



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4103007/2022

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Hearing Held in Glasgow on 14 and 15 September 2022

Employment Judge Jones

10 **Ms V Lindsay**

**Claimant
In Person**

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HBOS Plc

**Respondent
Represented by:
Mr H Zavidavi -
Counsel
[Instructed by
Evershed Sutherland]**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The claimant was constructively and unfairly dismissed by the respondent and the respondent is ordered to pay to the claimant a basic award of £9250 and a
25 compensatory award of £13,054.72. (net).

REASONS

Introduction

- 1. The claimant claimed that she had been constructively and unfairly dismissed. The respondent's position was that the claimant had resigned voluntarily and
30 that the respondent's actions did not amount to a repudiatory breach of contract.
- 2. The claimant gave evidence on her own account. The claimant's former line manager Ms Jallow gave evidence on behalf of the respondent. A joint bundle of documents was provided and parties made oral submissions.

Findings in fact

3. Having heard the evidence, considered the documents to which reference was made and the submissions of the parties, the Tribunal made the following findings in fact.
- 5 4. The claimant was employed by the respondent from 4 September 2000 until her resignation with immediate effect on 19 January 2022.
5. The claimant had previously been in a management role, but latterly her position was that of Mortgage and Protection Adviser based at the respondent's Hamilton branch. This is a role regulated by the Financial
10 Services Authority. Her line manager was Ms Jallow.
6. The claimant's net weekly pay was £407 and she was a member of the respondent's pension scheme whereby the respondent contributed 2% of her salary.
7. Since 2016, the claimant has suffered from Post-Traumatic Stress Disorder
15 following a family bereavement. The claimant experiences anxiety as result of this condition which can lead to panic attacks. The respondent is aware of the claimant's condition and prior to October 2021 provided the claimant with appropriate support to allow her to manage her condition and continue to work.
- 20 8. On 17 October 2021, the claimant had a significant family disagreement as a result of which she suffered a panic attack.
9. The claimant was due to attend a meeting on 18 October at work. She was unable to participate in the meeting and after discussion with her line manager Ms Jallow, it was agreed she would not work further that day. Ms Jallow
25 suggested to the claimant that she contact her consultant psychologist from whom she had been receiving treatment. The claimant agreed with this suggestion and made contact with the consultant.

10. While the claimant spoke to the consultant, he informed her that was going on leave and therefore could not have a full consultation with her until 12 November. This caused the claimant to have a further panic attack.
11. The claimant sought support from her GP who increased her medication. She
5 also obtained support from Veridium, a counselling service provided by the respondent who provided the claimant with techniques to manage her condition.
12. The claimant had a phone call with Ms Jallow on 22 October when she updated her on her condition and the support she had received. The claimant
10 told Ms Jallow that she was concerned about continuing to carry out her regulated role because of her condition and was worried she might be 'managed out' as the claimant had previously had a significant period of absence due to anxiety. The claimant was still in a heightened state of anxiety at this stage. It was agreed that there would be regular contact between the
15 claimant and her line manager.
13. A further call took place on 25 October when the claimant advised Ms Jallow that her medication had been increased and that her GP had signed her off as unfit for work for three weeks.
14. There was a further call on 29 October when the claimant informed Ms Jallow
20 that the increase in medication had been having a beneficial effect.
15. The next conversation between the claimant and Ms Jallow took place on 10 November. The claimant said that the prospect of returning to work on Monday (being the expiry of her sick line) 'filled her with fear'. Ms Jallow asked the claimant whether she wanted her to find out information from HR
25 regarding the possibility of redeployment if the claimant were unable to return to a regulated role. The claimant made clear that she did not want Ms Jallow to discuss this with HR as she hadn't spoken to her consultant yet and didn't want to make any decisions when she was unwell.

