIP in November 2018 and had gone on to receive a grade of 1.5 at her Annual Performance review all played a part in the claimant being subject to a disciplinary hearing and then to the issuing of a First Written Warning.

198. The respondent had policy in relation to PIPs that provided that they could be entered into a quarterly reviews and no policy that provided for the provision of half grades. As such, there was no policy as to whether a grade of 1.5 should be treated as unacceptable performance (grade 1) or some improvement needed (grade 2).

199. As part of his appeal outcome Mr Howard said "*If the PR was graded at either 1 or 2 the discipline outcome would have been the same."* Mr Howard acknowledged that this was incorrect as part of the appeal process relating to the second First Written Warning that the claimant received for poor performance, (p.307).

200. Accordingly, there was confusion and lack of clarity as to how the respondent's performance improvement process worked and part of the reasoning provided by Mr Howard in upholding the disciplinary sanction on appeal was incorrect.

201. I find that issuing a First Written Warning in circumstances where the respondent had no or no clear policy setting out how the PIP process worked or the relationship between the PIP process, the grades received by the employee and the issuing of disciplinary sanctions, contributed, as set out at paragraph 231 below, to the breach of the implied term. However, in light of the fact that the claimant was underperforming at this time I find that this conduct fell short of a freestanding breach of the implied term.

Allegation of Poor Performance 2 – issued with a First Written Warning on 29 December 2019 by Mr Simons, which was overturned on appeal on 20 February 2020. However, the claimant was to remain under a PIP

202. A number of issues with the First Written Warning issued on 9 April 2019, such as the award of a grade of 1.5, were raised again by the claimant when she challenged the First Written Warning that was issued on 29 December 2019.

203. However, there were additional issues with the process followed by Mr Simons in relation to the warning issued on 29 December. The most obvious is that Mr Simons completed the 3 December 2019 review on an Annual Performance Review document in circumstances where the claimant was only due to have a quarterly review. He then proceeded in a manner that was consistent with it being an Annual Performance Review by progressing to a disciplinary process. The respondent's policy, as explained to me by Mr Bennett, was for employees to potentially enter a PIP process and be subject to potential disciplinary action on the basis of the grades they receive at their Annual Performance Review.

204. Further, Mr Simons was highly critical of the claimant's performance in the 3 December 2019 review and awarded her a grade 1 despite the fact that at their last HIG chat on 30 October 2019 Mr Simons had said he was happy that everything on the agreed action plan had been signed off and noted that the claimant had achieved her goal in terms of complaints. Mr Simons had also told the claimant that "*In terms of your goals we are getting somewhere. Well done."*

205. I accept that, when reviewing the claimant's performance in the round, Mr Simons was entitled to take into account more than just the extent to which the claimant had achieved the goals that he had set for her. However, it seems to me that either Mr Simons should, acting fairly, have given the claimant more credit for the progress she had made with those goals when he conducted the 3 December 2019 review or, in the alternative, he should, acting fairly, have given the claimant an indication at the 30 October 2019 HIG chat that despite the progress she was making she was still on track to receive a low grade at the upcoming review and he should have explained to her why that was the case. In my opinion, it was unfair of Mr Simons not to take one or other these approaches.

206. In addition, I find that it was unfair of Mr Simons to impose a disciplinary sanction given the failures in the process identified by Mr Howard on appeal and, in particular, given that the claimant was not due to have an Annual Performance Review until March 2020. It was also unfair of him to impose the sanction without engaging in his letter of 29 December 2019 with any of the matters that the claimant and her Trade Union representative had raised at the disciplinary meeting.

207. I do, however, accept that there were genuine issues with the claimant's performance, and that, viewed objectively, Mr Simons was acting in good faith. I therefore find that Mr Simons' conduct fell short of a freestanding breach of the implied term. However, as set out at paragraph 231 below, the imposition of the disciplinary sanctions contributed to a breach of that implied term.

208. I do not find that Mr Howard's conduct of the appeal contributed to a breach of that implied term. Mr Howard upheld the claimant's appeal by overturning the sanction. Further, given that there remained genuine concerns with the claimant's performance it was reasonable for him to conclude that the claimant should remain on a PIP.

Bonus payments and pay rises withheld

209. As set out above, I have found that the claimant was not paid the bonus for the first quarter of 2018 due to an administrative oversight and that no pay rises to which she was entitled were withheld. In the circumstances, I find that these matters did not amount to a freestanding breach of the implied term and did not contribute to a breach of the implied term.

