EMPLOYMENT TRIBUNALS

Claimant: **Ms Walrond**

Respondent: **Bermondsey Central Hall Methodist Church**

Heard at: **London South Employment Tribunal (in person)**

On: **20.04.2022 – 22.04.2022**

Before: Employment Judge Dyal

Representation:

Claimant: in person

Respondent: Mr J Davies, Counsel

RESERVED JUDGMENT

1. The Claimant was (constructively) unfairly dismissed on 9 October 2018.

2. There is no *Polkey* reduction in respect of losses occurring prior to 29 January 2019. A 60% *Polkey* reduction applies to any compensatory award in respect of loss of earnings and/or pension loss from 29 January 2019 onwards.

3. There was a failure to pay the Claimant notice pay.

4. The complaints of unauthorised deduction from wages and failure to pay holiday pay fail and are dismissed.

CASE MANAGEMENT ORDERS FOR REMEDY

1. Remedy in respect of the successful complaints to be determined at a remedy hearing if not agreed.

2. The case is stayed until 1 June 2022 in order for the parties to try and agree remedy.

3. If remedy is not agreed the parties must liaise with each other and propose either a further stay or comprehensive case management directions for remedy (marked for the attention of Judge Dyal) by 8 June 2022.

REASONS

Introduction

The issues – the background

1. An outline of the issues was identified at a case management Preliminary Hearing before Employment Judge Corrigan. She identified complaints of:

   1.1. Constructive unfair dismissal
   1.2. Constructive wrongful dismissal (notice pay)
   1.3. Failure to pay holiday pay upon termination
   1.4. Wages for October 2018
   1.5. Redundancy pay
   1.6. Religious discrimination

2. The latter two complaints were subsequently withdrawn. Employment Judge Corrigan noted that the Claimant might apply to amend to include a public interest disclosure ('PID') complaint. She also identified a dispute about the admissibility of an email of 21 September 2018. The Respondent's position was that it was inadmissible pursuant to s.111A Employment Rights Act 1996 (ERA) and/or without prejudice privilege. That matter and any application to amend to include a PID complaint was set down to be determined at an open Preliminary Hearing.

3. There was an open Preliminary Hearing before Employment Judge Hargrove. The Claimant did apply to add a PID claim and that application was refused. Employment Judge Hargrove ruled that s.111A did *not* render the email of 21 September 2018 inadmissible. For reasons that are unclear no ruling on without prejudice privilege was made.

The issues – this hearing

4. I started by identifying my understanding of the claims before the tribunal, namely that they were:

   4.1. Constructive unfair dismissal
   4.2. Constructive wrongful dismissal (notice pay)
   4.3. Failure to pay holiday pay upon termination
   4.4. Wages for October 2018

5. The Claimant said she understood herself to have a PID claim. I explained the above history and she ultimately accepted that she did not have PID claim before the tribunal.

6. Unfortunately, the matter arrived at this final hearing without the particulars of the Claimant's case that the Respondent was in breach of the implied term of trust and confidence having been identified and they were far from apparent. We spent almost the entirety of the first morning of this hearing identifying them.

7. This was a discursive process in which I methodically went through each year of the Claimant's employment and asked her to identify what matters she said occurred that was, or contributed to, a repudiatory breach of her contract of employment. This was a challenging task.

8. I was careful at every stage to check with Mr Davies whether he took any pleading point, that he understood the case as characterised and whether he had any other objection. He took a helpfully realistic approach. There were two matters that he wanted to take specific instructions on and I allowed him time to do that. Ultimately he had one objection to the list of issues as identified, namely the reliance on the email of 21 September 2018. His position was that it was covered by without prejudice privilege, was inadmissible so could not be relied upon. I gave a reasoned ruling on that matter which I explain below.

Constructive unfair dismissal

9. Did the Respondent, without reasonable and proper cause, act in a manner that was calculated or likely to destroy or seriously damage the relationship of trust and confidence between the parties? The particulars of alleged breach are:

   9.1. 2012:

      9.1.1. Rev Dr Corlett referred work to the Claimant in respect of matters that were outside of her contractual remit as a housing welfare advisor, including matters relating to immigration, mental health problems and bereavement counselling;
      9.1.2. Referrals were often sent to the Claimant's private email account and private mobile number;
      9.1.3. Rev Dr Corlett referred potentially dangerous clients such as people discharged from prison to the Claimant without any safeguarding measures being in place;
      9.1.4. There was a failure to obtain regular DBS checks for staff;
      9.1.5. A profile about the Claimant was included in the Respondent's annual marketing report which included information about skills she had that went beyond those that were required to fulfil her role, such as immigration advisory skills (which prompted more clients to seek the Claimant's assistance).

   9.2. 2013:

      9.2.1. As per 2012 [however the claimant sometimes refused to deal with clients that she considered outside of her remit and signposted them elsewhere.]

9.2.2. Rev Dr Corlett failed to put the Claimant's concerns about the work she was being assigned to the board of trustees.

9.3. 2014:

9.3.1. As per 2012 [however the claimant sometimes refused to deal with clients that she considered outside of her remit and signposted them elsewhere.]

9.4. 2015:

9.4.1. The Claimant provided maternity cover for a colleague 1 day per week who worked on the food bank and with mothers and babies, the Marsden mental health team and medical centre next door. Through that the Claimant was exposed to this colleague's clients. The issue is that Rev Dr Corlett then further referred those clients to the Claimant for her to deal with in respect of matters that were outside of her remit, such as mental health, domestic violence and alcohol issues.

9.5. 2016:

9.5.1. In 2016 the Claimant reverted to working within the terms of her contract. However, the Respondent tried to get the Claimant to agree a new contract on terms that were untenable [it is more accurately described as a new Job Description but the Claimant prefers to on call it a new contract]:

9.5.1.1. Included duties that were outside of the Claimant's existing remit such as immigration advice;
9.5.1.2. The client group were vulnerable adults: however the Respondent was not registered with the Charity Commission for working with vulnerable adults and was legally required to be.
9.5.1.3. The size of the job was so expansive that it was unmanageable.
9.5.1.4. Included widely drafted flexibility clause at clause 2.

9.6. 2017

9.6.1. Rev Dr Corlett misrepresented the Claimant's duties to the finance and governance team on 8 May 2017, by stating that the Claimant was working to the proposed new contract/job description which was untrue.

9.6.2. Rev Dr Corlett made the same misrepresentation to Anne Bishop and Robert Pierce.

9.7. 2018:

9.7.1. The dealings with Peninsula in respect of the Claimant's contract:

9.7.1.1. Peninsula did not look at the existing concerns that the Claimant had with her contract and simply adopted management's side;
9.7.1.2. Peninsular pressured the Claimant into signing a new contract in like terms to the contract proposed in 2016 [again this was technically a new Job Description rather than contract].

9.8. The correspondence of 21 September 2018 [in accordance with my ruling only part of this document is admissible].

9.9. On 24 September 2018:

9.9.1. being asked to leave the building by Rev Dr Corlett and to take the remainder of 24 and 25 September 2018 as leave;

9.9.2. the terms of the letter of 24 September 2018 that assumes the Claimant's employment is about to terminate.

10. If the Respondent was in repudiatory breach did the Claimant resign in response to the breach? Did she do so without affirmation, delay or waiver? If she affirmed the contract is she nonetheless able to rely upon a final straw?