16. A further call took place on 15 November. Ms Jallow asked the claimant whether she had discussed the possibility of another role with her consultant and the claimant told her that -his view was that she should not be taking any decisions at this stage. Ms Jallow asked the claimant to ask her medical
5 advisors how long she was likely to be absent from work. Ms Jallow also asked the claimant whether returning to a regulated role was the best thing for her and discussed the claimant being in a 'cycle of anxiety' where the claimant's anxiety caused her to be off work and then she was becoming anxious about being off work and then anxious about returning to work.
- 10 17. Ms Jallow was aware that while the claimant's initial absence was not caused by work, but the prospect of a return to work and the nature of the claimant's role was impacting on the levels of her anxiety. Despite the claimant having previously made clear she did not want Ms Jallow to contact HR about possible redeployment, Ms Jallow indicated that she was going to contact HR.
- 15 18. On 17 November, Ms Jallow called HR and then phoned the claimant to inform her of the advice she had received. She told the claimant she had been on the phone to HR for an hour. The claimant said 'her head was in a tailspin' (by which she meant in response to what Ms Jallow was saying to her) and that her consultant had told her she shouldn't be considering alternative roles
20 at this point. The claimant told Ms Jallow that thinking about work scenarios was causing her additional anxiety.
19. The claimant asked Ms Jallow not to call her on 24 November as this was the anniversary of her sister's death.
20. A further call took place on 30 November. The claimant told Ms Jallow that
25 the prospect of speaking to her had caused her considerable anxiety over the previous weekend. The claimant told Ms Jallow she had seen an advert for a job which she was concerned was the respondent advertising her role. Ms Jallow told the claimant it was not her role and she was 'catastrophising'. Ms Jallow was aware that the claimant overthought issues and was extremely

sensitive about her role, whether she might be managed out and the prospect of return to work.

21. Despite the claimant making clear that she was satisfied with the level of support she was getting and her medication, during the call Ms Jallow continued to urge the claimant to revisit her medication and support with her GP and medical practitioners. The claimant felt under considerable pressure from Ms Jallow during this call and became very upset. Ms Jallow was aware that the claimant was upset. There was no reasonable basis for Ms Jallow to question the appropriateness of the claimant's medication and treatment and Ms Jallow knew or ought to have known that in doing so she would cause the claimant additional anxiety.
22. The claimant asked if it was necessary to have such regular contact as this was causing her considerable anxiety and Ms Jallow incorrectly informed the claimant that she was required to contact her every 10 days, Ms Jallow suggested that the claimant seek advice from her doctor about further contact between them. Ms Jallow was insistent that the claimant contact her GP regarding further treatment options.
23. The claimant contacted her GP on 3 December, who signed her off for a further 6 weeks and confirmed that her treatment was appropriate.
24. On 14 December the claimant sent Ms Jallow an email which stated "When we spoke the last time, you asked me to ask my GP about a medication review and to ask him if I could be referred to a specialist mental health department. I explained that my medication was increased approx. 4 weeks previously and I was already seeing a clinical psychologist via Bupa. You said because I wasn't feeling any better and because it was now manifesting into physical symptoms, you felt I should still ask the doctor for both these things. As discussed, I didn't feel I should be doing this as I had already increased meds and had only had 2 sessions with my psychologist. The bank were already aware of this. You then said to me 'so you're not comfortable doing that then' but it was the case I wasn't comfortable doing it, I didn't feel I should need to

do that as I felt I was already on a treatment plan. I have spoken to both my GP and psychologist about the banks suggestion/requests and they both feel my treatment plan is correct and that I need to be allowed to follow medical recommendations without being asked to do more or anything different by work as its having a significant impact on me and is detrimental to my recovery. I wanted to send this over before we speak tomorrow.'

25. The prospect of the call with Ms Jallow the following day caused the claimant not to sleep that night and additional anxiety. She agreed with her partner that he would take the call. During the call between Ms Jallow and the claimant's partner it was agreed that in order to reduce the anxiety contact with work was having on the claimant, in future Ms Jallow would text the claimant in the morning when she intended to call her. It was also agreed that as Ms Jallow would be finishing for an extended period of leave on 17 December, the next call would be in the week beginning 17 January. The claimant felt that this arrangement would give her an opportunity to recover.

26. The claimant had prebooked annual leave and went to Blackpool on holiday with her family on 16 December. The claimant did not expect, and was entitled not to expect (absent any emergency), any contact from the respondent until after Ms Jallow's return from leave.