Removed from manager's rota in December 2019 – Jon Simons removed the Claimant's name from the Waltham Abbey Managers' Schedule

210. I have found as a fact that the omission of the claimant's name from the rota was an error and that the claimant's name had been included in the rota for the following weeks.

211. I find that this error could not amount to a freestanding breach of the implied term nor could it contribute to a breach of the implied term.

Placed on furlough leave and remained on it despite all the other salaried managers being returned to work – the Claimant was informed on 9 July 2020 by Lynne St. Ange that she was to remain on furlough leave

212. The claimant remained on furlough leave after the two other First Assistant Managers at Waltham Abbey had been un-furloughed because they had particular skills that the claimant did not have. Further, the claimant accepted in evidence that she did not know when the salaried managers at other of the respondent's restaurants returned to work.

213. I have also found as a fact that there were legitimate business reasons for the respondent not un-furloughing the claimant at an earlier date.

214. In the circumstances, I find that there was no freestanding breach of the implied term and that these acts did not contribute to a breach of the implied term.

Threatening and abusive WhatsApp messages – between November 2018 and March 2020, the claimant received threatening and abusive WhatsApp messages from her manager, Mr Simons.

215. I have found as a fact that Mr Simons sent aggressive WhatsApp messages to the WhatsApp group and that they included threats of disciplinary action.

216. In my opinion, Mr Bennett was right to accept that these messages are an example of how a manager should not communicate. In particular, statements

such as "*…make no mistake, you will be disciplined now if these figures do not improve"* carry with them the implication that Mr Simons had already decided that, if the figures did not improve, disciplinary sanctions would be imposed irrespective of what was revealed as the result of any proper disciplinary process.

217. Given that these messages were sent to all managers at Waltham Abbey rather than being targeted at the claimant, I find that these messages did not amount to a freestanding breach of the implied term. However, as set out at paragraph 231 below, they contributed to a breach of that implied term.

The request by Mr Loizou made to Mr Mustafa on 11 August 2020 to provide an untrue statement that Mr. Wood (the claimant's partner) had asked Mr. Mustafa to offer the claimant a job

218. I have found that Mr Loizou did not ask Mr Mustafa to make an untrue statement: the reason Mr Loizou approached Mr Mustafa was that he hoped Mr Mustafa would corroborate his own genuine memory of what was said between them at the Franchisee event in 2018.

219. Accordingly, there was no freestanding breach of the implied term and no act that contributed to a breach of the implied term.

The comments made by Mr. Loizou to Mr. Mustafa, and reported to Mr. Wood, that the claimant was "*a problem*" and was "*always sick*"

220. I have found as a fact that Mr Loizou did tell Mr Mustafa that the claimant was "*a problem"* but that he did not say that she was "*always sick"*. This comment was made in the context of the claimant having brought a wide-ranging grievance in relation to her treatment at the hands of the respondent. Further, the comment was likely to be relayed back to the claimant in light of the fact that the claimant's partner, Mr Wood, was Mr Mustafa's Operations Consultant.

221. I find that telling Mr Mustafa that the claimant was *"a problem*" during the course of a grievance process is conduct that was likely to seriously damage the implied term of trust and confidence and that, as such, it amounted to a freestanding breach of the implied term. In the alternative, at set out at paragraph 231 below, this comment by Mr Loizou contributed to a breach of the implied term.

The failures of the grievance outcome detailed in the claimant's grievance appeal

222. I have found that Mr Bennett determined the claimant's grievance in good faith and without any ulterior motive and produced a detailed response to what was a lengthy grievance. Moreover, he investigated the issues relating to the bonus, the pay rises and the awards for service and ensured that the claimant received the payments that were owing to her.

223. However, in respect of the disciplinary sanctions, Mr Bennett concluded that despite the sanctions being overturned on appeal there was not sufficient evidence to conclude that the claimant had been "*unreasonably or unfairly disciplined"*.

224. In fact, and for the reasons set out above, the issuing of these sanctions was, in my opinion, unfair.

225. Further, and because the sanctions were unfair, I find that it was necessary as part of a fair investigation for Mr Bennett to at least have interviewed Mr Simons, who had imposed two of the three sanctions and investigated the third, in order to determine whether there was any foundation to the allegations the claimant was making in her grievance in relation to the respondent's motivation when issuing those disciplinary sanctions.