11. The Respondent accepts that if the Claimant was dismissed she was unfairly dismissed.

Notice pay

12. Was the Claimant dismissed? If so what was her notice period? Was she paid for her notice period?

Wages

13. Did the Respondent make deductions from the Claimant's wages in October 2018?

Holiday pay

14. Did the Claimant have any accrued leave at the point of dismissal? If so was she paid for it?

The hearing

15. *Documents before the tribunal*:

15.1. Respondent's bundle;
15.2. Claimant's bundle;
15.3. Claimant's witness statement;
15.4. Reverend Gillman's witness statement;
15.5. Respondent's skeleton argument;

15.6. A guidance document extracted by the Claimant from www.gov.uk: *Safeguarding and protecting people for charities and trustees.*

Witnesses the tribunal heard from:

16. I heard from:

    16.1. The Claimant;
    16.2. Reverend Gillman.

Admissibility of email of 21 September 2019

17. On 21 September 2019 the Respondent made the Claimant an offer of settlement (it was contained in an email but sometimes has been referred to as a letter – for the avoidance of doubt, this distinction is of no materiality). The offer was headed without prejudice. It set out the main terms of a proposed severance of her contract of employment, subject to a settlement agreement. The claimant did not receive the offer until a hardcopy of the email was handed to her by her manager Rev Dr Corlett on 24 September 2019.

18. The Claimant referred to this communication and part of the detail of it in her claim form. In its grounds of resistance the respondent averred that the claimant had referred to without prejudice communications which were not admissible in the tribunal proceedings, clearly a reference to that email.

19. At the open preliminary hearing Employment Judge Hargrove ruled that "*the contents of the respondent's letter to the claimant dated 21 September 2018 are not inadmissible under section 111A Employment Rights Act 1996.*" There has been no appeal against that ruling and no material change of circumstances and therefore it must stand in this litigation.

20. As noted above the issue of without prejudice privilege at common law remains outstanding.

21. Mr Davies's position is that the mere fact of the Respondent sending a without prejudice communication on 21 September 2018 is not privileged but that the content of the communication is (the basis of this distinction is *Faithorn Farrell Timms v Bailey* [2016] IRLR 839 at para 39).

22. The Claimant's position is that without prejudice privilege does not apply to the communication at all. She made submissions about this that I would attempt to summarise the important parts of as follows:

    22.1. She was required to meet with Peninsula on two occasions to discuss her terms in the summer of 2018. (It should be noted that these were open meetings.) At the meetings Peninsula showed no interest in really hearing from her and instead of acting impartially simply tried to get her to agree to new terms of employment that had been previously proposed in 2016.
    22.2. The Claimant felt pressured to attend those meetings.

22.3. In between the two meetings Rev Dr Corlett had spoken sharply to the Claimant that '*she had better tell Peninsula what she is doing here*' i.e. what her job role was.
22.4. The disagreement between the Claimant and the Respondent as to her job role became public knowledge in the workplace and made the environment hostile.
22.5. The terms of the settlement proposed were inadequate and did not reflect her entitlement.
22.6. The settlement referred to a breakdown in the relationship and yet the claimant had done no misconduct and had performed her job well.

23. The Claimant handed up a short piece of commentary on ***Berkley Square Holdings Limited v Lancer Property Assess management Limited*** [2021] 1 WLR 4877.

- *Applicable law*

24. In ***Woodward v Santander UK PLC*** [2010] IRLR 834, the EAT summarised the without prejudice rule as follows:

> *47 The without prejudice rule is a rule of evidence which (subject to exceptions) makes inadmissible in any subsequent litigation evidence of communications made in negotiations entered into between parties with a view to settling litigation or a dispute of a legal nature. The rule applies to exclude all negotiations genuinely aimed at settlement whether oral or in writing from being given in evidence.*

25. In order for without prejudice privilege to apply, there must be a real dispute which has come into existence and which is "*capable of settlement in the sense of compromise (rather than in the sense of simply payment or satisfaction)*" (per Lord Mance in ***Bradford & Bingley Plc v Rashid*** [2006] 1 WLR 2066 at [81]). In order to be protected the communication must be part of genuine attempt to resolve the dispute.

26. The need for a dispute is vital as ***BNP Paribas v Mezzotero*** makes clear. In that case the claim to without prejudice privilege failed because there was no relevant dispute. The EAT also found that the without prejudice privilege did not apply because the employer's conduct was unambiguous impropriety.

27. Where the without prejudice communication has come into existence before the commencement of proceedings it is more difficult to determine whether or not there is a dispute of the relevant kind. As Auld LJ put it in ***Barnetson v Framlington Group Ltd*** [2007] ICR 1439 at [34]:

> *"The critical feature of proximity for this purpose, it seems to me, is one of the subject-matter of the dispute rather than how long before the threat, or start, of litigation it was aired in negotiations between the parties. Would they have respectively lowered their guards at that time and in the circumstances if they had not thought or hoped or contemplated that, by doing so, they could avoid the need to go to court over the very same dispute? On that approach, which I*

would commend, the crucial consideration would be whether in the course of negotiations the parties contemplated or might reasonably have contemplated litigation if they could not agree. Confining the operation of the rule, as the judge did, to negotiations of a dispute in the course of, or after threat of litigation on it, or by reference to some time limit set close to litigation, does not, with respect, fully serve the public policy interest underlying it of discouraging recourse to litigation and encouraging genuine attempts to settle whenever made."

28. In ***Bailey,*** HHJ Eady QC (as she was) said:

> *Without prejudice privilege can be waived, but that requires the agreement of both sides in those negotiations (both having an interest in the privilege). Waiver should be ….*

32. There are some exceptions to without prejudice privilege. The principal exceptions to the rule were listed by Walker LJ in ***Unilever plc v Proctor & Gamble Co*, at 2444F–G; *Savings and Investment Bank Ltd (in liquidation) v Fincken*** *[2003] EWCA Civ 1630*, *[2004] 1 All ER 1125*, *[2004] 1 WLR 667* at 2444–2445. Of particular relevance, Walker LJ said this:

> *'Apart from any concluded contract or estoppel, one party may be allowed to give evidence of what the other said or wrote in without prejudice negotiations if the exclusion of the evidence would act as a cloak for perjury, blackmail or other "unambiguous impropriety" (the expression used by Hoffmann LJ in Forster v Friedland [1992] CA Transcript 1052). Examples (helpfully collected in Foskett's Law & Practice of Compromise (4th edn, 1996) p 153–154 (para 9–32)) are two first-instance decisions, Finch v Wilson (8 May 1987, unreported) and Hawick Jersey International v Caplan (1988) Times, 11 March. But this court has, in Forster v Friedland and Fazil-Alizadeh v Nikbin (1993) Times, 19 March, warned that the exception should be applied only in the clearest cases of abuse of a privileged occasion.'*

33. In ***Woodward*** the EAT said:

> *The list of exceptions to the rule is not closed: see* Ofolue *at paragraphs 38–40 (Lord Rodger) and paragraph 98 (Lord Neuberger). Nevertheless arguments seeking to establish a new exception should be scrutinised with care. Any new exception must be consistent with the overall policy behind the rule: see* Ofolue *at paragraph 39 (Lord Rodger), paragraph 97 (Lord Neuberger). A new exception should only be recognised if justice clearly demands it: see* Ofolue *at paragraph 56 (Lord Walker).*

34. In ***Fincken***, Rix LJ said at [57] that the without prejudice rule is all about encouraging parties *'to speak frankly to one another in aid of reaching a settlement: and the public interest in that rule is very great and not to be sacrificed save in truly exceptional and needy circumstances'*.

35. In ***Berkely Square**,* David Richards LJ, said, at 33 "…*I do not accept that any extension must be an incremental development by reference to existing exceptions."*

Law applied to the facts

36. In this case there was plainly a dispute when the communication of 21 September 2018 was made and this was plainly a case in which litigation was reasonably in contemplation.