27. Ms Jallow contacted HR on 17 December following a contact from the Senior Branch Manager at the branch at which the claimant worked. The manager had informed Ms Jallow that colleagues at the branch had reacted negatively to a post made by the claimant regarding cakes made by her during her absence from work. The manager indicated that she had already told the staff that the claimant was not doing anything wrong and that she was entitled to do what she could for her health. HR recommended to Ms Jallow that as part of the next discussion she had with the claimant the matter could be raised with her. It was strongly recommended that the conversation should be positioned from 'a support/concern' perspective for the claimant.

28. Around 4pm on Friday 17 December, Ms Jallow called the claimant from a withheld number (which was not her normal practice). The claimant was in a shop in Blackpool with her family and said she would phone her back. When she called Ms Jallow, Ms Jallow asked the claimant how she was. The claimant expressed surprise at the call as she had understood there would be no contact with her before 17 January. Ms Jallow told the claimant that senior management had brought to her attention the claimant's social media presence regarding the cake making business the claimant operated. The claimant was told to be 'mindful' of the impact posting about this would have on colleagues when she was off sick. The claimant said that she had not been doing anything wrong and that this was a hobby which was therapeutic and had been approved by the bank. The claimant explained that she was on holiday with her family, that Ms Jallow knew she overthought issues and that she was surprised she had contacted her when she knew that she had been unable to take her call 2 days before. Ms Jallow offered to pick up the issue next week and the claimant said no. Ms Jallow told the claimant that she had taken advice from HR before calling her and had been advised to make the call. At this point the claimant became so distressed that her partner had to take the phone and told Ms Jallow that the claimant was now having a panic attack, that she should confirm anything in writing and that the claimant did not want further contact the following week.
29. Ms Jallow knew or should reasonably have known that calling the claimant unannounced about a work related matter which was not urgent and in which the claimant's conduct was being criticised, would cause the claimant significant distress. Ms Jallow had previously been aware that the claimant 'catastrophised' issues and would have known that any contact with her, and moreover calling the claimant to criticise her about her social media presence would cause her significant distress. There was no reasonable or proper cause for the call and there was no urgency for such a call to be made.

30. Ms Jallow misrepresented the advice she had been given from HR to the claimant during this call. Ms Jallow was aware that the claimant was very concerned about Ms Jallow contacting HR.
31. Ms Jallow then sent a text to the claimant on Monday 20 December saying
5 'apologies for not texting before calling on Friday. Can we catch up today and have a chat?' The claimant responded by saying 'No, I asked you on Friday not to call me this week. Can you please contact me in writing either by email or letter as requested.' Ms Jallow texted the claimant again indicating she was available for the rest of the week if the claimant changed her mind and
10 provided a colleague's number to contact who would get in touch with Ms Jallow thereafter.
32. On 21 December, the claimant contacted her trade union for advice. The claimant initially hoped she would be able to stay in employment. However, the claimant then emailed her trade union on 6 January indicating that 'Having
15 been treated so unfairly now by 2 separate managers, and particularly given that my current manager took HR advice prior to making the most recent phone call, I feel so let down by the company and I can't expose myself to that again. I feel that there is no way forward for me now with the bank and I think I am going to resign from my position and obtain advice with regards to
20 constructive dismissal.'
33. The claimant intimated her resignation in a letter to Ms Jallow dated 19 January.
34. Ms Jallow took advice from HR regarding the claimant's letter, which she discussed with her own line manager. They decided not to seek to dissuade
25 the claimant from resigning (despite advice to do so) and decided not to ask her whether she wished to continue to receive sick pay until the expiry of her fit note (again despite advice to do so).
35. The claimant has now set up a self-employed business as a mortgage protection advisor. She commenced work in this role from 4 April 2022 and

hopes to earn a similar income to that she received previously within 6-12 months from commencement of the role.