226. I find both the fact that Mr Bennett did not acknowledge the unfairness of the disciplinary sanctions and the fact that he did not interview Mr Simons as being acts that, as set out at paragraph 231 below, contributed towards a breach of the implied term. However, in light of matters set out a paragraph 222 above, I do not find that Mr Bennett's actions amount to a freestanding breach of the implied term.

<u>The outcome of the grievance appeal, and in particular upholding the grievance outcome as reasonable</u>

227. As with the grievance outcome, I have found that Ms Wood determined the grievance in good faith and without any ulterior motive.

228. However, I have found that as part of fair investigation it was necessary for Mr Bennett to at least have interviewed Mr Simons in order to determine whether there was any foundation to the allegations the claimant was making in her grievance in relation to the respondent's motivation when issuing those disciplinary sanctions.

229. I find that Ms Wood's failure to acknowledge this fact did not amount to a freestanding breach of the implied terms but that it did, as set out a paragraph 231below, contribute to a breach of the implied term.

<u>Did the above, individually or cumulatively, amount to a fundamental breach of contract of employment, entitling the claimant to resign?</u>

230. I find that there was one act that, taken on its own, amounted to a breach of the implied term; namely, Mr Loizou telling Mr Mustafa on 11 August 2020 that the claimant "*is a problem"*.

231. I also find that the following acts, when taken cumulatively, amounted to a breach of the implied term:

    a. The issuing of a Final Written Warning on 5 January 2016: see paragraphs 186-188 above;

b. The issuing of a Final Written Warning on 8 June 2018: see paragraphs 189-191 above;
c. The prohibition of the claimant from attending the Christmas meal: see paragraphs 192-193 above;
d. The issuing of a First Written Warning for poor performance on 9 April 2019: see paragraphs 197-201 above;
e. The issuing of a First Written Warning for poor performance on 29 December 2019: see paragraphs 202-208 above;
f. The sending of threatening and abusive WhatsApp messages: see paragraphs 215-217 above;
g. The comment made by Mr Loizou to Mr Mustafa that the claimant "*is a problem"*: see paragraphs 220-221 above;
h. The failures of the grievance outcome: see paragraphs 222-226 above;
i. The outcome of the grievance appeal: see paragraphs 227-229 above.

232. For the avoidance of doubt, and for the same reason that I find that they contributed to a breach of the implied term, I also find that the acts set out at g. – i. above were each capable of being a 'last straw' that entitled the claimant to resign and claim constructive unfair dismissal.

233. I also find that, taken cumulatively, the acts at a.-g. above amounted to a breach of the implied term.

234. When considering whether these acts, when taken cumulatively, amount to a breach of the implied term, I have applied the test in *Malik* and have considered whether the respondent has, without reasonable and proper cause, conducted itself in a manner calculated or likely to destroy or seriously damage its relationship of mutual trust and confidence with the claimant.

235. In applying that test I have taken into account the fact that although the claimant was sanctioned on three occasions she had those sanctions overturned on appeal. However, I find that the fact of receiving three unfair sanctions that had to be challenged is a fact that can, and in this case did, when taken with other acts, contribute to a breach of the implied term.

236. In the context of the claimant being subject to unfair disciplinary sanctions, the exclusion of the claimant from the Christmas meal and the fact that Mr Simons sent WhatsApp messages threatening disciplinary action were both matters that damaged or further damaged the respondent's relationship of trust and confidence with the claimant.

237. In the circumstances, the acts at g.-i. above were each acts that could count as a last straw that entitled the claimant to resign and claim constructive dismissal.

<u>Did the claimant resign in response to the alleged breach(es) of the implied term of trust and confidence?</u>

238. I remind myself of the principle that as long as there has been conduct which amounts to a fundamental breach, the right to resign in response to it has not been lost, and if the employee does resign at least partly in response to it,

constructive dismissal is made out. That is so even if other more recent conduct has also contributed to the decision to resign: see *Williams v Governing Body of Alderman Davies Church in Wales Primary School* [2020] IRLR 589 per Auerbach J.

239. The claimant's resignation letter referred to her treatment over recent years and to the matters set out in her grievance. Those matters included the acts that I have found amounted, taken cumulatively, to a breach of the implied term. The resignation letter also referred to the Mr Loizou's comment that the claimant was "*a problem"*. I find that the resignation letter reflects the claimant's reason for resigning. Accordingly, I find that she resigned at least partly in response to the breach of the implied term. The same conclusion follows in respect of all of the breaches of the implied term referred to at paragraphs 230-233 above.