37. The Claimant had repeatedly raised concerns about her contractual terms for several years - the general tenor of which was that the Respondent was in breach of contract by assigning work to her that fell outside what properly could be assigned to her under her contract. It was also her position that this had been done in a sort of sly underhand way. When she raised her concerns she did so in a markedly legalistic way in terms of the language that she chose.

38. By 2018, having been unable to resolve matters internally the Respondent instructed outside HR consultants to assist in agreeing the Claimant's terms and job description. This was an open process but one that ultimately resulted in the dispute escalating.

39. The Claimant met with the HR consultant twice. In the first meeting of 5 July 2018, on the Claimant's account (which I accept) there was a discussion of what would happen if she did not agree to new terms and she was told ultimately that she would be dismissed.

40. After the first meeting on 5 July 2018, the Claimant sent an email on 13 August 2018 that included the following:

> *"On 19 October 2016 I made a request through my line manager and asked for clarification of my legally binding contractual term…. In 2016 my correspondence fundamentally confirmed, and I quote "please accept that I am making it clear, I implicitly will not accept the proposed draft made which are a unilaterally drafting to changes to job title or terms and conditions… on 28 May 2018… again I verbally and in writing submitted to you confirmation that I implicitly don't want to change the job description or terms and conditions and was surprised this meeting was not about rectifying original contractual terms. In fact I refused to partake with the unilateral drafted contract which fails to have given any consideration of my current post requirements….*
>
> *Again I am issuing this notice for confirmation that is still refuse to agree, to the contractual changes suggested in the draft. Whereby the employer sees a new contract, then my contract must end (using the correct dismissal procedure) and re-employ someone else, using a new employment contract. Thank you for your cooperation I await contractual termination".*

41. There was a second meeting with the HR consultant in August 2018. Following that meeting there was an exchange of correspondence in which the Claimant said:

    "*For the purposes of clarity again I'm confirming that I'm not interested in and don't accept changes to the original contract… unfortunately nothing I have said so far or requested has been forthcoming to the point that I have lost trust and confidence in my employer."*

42. On 24 September 2018 there was an altercation between the Claimant and Rev Dr Corlett. After this altercation the Claimant sent a 10 page typed grievance dated 24 September 2018. It concludes by stating that the Claimant hoped that a fair outcome to settle and resolve matters could be reached without the need for a "*legal challenge*."

43. In my view, it is clear that this was a dispute that was in principle capable of resolution by settlement and this was a case in which the parties contemplated (and if am wrong about that, at least might reasonably have contemplated litigation):

    43.1. The dispute had been going on for a long time without agreement;
    43.2. The mechanism for open resolution – using outside consultants – failed and simply escalated the dispute;
    43.3. The language of the dispute was highly legalistic and the Claimant was clearly implying that the Respondent was in breach of legal obligations;
    43.4. The possibility of dismissal in the context of the dispute had been raised;
    43.5. In that context the Claimant said she had lost trust and confidence in the Respondent which is very much the language of the law and employment tribunal litigation in particular;
    43.6. The reference to 'legal challenge' in the letter of 24 September 2019 is good evidence in my view that when the offer was made just 3 days earlier it was in the parties' minds that the dispute may come to litigation in the future.

44. In my view, most of the communication of 21 September 2019 is a genuine attempt to settle this dispute. I would agree that the offer of settlement was far from generous, but it is nonetheless at a level that it represents a genuine if only commercial/nuisance level offer.

45. However, there is one sentence which in my view cannot be regarded as forming part of the communication to settle the dispute. It is entirely different and distinct. The offer of settlement is made in polite and temperate terms and prefaced with the words "*It is merely a proposal and not a forced process*". However, there is a sentence at the end of the email that reads *"Please ensure that some form of a handover on the matters you are handling is provide to the Charity by close of business on 26 September 2018."* Crucially, this instruction is not contingent on the Claimant accepting the offer of settlement set out in the preceding part of the document – it is simply an unqualified instruction that is not contingent upon reaching a negotiated agreement. That sentence, then, in

my view has nothing to do with the offer of settlement and is not covered by without prejudice privilege and is admissible. (I note that the admissibility of this part of the email is someone academic as the instruction is, in any event, repeated openly in Rev Dr Corlett's letter of 24 September 2018).

46. If I were wrong about that and this sentence does form part of a genuine attempt to settle the dispute, then I would hold that it is unambiguously improper. It is one thing to offer the Claimant an optional settlement to leave and that properly attracts privilege where there is a relevant dispute. However, it is quite another to use the cloak of privilege to tell the Claimant that she needs to handover all of her work (the implication being she no longer has a role) and that she must do so regardless of whether she agrees to the terms of settlement or not. That would, in effect, be using without prejudice privilege to remove the Claimant from post and prevent her from telling a court or tribunal that had happened and making a claim in respect of it. On this alternative basis I would hold that there is no privilege in this part of the communication of 24 September 2018. If, contrary to my view, an all or nothing decision had to be made in relation to the *whole* email of 28 September 2018, I would hold that privilege cannot be maintained in respect of any of it because it is essential to avoid unambiguous impropriety that the tribunal knows this was said: "*Please ensure that some form of a handover on the matters you are handling is provide to the Charity by close of business on 26 September 2018.*"[1]

47. I have also considered the matters that the Claimant relied upon to found an argument that without prejudice privilege did not apply, but I do not think those matters amount to unambiguous impropriety. They are indicative of an ordinary (though important to the parties) employment dispute in which positions have become somewhat entrenched over a period of time.

48. In conclusion:

    a. It is agreed that the fact of the communication of 21 September 2018 is admissible and I also agree;
    b. The content of the offer of settlement is not admissible;
    c. However the part of the email that states "*Please ensure that some form of a handover on the matters you are handling is provided to the Charity by close of business on 26 September 2018*" and basic details like when that email was sent and by whom are admissible.

Miscellaneous matters

49. Mr Davies was in some difficulty throughout the trial in that he did not have any witness with direct knowledge of the events in the claim. Nor had he been able to take instructions from anybody with such knowledge. Accordingly, he was limited in the way that he was able run the Respondent's case. I appreciate the care that he took not to advance a positive case where he had no proper basis for doing so.

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[1] When I announced my decision on this matter orally I omitted what is now said in this paragraph. That was an oversight on my part as we were under some pressure of time.

50. The hearing was listed as an in person hearing. However, at the end of day 2 the Claimant was suffering from toothache and it was mutually convenient for both parties for day 3 (closing submissions and judgment) to be conducted by CVP. I was happy to agree on the basis of assurances that the parties had the necessary technology to join remotely. Unfortunately, in the event, on day 3 the Claimant had intractable technology problems which meant that she could not join the CVP hearing or even join by telephone from home. Accordingly, the hearing was adjourned until 2pm and the Claimant attended the tribunal. She joined the CVP hearing from the tribunal room. Mr Davies joined the hearing remotely and I joined from my office. As a result of the delay I was unable to give an unreserved judgment.

Findings of fact

51. The tribunal made the following finds of fact on the balance of probabilities.

52. I note that the findings of fact are somewhat scanty. This reflect the scantiness of the evidence. The Respondent's only witness had no direct knowledge of virtually any relevant event in this case though his evidence was of some relevance because his deep knowledge of employment within the Methodist church had occasional materiality. The Claimant's evidence was also quite sparse and sometimes took the form of advocacy rather than simple narrative.

53. The Respondent is a Methodist Church. It is therefore part of a wider organisation of a substantial size. Of itself, however, of itself it is a small employer. During the Claimant's employment it had the feel of a small employer e.g. in the sense that its business culture was very informal and lacked the careful organisation (such as through implementation of corporate policies and the structured delineation of work between employees) typical of large employers.

54. Prior to her employment with the Respondent the Claimant's background was entirely in local authority work. She was accustomed to having a well-defined role as part of large organisations. In my view she did not find it easy to adapt to working for a small employer.