Observations on the evidence

36. The Tribunal found the claimant to be an impressive witness who made concessions regularly in her evidence and gave her evidence in a straightforward and balanced manner. The Tribunal found her evidence to be both credible and reliable and where there was any conflict in the evidence between her and Ms Jallow, the Tribunal preferred the evidence of the claimant. The Tribunal found Ms Jallow to be generally credible, however on occasion Ms Jallow was evasive in her answers in cross examination. Ms Jallow appeared to want to ensure that she referred back to her written notes of telephone conversations with the claimant when giving evidence and reiterating the content of those notes rather than focussing on the questions being asked and giving evidence in an open manner.
37. There was however, limited dispute between the parties in relation to the evidence. The dispute was more about what parties had taken from conversations which had taken place and parties' perceptions of events. In particular, it was suggested that Ms Jallow's conduct in suggesting that the claimant ask her GP to review her medication and ask for a referral to a specialist Mental health team was entirely reasonable and helpful. The Tribunal concluded that on an objective view such conduct was not at all reasonable and was quite the reverse. Ms Jallow had no medical training or knowledge of anti-depressant medication. She knew the claimant was in a state of high anxiety and despite the claimant making clear that she was content with the level of support given to her (from a consultant, the company's counselling service and her GP) and her medication, Ms Jallow continued to press the point and it was entirely unsurprising that the claimant should feel under pressure to do as her line manager had insisted, particularly when the line manager was aware that the claimant was very concerned about being absent from work and whether she might be 'managed out'. It

was suggested that this was no different to Ms Jallow's initial suggestion that the claimant make contact with her consultant when the claimant became ill. The Tribunal did not accept this position. There is a significant difference between suggesting that the claimant make contact with her consultant (albeit for reasons which were not clear Ms Jallow continued to refer to the consultant as a 'counsellor') and questioning whether the claimant was receiving the right medication and the right type of support.

38. In addition, it was suggested there had been no agreement between the claimant's partner and Ms Jallow that contact should cease between the call on 15 December and the week beginning 17 January. The Tribunal formed the view that while there was no formal agreement that contact would cease, in that it was not committed to writing, parties had the expectation that there would be no further contact unless initiated by the claimant prior to Ms Jallow returning to work on 17 January. Ms Jallow was aware that her contact with the claimant was causing her additional anxiety, so much so that the claimant could not speak to her on 15 December. There was nothing to suggest that the claimant would be contacted by the respondent at all between 15 December and 17 January. The fact that this was not a formal agreement appeared to the Tribunal to be nothing to the point.

39. Ms Jallow sought to suggest that she had followed HR advice at all times. She said that the notes of the HR contacts made by her were not entirely accurate. The Tribunal did not accept her position in this regard. It was quite clear from the notes that Ms Jallow had been advised to raise the issue of the social media posts at her next conversation with the claimant, not to initiate a conversation for that purpose. Neither did Ms Jallow follow HR advice in relation to the handling of the claimant's resignation.

Issues to determine

40. In determining this case, the Tribunal is required to answer the following questions:

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- i. Did the respondent's conduct in either the call of 13 November and/or 17 December amount to a fundamental breach the claimant's contract of employment?
 - ii. If so, did the respondent's breach or breaches cause the claimant to resign?
 - iii. Did the claimant delay too long before resigning, thus affirming the contract and losing the right to claim constructive dismissal.

Relevant law

- 10 41. Section 95 (1)(c) of the Employment Rights Act 1996 ('ERA') states that there is a dismissal when the employee terminates the contract, with or without notice, in circumstances such that he or she is entitled to terminate it without notice by reason of the employer's conduct.
- 15 42. The case of **Western Excavating Ltd v Sharp 1978 ICR 221** established that for a claimant to demonstrate that they have been constructively dismissed, a tribunal must be satisfied that there has been a repudiatory breach of contract by the employer.
- 20 43. The breach may involve an express term in the contract or an implied term in the contract. The duty of mutual trust and confidence is a term implied into every contract of employment. That term was examined in detail by the House of Lords in the case **Malik v BCC1 1997 ICR 606**. It was established that the term will only be breached if there was no reasonable or proper cause for the conduct in question and the conduct was calculated or likely to seriously damage or destroy the relationship of mutual trust and confidence between an employer and employee.
- 25 44. As Lord Justice Etherton put it in a non-employment case when considering the duty of mutual trust and confidence, **Eminence Property Developments Ltd v Heaney 2011 3 All ER (Comm) 223, CA**, the relevant question is to ask '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’.