Did the Claimant waive the breach and affirm the contract?

240. In closing submissions the respondent contended that the claimant affirmed the contract following any breaches from 2015-2019 due to the fact that she did not raise a grievance at the time and continued to work.

241. The breaches of the implied term that I have found as resulting from a number of separate acts taken in combination all had a last act or a final straw that took place in 2020 after the claimant had raised a grievance. The freestanding breach of the implied term that was caused by Mr Loizou's comment that the claimant was "*a problem"* took place in 2020.

242. The claimant did not return to work following these breaches of contract and continued to complain about her treatment at the hands of the respondent. As such, I find that the claimant did not affirm the breaches.

243. The respondent does not contend that if the claimant was dismissed there was nonetheless a fair reason for the dismissal.

244. I find, therefore, that the claimant was subject to a constructive unfair dismissal.

Employment Judge Margo

30 May 2022

JUDGMENT AND REASONS SENT TO THE PARTIES ON
……..
……
FOR THE TRIBUNALS

ANNEX 1: Agreed List of Issues

1. Prior to the Claimant's resignation on 14 December 2020, did the Respondent, without proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage its relationship of mutual trust and confidence with the Claimant? The Claimant relies on the following alleged acts:

    1.1 The 10 bullet points acts complained of by the Claimant - *paragraph 6 of the Details of Claim*. In particular:

        1.1.1 **Misconduct Allegation 1** – issued with a final written warning on 5 January 2016, which was overturned on appeal on 11 February 2016, without a written explanation;

        1.1.2 **Misconduct Allegation 2** – issued with a final written warning on 9 April 2018, which was overturned on appeal on 8 June 2018;

        1.1.3 **Prohibited from attending the Christmas meal** – informed in December 2017 by Paul Howard that the Claimant should not attend the Salaried Manager's Christmas Meal;

        1.1.4 **Provide sufficient notice if leaving the business** – the Claimant was told on two occasions in July 2018 by Paul Howard that if she wanted to leave the business, she should ensure that she gave 'sufficient notice';

        1.1.5 **Allegation of Poor Performance 1** – on 9 April 2019, issued with a first written warning by Jon Simons and upheld on appeal despite acknowledging the failings with the Respondent's procedures;

        1.1.6 **Allegation of Poor Performance 2** – issued with a first written warning on 29 December 2019 by Jon Simons, which was overturned on appeal on 20 February 2020. However, the Claimant was to remain under a Performance Improvement Plan;

        1.1.7 **Bonus payments and pay rises withheld** –

            (i) The Claimant's bonus payment of £375 was withheld for Q1 2018; and/or

            (ii) Pay rises for 2015, 2016, 2018 and/or 2019 were not awarded.

1.1.8 **Removed from manager's rota in December 2019** – Jon Simons removed the Claimant's name from the Waltham Abbey Managers' Schedule;

1.1.9 **Placed on furlough leave and remained on it despite all the other salaried managers being returned to work** – the Claimant was informed on 9 July 2020 by Lynne St. Ange that she was to remain on furlough leave; and/or

1.1.10 **Threatening and abusive WhatsApp messages** – between November 2018 and March 2020, the Claimant received threatening and abusive WhatsApp messages from her manager, Jon Simons.

1.2 The request by John Loizou made to Ahmet Mustafa on 11 August 2020 to provide an untrue statement that Mr. Wood (the Claimant's partner) had asked Mr. Mustafa to offer the Claimant a job – *paragraphs 8-9 and 18 of the Details of Claim*;

1.3 The comments made by Mr. Loizou to Mr. Mustafa, and reported to Mr. Wood, that the Claimant 'is a problem' and is 'always sick' – *paragraphs 9, 17 and 18 of the Details of Claim*;

1.4 The failures of the grievance outcome detailed in the Claimant's grievance appeal – *paragraph 13 of the Details of Claim*; and/or

1.5 The outcome of the grievance appeal, and in particular upholding the grievance outcome as reasonable – *paragraphs 16-18 of the Details of Claim*.

2. If so, did the above, individually or cumulatively, amount to a fundamental breach of contract of employment, entitling the Claimant to resign?

3. Did the Claimant resign in response to the alleged breach(es) of the implied term of trust and confidence?

4. Did the Claimant waive the breach and affirm the contract?