55. The Claimant's employment with the Respondent began on 4 October 2010 as Housing Advice Worker. She worked on the Robes Project which supports people by running a temporary night shelter. The Robes Project was a collaboration of local churches and others. The actual employer was the Respondent. This employment ended on 3 June 2011.

56. The Claimant then commenced a new contract of employment with the Respondent on 6 June 2011. She was employed as a Housing Advisor for the South London Mission (SLM). Initially this contract was for a fixed three month term but it became a permanent contract. The post had a job description and person specification. The claimant worked 1 day per week.

Some general findings

57. The Claimant's line manager was Rev Dr Corlett with whom she initially had good relations. These deteriorated badly over the course of the Claimant's employment.

58. Although the Claimant was employed in a housing role, one of many positive things about her is that she had many other skills and was experienced in providing advice in relation to a range of matters. She was also kind hearted - sometimes if she helped a client in the course of her professional duties she would chose to offer then further help with other matters on a voluntary basis in her own time. On occasion, clients whom she had helped in this way would feedback their gratitude to the church and thus to Rev Dr Corlett. In accordance with the idiom '*no good deed should go unpunished*' this in turn led to the Claimant developing a reputation for being able to provide assistance with matters such as bereavement and immigration. And that in turn led to referrals being made to her in relation to those matters which were outside of her job role.

59. Thus, I accept that between 2012 and some point in 2016 it is true that Rev Dr Corlett referred clients to the Claimant in respect of non-housing / non-benefit matters that fell outside the scope of the Claimant's job description. I have no doubt that Rev Dr Corlett's motivation for doing this was to help some of the many people that the church dealt with who were vulnerable and had a deep need for assistance. However, I also accept the Claimant's evidence that it led to her being overloaded with work and undertaking work that was, strictly, outside of the remit of her job.

60. The Claimant's job description identified her client base. It said this: *"Robes guests, Cluny Place House residents and other members of the BCH/SLM community as agreed with the Director."* The Director is a refence to Rev Dr Corlett. I accept that until 2016, clients who were not Robes guests or Cluny Place House residents were regularly referred to the Claimant. The Claimant acquiesced in this rather than agreed to it and often complained about it.

61. I accept that this is a matter that the Claimant regularly raised with Rev Dr Corlett. Her response, which was not an irrational one, was to offer the Claimant more hours of work and as seen below the Claimant's hours increased again and again. However, for the Claimant this was not an acceptable solution because what she wanted was to stick to her contractual duties.

62. I accept the Claimant's evidence that she was not made aware of any organisational safeguarding policy. I also accept, even granted that there have been rapid and deep developments in approaches to safeguarding in recent years and that it is wrong to apply a current standards to historical periods, the approach at the Respondent was very lax and informal. I also accept the Claimant's evidence that from time to time clients were referred to her who were potentially dangerous and that this was done without adequate screening of the clients and without any proper measures being put in place to mitigate risk.

63. The Respondent did obtain CRB/DBS checks on its employees but these were not updated with the regularity the Claimant would have like or was accustomed to from local authority employment.

64. Until 2016 the Claimant did not have a work mobile telephone and she was regularly called on her personal mobile including out of hours and even on Sundays. The Claimant had a work email account but again until 2016, she regularly received work emails to her private account. In late 2016 these matters were addressed and calls/correspondence to her private number/email account became uncommon though were not eradicated altogether.

65. I accept that the Respondent from time to time published information about the Claimant's work in its marketing materials including an annual report. This sometimes styled the Claimant as someone to go to with problems other than housing problems such as bereavement issues.

66. I accept that there was a general failure to hold one to ones, reviews and the like with the Claimant throughout her employment. Two consequence of this were that the Claimant's manager did not have as clear an understanding of what the Claimant was doing as she ought to and the Claimant felt unsupported and unheard.

2012

67. In the course of 2012 the Claimant's hours increased to 2 days per week.

68. I accept that in the course of 2012, the Claimant complained to Rev Dr Corlett about the expansion of her work and that Rev Dr Corlett agreed to refer the matter to the board of trustees but did not to the best of the Claimant's knowledge.

2015

69. In 2015 the Claimant agreed to provide maternity cover to a colleague in addition to her existing duties. Her working days increased to 4 days per week.

70. On 4 June 2015, Rev Dr Corlett wrote to the Claimant recording the agreement that the Claimant's hours would increase by a further 8 hours to allow her to assist with "Venture FX T-Room project" on Wednesday afternoons and the "Faith & Community Development Worker" Project on Friday afternoons during the colleague's maternity leave.

71. The Claimant had no issue with carrying out additional duties pursuant to this agreement. However, her complaint, and I accept it that the factual basis of it is true, is that the clients she was exposed to in the course of maternity cover were then further referred to her for further assistance in her housing advisor capacity. The Claimant's complaint about this, is that those clients fell outside of the client group stated in her job description. I agree that strictly they did.

2016

72. In 2016, the Claimant began working to rule. She ceased to provide her services in relation to matters that she considered fell outside of her contractual remit.

73. On 4 July 2016 the Claimant sent a letter of resignation upon two month's notice. The Claimant withdrew that resignation with a further letter in which she said "*Having spoke with team members and with sup[ort for my work and wellbeing, I would like to remain in my position as Housing/Welfare Officer at SLM".*

74. The issue of the Claimant's duties came to a head in 2016 and led to a more formal conversation between the Claimant and Rev Dr Corlett. It also led to the matter being raised with the Finance and Governance Committee.

75. On 19 October 2016, Rev Dr Corlett emailed the Claimant following a conversation with the Claimant about her role. She said:

    a. She understood that the Claimant wanted a revised job description to clarify her role. She said she was happy to draft it in consultation with the Claimant and Ms Bishop.
    b. Rev Dr Corlett wanted an external evaluation of the job description to ensure the Claimant was paid properly. N.b. the implication was only that the Claimant's pay may increase not that it may decrease.
    c. She recorded that they had agreed the claimant would work from home on Tuesdays to allow some space from drop-in callers and it is clear that it had been agreed the claimant would be given a work mobile.

76. The Claimant wrote to Rev Dr Corlett in response to her email of 19 October 2016. As is evident from this email, the Claimant had some fixed – in my view dogmatic - ideas about how the dispute about her duties should be resolved. She said:

    I am not agreeable to your suggestion to construct changes to my contract and this is because before a proposed change to my contract is made, it is essential I discover what the existing contract says on the issue of employment terms. For the purpose of clear understanding I am requesting an employment contract which sets out clearly the following:

    employment conditions
    rights
    responsibilities
    duties

    As an employee I fundamentally wish to stick to my contract until it ends (or until the terms are changed (by agreement). I'm requesting clarity of my current contract which is legally binding.

    Please accept that I am making it clear that I having implicitly not accepted the changes that have occurred in my current employment practice. Therefore I am

requesting clarity of my existing contract before I consider a reconstructed contract of changes and only with consideration of mutual agreement.

Due to the current contract not been clear, my work has become implied terms of duty and responsibilities although you state that this is my fault I want this rectified. I recognize the changes and can clearly identify where I am working out of contract and will be willing to confirm this once current contract is clarified.

77. It is not easy to entirely follow what was meant by this but my understanding is that the Claimant was saying:

    a. She did not want to discuss contractual changes until it was made clear what her existing contract was (this was curious as she had a written contract, written Job Description and Written Person Specification);
    b. She wanted to stick to her existing contract until it ended or there was an agreement to vary it;
    c. She did not accept any changes to her contract that might have occurred through its operation;
    d. She wanted her terms to be express rather than implied.