45. A constructive dismissal may arise following a course of conduct which
5 cumulatively amounted to a fundamental breach of contract following a ‘last straw’ incident, even though the last straw by itself does not amount to a breach of contract (**Lewis v Motorworld Garages Ltd 1986 ICR 157, CA**)

Submissions

46. The respondent’s submission first addressed the alleged breaches of contract
10 said to have led to the claimant’s resignation and then summarised the legal position. The primary submission was that neither alleged breach was serious enough to represent a breach of contract of the implied term of mutual trust and confidence and that cumulatively the position was the same.
47. In relation to the call of 13 November, it was said that the criticism was not the
15 call itself but what was said during the call about which there were different accounts. Ms Jallow was said to be a credible witness and her account had a ring of truth in that she was not telling the claimant what to do and that even taking the claimant’s case at its highest that Ms Jallow was telling the claimant to go and get a medical review, that was far below the threshold required.
- 20 48. The context of the call was said to be really important. This was not the first conversation and regard had to be had to the previous conversation on 22 October where suggestions of support had been made through work and beyond when the issue of the claimant consulting her counsellor had been raised and been well received and acted upon. Therefore, Ms Jallow had the
25 impression that she was able to engage with the claimant and that their relationship was open and supportive. The tribunal was invited to reject the suggestion that the claimant felt under duress, there was no evidence of a quid pro quo or consequences from not following the instruction and no escalation of any procedures. It was also said that in so far as there was a

breach, it had been affirmed by the claimant following through with the action. There was nothing in the follow up correspondence which suggested duress. The reference to the claimant 'not being comfortable doing that' was how she remembered it now. The relationship had been positive til this point and it was arguably unfair that a switch flipped in a way that Ms Jallow was now being criticised.

49. In terms of the call on 17 December, it was said that there was no evidence of an agreement precluding contact with the claimant until after 17 January. It was a matter of interpretation. Ms Jallow was simply away on holiday until then and that was a far cry from a suggestion that this was to give the claimant a break and that there was a positive undertaking not to contact her in order to protect her mental health. It was one thing not to expect a call and another to suggest that there was to be a break in contact. Could it really be said that the mere fact of a call regarding Facebook posts could amount to a repudiatory breach of contract and conduct calculated or likely to destroy or seriously damage trust and confidence? The test is an objective one and Ms Jallow's evidence and reasoning is useful. The claimant was expected to come back to work in January or later and when she did any further Facebook posts could result in further chatter from colleagues similar to that which resulted in the Senior Branch Manager contacting Ms Jallow. Therefore, while the claimant says that there was 'no just cause' in the contact, actually what is evident is that Ms Jallow took the decision for the benefit of the claimant as if she didn't and matters would be left to fester for another month, while the claimant remained ignorant of what was going on. This could not amount to a repudiatory breach of contract. While the claimant put emphasis on the suggestion that Ms Jallow had failed to follow HR advice, there was no evidence that Ms Jallow was precluded from calling the claimant or a timescale. The test is objective and the way in which the claimant received the call is subjective.
50. In terms of an argument in relation to the final straw, it was said that an entirely innocuous event can't amount to a final straw. The events of 17 December

were innocuous and therefore can't be a final straw. Reference was made to **Omilaju v Walton Forest Borough Council** 2005 ICR 481 as authority for this proposition. Reference was also made to **Malik v BCCI** in that acting unreasonably is not sufficient to amount to a breach of mutual trust and confidence and **BG v O'Brien** 2001 IRLR 496 at paragraph 27, where it was said that simply damaging the relationship was not enough, it needs to be seriously damaged. Reference was also made to paragraph 12-14 of **Fenkel Topping Ltd v King** UKEAT/106/15 which contained a useful summary of the stringency of the test to establish a breach of mutual trust and confidence.

51. Counsel highlighted some examples of conduct which had been found to have amounted to breaches of mutual trust and confidence or repudiatory breaches of contract. It was said that these demonstrated a theme of seriousness which was lacking in the claimant's case.
52. Reference was also made to the case of **Private Medicine Intermediaries Ltd v Miss Hodkinson and others** UKEAT/134/15 on which the claimant relied. It was said that this case could be distinguished for a number of reasons. The claimant in that case had been determined to be disabled for the purposes of section 6 Equality Act 2010 and absent for work related reasons. A letter or email sent in September 2013 was found to have been a breach of trust and confidence. It had been sent to the claimant when she was off work with work related stress. It was said that as the claimant in that case was off with work related stress, there was an onus on the employer to be more careful about communication. In addition, there was clear signposting by the claimant who had used words such as being devastated by how she had been treated which were missing in this case. While in the present case the claimant says that the respondent knew that she could not take the call from Ms Jallow, that was not the same thing as where a letter had been sent to a claimant setting out further allegations against her, which went beyond simply unwanted contact. In **Hodkinson**, the Tribunal made a lot of the fact that the matters raised with the claimant had already been dealt with and were being resurrected. Therefore, the circumstances were entirely different in that

at its highest in the present case Ms Jallow called about something which could wait until January. Further, Ms Jallow's evidence had been that there were two things she wanted to discuss, both the extent of the cake making and the issue of colleagues reaction to the social media posting. Ms Jallow
5 felt that the issue of the extent of the claimant's cake making could wait but she needed to speak to the claimant regarding the issue with colleagues and did not anticipate the claimant's reaction. Moreover, in the **Hodkinson** case, the letter was found to have been an act of disability harassment which is very different from the present case.

10 53. Counsel then turned to address the delay in the call of 17 December and the claimant's resignation. He said it was not the amount of time which was important but what had happened during that period. There was an implied waiver or affirmation of any breach which had occurred. The claimant had
15 continued to receive pay but more importantly had not indicated that she was working under protest. Further, the terms of the emails with her trade union representative amounted to an actual waiver in which she intimated that she intended to continue to be employed by the respondent and wanted to try and restore the relationship. That was all inconsistent with a repudiatory breach. The claimant also took steps to organise a representative for future meetings
20 with Ms Jallow.

54. Turning to the question of remedy, while concern was expressed that the figures put forward by the claimant were not accurate, Counsel accepted that he had not cross examined on the issue and the ET3 did not provide any alternative information. On that basis, he candidly recognised that he was in
25 some difficulty in seeking to challenge the evidence and information provided by the claimant.

55. The claimant summarised the evidence given about what she said was inappropriate contact and a failure to follow HR advice. She made reference to page 214 of the productions and Ms Jallow's evidence that she knew that
30 the unexpected nature of the call could make her more anxious but still chose

to call. She said there was no reasonable or proper cause for the call, it was not important or time sensitive. During the call of 17 December, Ms Jallow had said that it didn't have to be discussed at the time. The claimant said that these were actions which were without reasonable or proper cause and in a manner likely to cause a breach of mutual trust and confidence.

56. The previous call had already caused serious damage by overstepping the mark of a reasonable conversation, and whether or not it was Ms Jallow's intention, she knew that the call would cause distress and that the claimant would be annoyed.
- 10 57. When Ms Jallow was asked in evidence about what the claimant's letter of resignation had referred to, she had assumed it was linked to the call of 17 December which was said to demonstrate that Ms Jallow had some level of understanding that the call had damaged the relationship.
- 15 58. It was said that on the evidence submitted the respondent through its conduct had significantly breached trust. It was also highlighted that all the contact had taken place when the claimant was signed off with anxiety.
59. The claimant accepted that when she went off sick on 18 October, it wasn't related to work. However, through the evidence led it was said that it was clear that the claimant had intimated on several occasions to Ms Jallow that work issues were causing increased levels of stress. Therefore, the claimant's manager's conduct should be treated in the same way as if she was absent on grounds of work-related stress.
- 20 60. In terms of **Hodkinson**, the claimant pointed out that the finding that the letter had amounted to disability harassment had been overturned on appeal and that only the constructive dismissal claim remained. It was therefore relevant that the tribunal had found in the claimant's favour because of contact with her while off sick for reasons which were not serious and did not need to be dealt with at that time and that it was known that the claimant would be upset by the letter sent. Reference was made to Ms Jallow's evidence that she knew
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- calling the claimant on 17 December would cause some upset or annoy her. The claimant said that the distress caused to her was horrific, that Ms Jallow was aware of how serious the claimant's anxiety was given that she was so concerned about whether the claimant was getting sufficient support.
- 5 Therefore, Ms Jallow knew that making the call when it didn't have to take place is acceptance in itself that the call was unnecessary.
61. Referring to the emails between the claimant and her trade union, the claimant pointed out that the call with Ms Jallow was at 4pm on a Friday afternoon and she contacted the union on the next working day after her leave and explained
- 10 that she was acutely unwell. The claimant made reference to the evidence she had given that she needs to process things which is part of the techniques taught to her by her clinical psychologist to understand her thoughts. The claimant said that she was devastated to the point that she had a panic attack which lasted 30' minutes as a result of the call which was seen' by her two
- 15 youngest children. She felt that the relationship was destroyed. She contacted the union as she wanted some perspective as to whether what she felt was understandable or she was reading too much into it. The union had confirmed that the contact was unnecessary particularly when there had been an agreement that there would not be any contact.
- 20 62. The claimant said that from her perspective and from the notes taken by Ms Jallow she cannot understand what other conclusion could be reached but that the claimant did not want to be contacted. What she had said throughout November and December was consistent with this and was disregarded. The claimant also said that the notes of the contact with HR made clear that it was
- 25 recommendations and instructions being given, not guidance.
63. In terms of the issue of affirmation, the claimant said that she had two sessions with her psychologist throughout the holiday period and that every time she tried to draft an email to Ms Jallow to discuss a way forward she became too upset. She had been clinging on to the hope that the relationship
- 30 had not been destroyed. The claimant concluded by saying that the actions