78. At some point shortly after this exchange Dr Corlett proposed a new job description (that the Claimant refers to as a new contract). It is undated but appears at p64 of the Respondent's bundle. Some of its features are as follows:

    a. In addition to identifying housing and welfare benefits advice it added a further duty: *"To provide basic information and sign-posting in other key areas such as debt or immigration issues"*
    b. It defined the client group whom the Claimant would work with broadly. Significantly more broadly than the old job description. The client group undoubtedly included vulnerable adults, but so too did the client group under the existing job description.
    c. It said at clause 2: *"To work collaboratively within a diverse staff team to enhance and underpin our work through providing guidance and advice to other staff members as requested by your line-manager in the areas of your specific professional expertise".* This concerned the Claimant because she had a wide range of expertise but only wanted deploy part that in her job.

79. This is a convenient moment deal with the Claimant's case that the Respondent was in breach of a specific duty to be registered with the Charity Commission for working with vulnerable adults. This is a case she pursued with confidence and vigour. The Respondent's position was that it was a registered Charity (i.e., registered with the Charity Commission) but that there was no further requirement to, and indeed no way of, further registering with the Charity Commission work with vulnerable adults. I gave the Claimant from day 1 of the trial to the afternoon of day 3 to state where this specific duty was found or otherwise evidence it. On day 3 she produced a guidance document from gov.uk in relation to charities. It refers to various safeguarding requirements, none of which have anything at all to do with registering with Charity Commission that the charity works with vulnerable adults. I do not accept the Claimant's case then

that the Respondent was in breach of any duty to register its work with vulnerable adults with the Charity Commission.

2017

80. On 27 February 2017, Rev Dr Corlett, wrote to the Claimant and informed her that the Finance and Governance committed had considered her case and made some rulings. The letter also served some other purposes. The key points are:

    a. The Finance and Governance committee approved a permanent increase in the Claimant's hours to 4 days per week;
    b. The Claimant's original Job Description and Person Specification.
    c. Rev Dr Corlett gave an account of the Claimant's job role as it had originally stood. This appears to be in response to the Claimant's email referred to above. In my view this was an accurate account.
    d. Rev Dr Corlett stated that the Finance and Governance committee recognised the necessity of updating the Job Description and that further guidance was awaited from them as to the mechanism for that. However:
        i. The Claimant was note expected to undertake work on immigration issues;
        ii. The Claimant was not expected to undertake in-depth case-work but she could potentially do so if interested following consultation with her manager;
        iii. The Claimant was not expected to work on any other projects or areas of work such as food bank or Venture FX but those projects could refer clients to her for advice.
    e. It was recommended that the Claimant had regular line management meetings with Rev Dr Corlett.

81. In the course of May 2017 the I accept that Rev Dr Corlett represented to the committee that the Claimant was working in accordance with the revised job description that had been provided in May 2016 albeit informally. She also made that representation later in the year to the Respondent's business managers. The representation was not right – the Claimant was not working in accordance with the new job description. She was working in accordance with her original job description and had been since some point in 2016 when she reverted to working to rule. In my view Rev Dr Corlett made mistaken assumption – as a result of not sitting down with the Claimant and finding out what she was doing. She was not telling deliberate untruths.

2018

82. By this stage there was an entrenched dispute about the Claimant's job role. It had become toxic in its impact on workplace happiness and relations.

83. Ultimately, the mechanism settled upon to agree the Claimant's job description going forwards was to instruct an external HR consultant to facilitate the process. This was intended to be an independent, unbiased person.

84. There was a negotiation about who the consultant would be and the Claimant rejected at least one of the suggested people. Ultimately, it was decided that Peninsula would be instructed and would provide an HR consultant.

85. The Claimant was reluctant to meet with Peninsula. In my view the Claimant was not very cooperative in actually taking steps to resolve the dispute and maintained very rigid ideas about her job role.

86. The Claimant wanted an employment history to be provided. On 13 June 2018, Rev Dr Corlett wrote to the Claimant and provided here with the employment history. The letter is anodyne in its content. It gives a chronology and sets out the Claimant's duties by quoting from her existing job description. It then quotes the relevant instructions of the Finance Committee per the letter from February 2017.

87. In the Claimant's mind there remained inclarity about what her existing contractual terms and duties were that she wanted to be resolved prior to considering any variation to the same. I found this position hard to follow in light of the Claimant's written contract, JD and person specification coupled with the determination of the Finance and Governance committee as expressed in February 2017. Nonetheless, in the Claimant's mind there was something that had to be cleared up first as a pre-requisite to any further discussion. My sense is that with a better channel of communication between her and Rev Dr Corlett this obstacles might have been resolved or cleared. It was unhelpful that Rev Dr Corlett assumed that the Claimant was informally working to the new job description when in fact she was and in my finding this was a significant factor in perpetuating the approach the Claimant took.

88. On 5 July 2018, the Claimant reluctantly had a meeting with a consultant from of Peninsula. Despite it being agreed that the meeting would be recorded by Peninsula it was not and nor was any note made of the meeting. I accept the Claimant's account of the meeting which is essentially that:

    a. The consultant had no interest really in listening to her side of matters;
    b. The consultant's only agenda was to try and get the Claimant to accept Rev Dr Corlett's perspective;
    c. The Claimant asked what would ultimately happen if she did not agree to a new job description and was told that ultimately dismissal was a possibility.

89. The meeting did not go well and served only to escalate matters. The Claimant was reluctant to attend a further meeting. At one stage, Dr Rev Corlett said to her words to the effect that 'you better tell them [Peninsula]' what you are doing here [i.e., her job role].'

90. After the meeting the consultant emailed the Claimant a copy of a proposed job description. It was the same job description proposed by Rev Dr Corlett in 2016. The Claimant replied by email. The tone of the email is legalistic and adversarial reflecting the temperature of the dispute by now. It said, among other things:

"On 19 October 2016 I made a request through my line manager and asked for clarification of my legally binding contractual term…. In 2016 my correspondence fundamentally confirmed, and I quote "please accept that I am making it clear, I implicitly will not accept the proposed draft made which are a unilaterally drafting to changes to job title or terms and conditions… on 28 May 2018… again I verbally and in writing submitted to you confirmation that I implicitly don't want to change the job description or terms and conditions and was surprised this meeting was not about rectifying original contractual terms. In fact I refused to partake with the unilateral drafted contract which fails to have given any consideration of my current post requirements….

Again I am issuing this notice for confirmation that is still refuse to agree, to the contractual changes suggested in the draft. Whereby the employer sees a new contract, then my contract must end (using the correct dismissal procedure) and re-employ someone else, using a new employment contract. Thank you for your cooperation I await contractual termination".

91. On 23 August 2018, Rev Dr Corlett wrote to the Claimant in response. She stated that the Respondent sought to work with the Claimant to draft and finalise her job description which "*best reflects your role at present*". She stated that the role had evolved over time and noted that changes to the job description were not made at the relevant junction. She noted that any indication of an increased workload / role would potentially warrant a salary increases.

92. On 24 August 2018, bizarrely, the Peninsula consultant then wrote to the Claimant in literally identical terms as Rev Dr Corlett had on 23 August 2018. I find that this confirms the Claimant's view: far from being an impartial facilitator, the Peninsula consultant lost impartiality (if she ever had it) and was working hand in glove with Rev Dr Corlett.

93. There was then a second meeting with the consultant. Again the meeting did not go well. However, and this is important, I accept the Claimant's evidence that she did nothing at this meeting to indicate that she no longer wished to work for the Respondent or that she was about to leave voluntarily.