of the respondent had breached the implied duty of mutual trust and confidence and that she had been constructively and unfairly dismissed.

Discussion and decision

Did the respondent fundamentally breach the claimant's contract of employment?

5 64. The claimant relied on two matters which she said either individually or cumulatively amounted to breaches of the duty of mutual trust and confidence.

65. In relation to the call of 30 November, the Tribunal concluded that the claimant's line manager insisted without any justification that the claimant ask her medical practitioners to review her treatment. Ms Jallow appeared to rely
10 on the fact that her mother had suffered from mental health issues and that she knew how difficult it was to obtain appropriate treatment. Rather than excuse Ms Jallow's conduct towards the claimant, this position makes it all the more extraordinary that she should approach matters in the way in which she did. Ms Jallow's mother had suffered from a very different condition from
15 that of the claimant, however one would imagine this would have given some insight into how sensitivity is required when dealing with people with mental health issues.

66. The claimant made clear that she did not think there was any basis on which she should have to question her medical practitioners in this way. Despite that
20 and despite the fact that Ms Jallow knew the claimant was suffering from severe anxiety, Ms Jallow was insistent that the claimant should do as she said. Ms Jallow also knew that the claimant was very nervous about her continuing employment and concerned that she might be managed out. It was reasonable of the claimant in these circumstances to have felt obliged to do
25 as asked even though this caused her additional anxiety.

67. It was unreasonable of Ms Jallow to question the claimant's medical treatment. She had no proper cause for doing so and in so doing caused serious damage to the duty of mutual trust and confidence. The claimant was off work because of anxiety and was further anxious about how long her

employer would tolerate her absence. Objectively, Ms Jallow's conduct seriously damaged the relationship of mutual trust and confidence with the claimant. That is apparent given that the claimant became increasingly anxious about contact and her work situation. She felt the need to confirm in writing what Ms Jallow had said to her, when previously the relationship had been supportive. She also told Ms Jallow that the contact was causing her increasing anxiety.

68. Turning to the call on 17 December, the Tribunal is of the view that this call of itself amounted to a clear breach of mutual trust and confidence. The circumstances were that the claimant was off sick with severe anxiety and suffering from panic attacks. Ms Jallow knew that the claimant was increasingly anxious about a return to work and the possibility of the respondent taking action against her because of her absence. Ms Jallow knew that the claimant 'catastrophised' matters as was evident when she thought that her job had been advertised without her knowledge. The claimant had permission to engage in her cake making business, which she operated as a hobby and was therapeutic for dealing with her anxiety. The claimant had posted on Facebook saying that she hadn't posted for 6 months and was posting pictures of cakes she'd made over that period. There was nothing blameworthy about her conduct. While it may well be that staff at the branch at which the claimant worked made comment about this while the claimant was off sick, the Tribunal found that there was no proper reason given for raising this with the claimant at the time the respondent raised it or indeed at all.