94. On 5 September 2018, the Claimant emailed the consultant and among other things said this:

"*For the purposes of clarity again I'm confirming that I'm not interested in and don't accept changes to the original contract… unfortunately nothing I have said so far or requested has been forthcoming to the point that I have lost trust and confidence in my employer."*

95. On 21 September 2018, the consultant sent the Claimant a without prejudice communication by email. Also in that email, but not forming any part of an attempt to reach a negotiated resolution of the dispute, there was an instruction as follows: *Please ensure that some form of a handover on the matters you are handling is provided to the Charity by close of business on 26 September 2018.*

96. The Clamant did not receive this communication until she was handed it by Rev Dr Corlett on 24 September 2018. They had a verbal altercation which another employee saw.

97. Shortly thereafter Rev Dr Corlett handed the Claimant an open letter dated 24 September 2018. Rev Dr Corlett wrote:

    We have just had an unfortunate exchange of words in front of another employee. I am requiring that you cancel today's appointments and take today and tomorrow as paid leave.

    I know you are concerned about client data.

    You have previously dealt with SLM's Data Controller who is 'Trustees for Methodist Church Purposes' Registration number 25439898

    Please talk to them regarding correct hand over of the personal data you have gathered as an employee of South London Mission.

    My understanding is that as you will have no legitimate interest in retaining data once your employment ceases, you will need to return all data, in whatever format it is stored, to SLM by 5pm Wednesday 26th September, along with your work phone and work laptop.

    It would be disadvantageous to vulnerable clients if there is not a hand over to ensure continuity for their ongoing support.

98. There is no other context to this letter. For example, there was *no* agreement that the Claimant's employment would end on or around 26 September 2018 or at all, nor that she would somehow vacate her post but remain on some sort of leave. This was a repetition of the unilateral instruction given in the email of 21 September 2018.

99. On 24 September 2018, the Claimant raised a written grievance.

100. On 1 October 2018 the Claimant resigned on one week's notice. The letter of resignation is lengthy and includes reference to changes to her job responsibilities over the years, the one sided manner in which the negotiations had been handled by Peninsula and that on 24 September 2018 she had been issued with a notice "with intent to force me out…".

101. Having considered all the evidence I find that there were multiple reasons for the Claimant's resignation and among them material reasons included:

    a. Dissatisfaction with attempts to change the Claimant's job role;
    b. The manner in which the Respondent had attempted to resolve that issue including the content of the proposed new job description and including the way in which Peninsula had handled the dispute (including failing to show

any interest in the Claimant's side and simply adopting the Respondent's side);

c. The instruction that the Claimant handover her work by 26 September 2018 (both in the email of 21 September and the letter of 24 September 2018).

102. The effective date of termination was 9 October 2018.

Wages for October 2018

103. The Clamant received her final pay on 15 October 2018. It was substantially less than her usual pay. She considers that it was an under payment of her wages.

104. The Respondent accepts that the Claimant was indeed paid less than usual. However, its explanation is that the Claimant was paid on the 15th of the month for the whole month. Thus she was paid partly in arrears (1-15 the month) and partly in advance (16 – to last day of the month). Thus she had been paid for all of September 2018 on 15 September 2018 and the only payment that fell to be made on 15 October 2018 was for 1 – 9 October 2018.

105. I asked the Claimant in her evidence whether she accepted this account. She did not, but she was unable to give any clear explanation as to why not or for the basis of her view that she was paid entirely in arrears.

106. I asked Reverend Gillman whether he had any evidence to give on this matter. His evidence was that it had always been the case that Methodist Church employers paid employees partly in arrears and partly in advance in the manner described above. Prior to taking on a role directly with the Respondent Reverend Gillman had been a Superintendent of the Circuit of churches of which the Respondent is part. It was plain from his evidence that he had a deep knowledge of practice and procedure in the Methodist Church.

107. I accept Reverend Gillman's evidence on this matter. I think it is likely the Claimant was paid part in arrears and part in advance. As such there was no underpayment of the Claimant's wages. She was paid for all of September 2018 on 15 September 2018. On 15 October 2018 all that fell to be paid was 1 – 9 October 2018 and it was.

Holiday pay

108. The Claimant's annual leave year was 6 June to 5 June. In the 2018 leave year she had taken 14 days leave. She had in fact taken more leave than she accrued.

109. The Claimant wonders whether she may have carried leave over from previous leave years but was unable to say in her evidence whether she had or not. She asked the Respondent in a DSAR what the position was. It had no record of her leave prior to February 2018. There is thus no evidence that the Claimant did have unused leave in previous leave years.

Law

Constructive dismissal

110. The essential elements of constructive dismissal were identified in ***Western Excavating v Sharp*** [1978] IRLR 27 as follows:

> *"There must be a breach of contract by the employer. The breach must be sufficiently important to justify the employee resigning. The employee must resign in response to the breach. The employee must not delay too long in terminating the contract in response to the employer's breach, otherwise he may be deemed to have waived the breach in terms to vary the contract".*

111. It is an implied term of the contract of employment 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"* (***Malik v BCCI*** [1997] IRLR 462).

112. It is for the tribunal to decide whether or not a breach of contract is sufficiently serious to amount to a repudiatory breach. However, a breach of the implied term of trust and confidence is inevitably a repudiatory breach of contract. Whether conduct is sufficiently serious to amount to a breach of the implied term is a matter for the employment tribunal to determine having heard all the evidence and considered all the circumstances: ***Morrow v Safeway Stores*** [2002] IRLR 9.

113. The core issue to determine when considering a constructive dismissal claim was summarised by the Court of Appeal in ***Tullett Prebon Plc v BGC Brokers LP*** [2013] IRLR 420 as follows:

> *19. … The question whether or not there has been a repudiatory breach of the duty of trust and confidence is "a question of fact for the tribunal of fact": Woods v WM Car Services (Peterborough) Limited, [1982] ICR 693 , at page 698F, per Lord Denning MR, who added: "The circumstances … are so infinitely various that there can be, and is, no rule of law saying what circumstances justify and what do not" (ibid).*
>
> *20. In other words, it is a highly context-specific question. It also falls to be analysed by reference to a legal matrix which, as I shall shortly demonstrate, is less rigid than the one for which Mr Hochhauser contends. At this stage, I simply refer to the words of Etherton LJ in the recent case of Eminence Property Developments Ltd v Heaney [2010] EWCA Civ 1168 (at paragraph 61): "…the legal test is whether, looking at all the circumstances objectively, that is from the perspective of a reasonable person in the position of the innocent party, the contract breaker has clearly shown an intention to abandon and altogether refuse to perform the contract."*

114. The implied term can be breached by a single act by the employer or by the combination of two or more acts: ***Lewis v Motorworld Garages Ltd*** [1985] IRLR 465.

115. Breach of the implied term must be judged objectively not subjectively. The question is not whether, from either party's subjective point of view, trust and confidence has been destroyed or seriously undermined, but whether objectively it has been. See e.g. ***Leeds Dental Team v Rose*** [2014] IRLR [25] and the authorities cited therein.

116. The employee must resign in response to the breach. Where there are multiple reasons for the resignation the breach must play a part in the resignation. It is not necessary for it to be 'the effective cause' or the predominant cause or similar. See e.g. ***Wright v North Ayrshire Council*** [2014] ICR 77 [18].

117. In ***LB Waltham Forest v Omilaju*** [2005] IRLR 35, the CA guided that the final straw, viewed in isolation, need not be unreasonable or blameworthy conduct. The mere fact that the alleged final straw is reasonable conduct does not necessarily mean that it is not capable of being a final straw, although it will be an unusual case where conduct which has been judged objectively to be reasonable and justifiable satisfies the final straw test. Moreover, an entirely innocuous act on the part of the employer cannot be a final straw, even if the employee genuinely, but mistakenly, interprets the act as hurtful and destructive of his trust and confidence in the employer. The test of whether the employee's trust and confidence has been undermined is objective.

118. In ***Kaur and Leeds Teaching Hospitals NHS Trust*** [2018] EWCA Civ 978 [2019] ICR 1 the Court of Appeal suggested the following approach:

a. What was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, his or her resignation?
b. Has he or she affirmed the contract since that act?
c. If not, was that act (or omission) by itself a repudiatory breach of contract?
d. If not, was it nevertheless a part…of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a (repudiatory) breach of the *Malik* term?
e. Did the employee resign in response (or partly in response) to that breach?

119. In ***Chindove v William Morrisons Supermarket PLC*** UKEAT/0043/14/BA, Langstaff P said this in relation to affirmation:

24. Had there been a considered approach to the law, it would have begun, no doubt, with setting out either the principles or the name of Western Excavating Ltd v Sharp [1978] 1 QB 761 CA. At page 769 C-D Lord Denning MR, having explained the nature of constructive dismissal, set out the significance of delay in words which we will quote in a moment. But first must recognise are set out within a context. The context is this. There are two parties to an employment contract. If one, in this case the employer, behaves in a way which shows that it "altogether abandons and refuses to perform the contract", using the most modern formulation of the test, in other words that it will no longer observe its side of the bargain, the employee is left with a choice. He may accept that because the employer is not going to stick to his side of the bargain he, the employee, does not have to do so to his side. If he chooses not to do so, then he will leave employment by resignation, exercising his

right to treat himself as discharged. But he may choose instead to go on and to hold his employer to the contract notwithstanding that the employer has indicated he means to break it. The employer remains contractually bound, but in this second scenario, so also does the employee. In that context, Lord Denning MR said this: "Moreover, he [the employee] must make up his mind soon after the conduct of which he complains: for, if he continues for any length of time without leaving, he will lose his right to treat himself as discharged. He will be regarded as having elected to affirm the contract."
25. This may have been interpreted as meaning that the passage of time in itself is sufficient for the employee to lose any right to resign. If so, the question might arise what length of time is sufficient? The lay members tell me that there may be an idea in circulation that four weeks is the watershed date. We wish to emphasise that the matter is not one of time in isolation. The principle is whether the employee has demonstrated that he has made the choice. He will do so by conduct; generally by continuing to work in the job from which he need not, if he accepted the employer's repudiation as discharging him from his obligations, have had to do.
26. He may affirm a continuation of the contract in other ways: by what he says, by what he does, by communications which show that he intends the contract to continue. But the issue is essentially one of conduct and not of time. The reference to time is because if, in the usual case, the employee is at work, then by continuing to work for a time longer than the time within which he might reasonably be expected to exercise his right, he is demonstrating by his conduct that he does not wish to do so. But there is no automatic time; all depends upon the context. Part of that context is the employee's position. As Jacob LJ observed in the case of <u>Buckland v Bournemouth University Higher Education Corporation [2010] EWCA Civ 121</u> , deciding to resign is for many, if not most, employees a serious matter. It will require them to give up a job which may provide them with their income, their families with support, and be a source of status to him in his community. His mortgage, his regular expenses, may depend upon it and his economic opportunities for work elsewhere may be slim. There may, on the other hand, be employees who are far less constrained, people who can quite easily obtain employment elsewhere, to whom those considerations do not apply with the same force. It would be entirely unsurprising if the first took much longer to decide on such a dramatic life change as leaving employment which had been occupied for some eight or nine or ten years than it would be in the latter case, particularly if the employment were of much shorter duration. In other words, it all depends upon the context and not upon any strict time test.
27. An important part of the context is whether the employee was actually at work, so that it could be concluded that he was honouring his contract and continuing to do so in a way which was inconsistent with his deciding to go. Where an employee is sick and not working, that observation has nothing like the same force.

<u>Unfair dismissal</u>

120. By s.94 Employment Rights Act 1996 there is a right not to be unfairly dismissed. That includes a right not be unfairly constructively dismissed (s. 95(1)(c) ERA).

121. There is a limited range of fair reasons for dismissal (s.98 ERA). This is includes a residual category: 'some other substantial reason'. Provided the reason is not whimsical or capricious (***Harper v National Coal Board*** [1980] IRLR 260), it is

capable of being substantial and, if, on the face of it, the reason *could* justify the dismissal then it will pass as a substantial reason (***Kent County Council v Gilham*** [1985] IRLR 18*).*

122. In a constructive dismissal case, the reason for dismissal is the reason that the employer did whatever it did that repudiated the contract and entitled the employee to resign. See ***Beriman v Delabole*** [1985] IRLR 305 [12 – 13].

123. In ***Buckland***, the Court of Appeal gave guidance as to the stages of the analysis in a constructive dismissal claim: (i) in determining whether or not the employer is in fundamental breach of the implied term of trust and confidence the unvarnished *Malik* test applies; (ii) if acceptance of that breach entitled the employee to leave, he has been constructively dismissed; (iii) it is open to the employer to show that such dismissal was for a potentially fair reason; and (iv) if he does so, it will then be for the employment tribunal to decide whether the dismissal for that reason, both substantively and procedurally, fell within the range of reasonable responses and was fair.

124. It is for the employer to show the reason for the dismissal and that the reason was a potentially fair one. Conduct is a potentially fair reason. The test of fairness is at s.98(4), in relation to which the burden of proof is neutral:

(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)
(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
(b) shall be determined in accordance with equity and the substantial merits of the case.

125. The range of reasonable responses test applies when considering the s.98(4) test.

29. In *Polkey v A E Dayton Services Ltd* [1987] IRLR 503, Lord Bridge said this:

> *'If it is held that taking the appropriate steps which the employer failed to take before dismissing the employer would not have affected the outcome, this will often lead to the result that the employee, though unfairly dismissed, will recover no compensation or, in the case of redundancy, no compensation in excess of his redundancy payment. Thus, in* Earl v Slater & Wheeler (Airlyne) Ltd *[1973] 1 WLR 51 the employee was held to have been unfairly dismissed, but nevertheless lost his appeal to the Industrial Relations Court because his misconduct disentitled him to any award of compensation, which was at that time the only effective remedy. But in spite of this the application of the so-called* British Labour Pump *principle [*British Labour Pump Co Ltd v Byrne *[1979] IRLR 94, [1979] ICR 347] tends to distort the operation of the employment protection legislation in two important ways. First, as was pointed out by Browne-Wilkinson J in* Sillifant's *case, if the [employment] tribunal, in considering whether the employer who has omitted to take the appropriate procedural steps acted reasonably or unreasonably in treating his reason as a sufficient reason for dismissal, poses for itself the hypothetical question whether the result would have been any different if the appropriate procedural steps had been taken, it can only answer that*

question on a balance of probabilities. Accordingly, applying the British Labour Pump *principle, if the answer is that it probably would have made no difference, the employee's unfair dismissal claim fails. But if the likely effect of taking the appropriate procedural steps is only considered, as it should be, at the stage of assessing compensation, the position is quite different. In that situation, as Browne-Wilkinson J puts it in* Sillifant's *case, at 96:*

> *"There is no need for an 'all or nothing' decision. If the [employment] tribunal thinks there is a doubt whether or not the employee would have been dismissed, this element can be reflected by reducing the normal amount of compensation by a percentage representing the chance that the employee would still have lost his employment."*

An example is provided by the case of Hough and APEX v Leyland DAF Ltd *[1991] IRLR 194 where the EAT upheld an [employment] tribunal decision that the compensatory award should be reduced by 50% in circumstances where there was a failure to consult over redundancies but the tribunal concluded that such consultation might have made no difference'.*

30. The *Polkey* principle is not confined to cases of procedural unfairness but has a broader application. The tribunal's task is to apply ERA 1996 s 123(1) and award 'such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer'). See e.g. *Lancaster & Duke Ltd v Wileman* [2019] IRLR 112*.*

31. In *Hill v Governing Body of Great Tey Primary School* [2013] IRLR 274*,*

> *A '*Polkey *deduction' has these particular features. First, the assessment of it is predictive: could the employer fairly have dismissed and, if so, what were the chances that the employer* would *have done so? The chances may be at the extreme (certainty that it would have dismissed, or certainty it would not) though more usually will fall somewhere on a spectrum between these two extremes. This is to recognise the uncertainties. A tribunal is not called upon to decide the question on balance. It is not answering the question what it would have done if it were the employer: it is assessing the chances of what another person (the actual employer) would have done. Although Ms Darwin at one point in her submissions submitted the question was what a hypothetical fair employer would have done, she accepted on reflection this was not the test: the tribunal has to consider not a hypothetical fair employer, but has to assess the actions of the employer who is before the tribunal, on the assumption that the employer would this time have acted fairly though it did not do so beforehand…*

32. Guidance as to the *Polkey* exercise was given in *Software 2000 -v- Andrews* [2007] IRLR 568 which must be read subject to the repeal of Section 98A, but which otherwise speaks for itself. Similarly, in *Scope -v- Thornett [2007] IRLR 155,* Pill LJ said as follows at paragraph 34:

> "*... The employment tribunal's task, when deciding what compensation is just and equitable for future loss of earnings will almost inevitably involve consideration of uncertainties. There may be cases in which evidence to the contrary is so sparse that a tribunal should approach the question on the basis that loss of earnings in the employment would have continued indefinitely but, where there is evidence that it may not have been so, that evidence must be taken into account ...*"

Statutory minimum notice periods

33. By s.86 ERA there are statutory minimum notice periods. The Claimant had 8 years of continuous service and so was entitled to 8 weeks notice (her contractual entitlement was one week so the statutory entitlement applies).

Wages

34. By s.13 ERA there is right not to suffer unauthorised deductions from wages that are properly payable.

Holiday pay

35. There is a statutory right to paid holiday in regs 13 – 16 Working Time Regulations 1998 and this includes pay in lieu of accrued leave upon termination.

36. In principle, holiday pay rights can also arise under contract although the Claimant's contract did not make any provision for pay in lieu of accrued holiday upon termination.

Discussion and conclusions

Unfair dismissal

126. In my judgment the Claimant was constructively dismissed.

127. Per *Kaur* it is sensible to start with the final act of alleged repudiation. Obviously in considering this matter it is important to set it in its factual context which is one of the reasons why I have made findings of fact on the events that brought the parties to this point.

128. In this case the final alleged repudiatory breach is the admissible part of the email of 21 September 2018 and the letter of 24 September 2018. The material parts are in like terms.

129. The Claimant was told that she should handover her work by 26 September 2018, along with her work phone and work laptop. It is plainly arguable that these were words of express dismissal (and if the case had been put that way I would have so found). They are in any event, however, the most unequivocal repudiation of the contract. The employer is in my judgment plainly saying that it no longer considers itself bound by the Claimant's contract and that the Claimant no longer has a job with it. Mr Davis (properly in my view) did not feel able to argue the contrary.

130. This was – objectively - conduct that was calculated and likely to undermine and destroy the relationship of trust and confidence.

131. For the avoidance of doubt, there was no reasonable and properly cause for this conduct. It came more or less out of the blue. There was a dispute afoot

but this was incredibly abrupt and did not reflect for instance, any indication from the Claimant that she was happy to leave the Respondent's employment or anything of that nature. There was no reasonable and proper cause for progressing the dispute so suddenly, in this summary way. There is also a complete absence of an explanation as to why the dispute was progressed in this way.

132. The Claimant resigned in response to the breach and did so swiftly and without any affirmation (the Respondent accepts both of these points).

133. The Claimant was dismissed.

134. The Respondent has conceded that if the Claimant was dismissed, the dismissal was unfair. That is plainly right.

135. In my view there were two reasons for the dismissal:

    a. Relations with the Claimant had become strained and difficult;
    b. There was an ongoing disagreement about the content of her job description.

136. In my view those matters each amount to some other substantial reason for dismissal. However, the dismissal was unfair pursuant to s.98(4) ERA (applying the range of reasonable responses test). No reasonable employer would have dismissed the Claimant in this abrupt and incredibly summary fashion; particularly not in relation to a long-serving, high-quality employee who had done no misconduct.

Polkey

137. This is a case in which there was an ongoing, by 2018 festering, dispute as to what the Claimant's job description should be. It was bad for everyone for this to continue. The Respondent had a proper business interest in resolving the dispute.

138. In my view if the Respondent had not acted unfairly it could and would have taken the following course:

    a. It would have made a further effort to de-escalate the dispute with the Claimant through emollient words and correspondence;
    b. In the absence of a swift negotiated agreement as to the Claimant's job description (and this would have been absent), put the Claimant to an election in writing. Either accept a new job description or be dismissed on notice. The offer to her could either have been to accept the job description as a variation to her existing job description or it could have been to accept the new job description pursuant to a new contract of employment. It matters not which for our purposes but it my view it would have been the latter since this is what had been canvassed over the summer of 2018.
    c. If that had happened, I think there is a realistic prospect that the negotiations as to the content of the Claimant's job description may have

progressed. There is a realistic prospect that it may have moved the Claimant on from the dogmatic position which she took – that she wanted some sort of clarification of her existing contract before discussing any variation thereto. If she had moved on from that then I think there was a good prospect of an agreement being reached. This would have involved some negotiated amendment of the new Job Description that had actually been proposed because there were elements of it the Claimant probably would not have accepted.

d. I certainly cannot be sure that the parties would have reached an agreement as to the content of the Claimant's job description and there is a significant chance that they would not. In that instance, the Claimant is likely to have been dismissed and in my view the dismissal would have been fair. The reason for the dismissal would be 'SOSR' (an intractable dispute as to the scope of the Claimant's role going forwards) and it would have been fair in all the circumstances. There was a clear business need for the dispute to be resolved. The dispute had protracted for years and years. It made the Claimant extremely unhappy. It contributed to (in her words) a toxic work environment. The Respondent had a clear business need for the Claimant to accept a wider job role than she had originally agreed to. Its clientele had grown and developed and a wider group of clients needed advice. Once all reasonable steps had been taken to resolve the dispute it would have been fair in accordance with s.98(4) ERA to dismiss the Claimant.

139. It is necessary to solidify the above into something more concrete:

a. If the Respondent had been acting fairly, it would have taken around 16 weeks to take the steps set out above (which would include giving the Claimant 8 weeks notice were that to become necessary). No *Polkey* deduction should therefore be made in respect of the first 16 weeks after 9 October 2018.
b. In my view there is an approximately 40% chance that if the Respondent had acted fairly the parties could have agreed a mutually satisfactory job description and the Claimant's employment would have continued.
c. On the other hand there is approximately a 60% chance that even if the Respondent had acted fairly the Claimant could and would have been dismissed around 16 weeks after her actual dismissal and that dismissal would have been a fair one.

Notice pay

140. The Claimant was dismissed. She worked and was paid for 1 week of notice. She was entitled to 8 week's notice in accordance with the statutory minimum. She is therefore owed 7 week's notice pay.

Wages

141. The claim for wages fails on the facts. The wages in October 2018 were properly paid.

Holiday pay

142. The claim for holiday pay fails on the facts. There was no accrued leave upon termination and in fact the Claimant had taken more leave than she had accrued in the 2018 leave year. There is no evidence of unused leave from previous leave years.

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Employment Judge Dyal

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Date **29th April 2022**

SENT TO THE PARTIES ON
Date **27th June 2022**

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FOR EMPLOYMENT TRIBUNALS