69. The Tribunal did not accept Ms Jallow's evidence that her reason for calling the claimant to inform her of the issue was done with the claimant's best interests at heart. Ms Jallow accepted that the claimant had done nothing wrong. She knew that only 48 hours previously, the claimant had been too anxious to speak to her. She knew that there had been an arrangement whereby there would be no contact with the claimant for at least a month. She knew that there was an agreement that Ms Jallow would send a text to the

claimant advising her when she would contact her. Ms Jallow knew that the claimant was very concerned about her ongoing employment. Ms Jallow knew that the claimant was particularly sensitive about contact with HR regarding her position. While Ms Jallow may not have known that the claimant was on holiday, it would have been reasonable given the time of the year to have checked either on the respondent's systems or by text with the claimant before contacting her.

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70. Notwithstanding all of these factors, Ms Jallow contacted the claimant and told her she had to be 'mindful' of posting on social media about making cakes. While the respondent sought to argue that such contact could not amount to a breach of mutual trust and confidence, it is necessary to consider all the fact and circumstances and the context in which the call occurred. While contacting a member of staff off sick with say a broken arm who has been posting about activities on Facebook might be different, Ms Jallow knew that the claimant was suffering from severe anxiety, that contact with work was exacerbating that anxiety and that the claimant was concerned about her ongoing employment. She knew that at the earliest the claimant would be returning to work towards the end of January. Calling her to discuss a matter where there was no urgency, which Ms Jallow would know or should reasonably know the claimant would perceive as being critical of her conduct would inevitably seriously damage the duty of mutual trust and confidence.

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71. The Tribunal did not accept Ms Jallow's evidence that she felt that this was urgent to make sure that relations between the claimant and her colleagues would not be further damaged. Ms Jallow said to the claimant during the phone call that they could speak about the issue the following week. That was not consistent with any urgency. The advice sought and received from HR was not consistent with the suggestion that there was urgency. The only urgency appeared to be that Ms Jallow wanted to call before she went on holiday. Ms Jallow knew that the manager in question had already told staff that the claimant was doing nothing wrong in baking cakes while off sick. Ms Jallow also knew that the claimant was particularly nervous about contact with

HR because of the potential impact on her employment. Ms Jallow would have known that telling the claimant that she had taken advice from HR before contacting her would give the claimant the impression that she was speaking on behalf of the respondent and not just having an informal chat. Taking into
5 account all of the circumstances, a reasonable person in the position of the claimant would take the view that the respondent did not wish to bound by the contract of employment any longer.

72. While the call of 17 December on its own in the view of the Tribunal amounted to a clear breach of the duty of mutual trust and confidence, when taken
10 together with the conduct of Ms Jallow in the call on 30 November, there could be no doubt that the claimant was entitled to come to the view that the respondent no longer wished to be bound by the contract of employment.

Did the claimant resign in response to the breach?

73. The tribunal then went on to consider whether the claimant had resigned in
15 response to the breach or breaches. The Tribunal had no hesitation in concluding that it was Ms Jallow's conduct on these occasions which she viewed in relation to the second incident as being with the authority and on the advice of the respondent's HR department as being the cause of the claimant's resignation.

20 *Did the claimant delay too long in resigning?*

74. The respondent's position was that the claimant had delayed too long in resigning and/or had affirmed any breach.

75. It was suggested that by doing as instructed by Ms Jallow on 30 November, the claimant had affirmed any breach. The Tribunal did not accept that
25 submission. The point was that there was no reasonable cause for the claimant to have been instructed to act in the way in which she did. The claimant confirmed in writing that she had done as instructed only under duress. This did not amount to an affirmation.

76. It was also said that as the claimant had initially indicated to her trade union that she wished to remain in employment, that this amounted to either an affirmation or unreasonable delay in resigning.
77. The Tribunal did not accept this submission. In the first instance, it must be borne in mind that the period over which this occurred was the festive period when most people were on holiday. The claimant had worked for the respondent for over 21 years. There is a difference between an employee being reluctant to terminate their employment and there being no basis on which to do so. The claimant was in a state of high anxiety. She wanted to check with her union whether she was overreacting to events. She wanted to speak to her consultant before she took any decisions. This was all reasonable conduct on the part of the claimant and did not amount to either affirmation or undue delay. The claimant wanted to 'process' events and having been able to do so intimated her resignation around the time she expected contact from the respondent. The claimant knew that Ms Jallow was on leave until 17 January. She intimated her resignation on 19 January. There was no undue delay and in taking time to process events while in a state of high anxiety, the claimant did not affirm the breach.
78. In all of the circumstances, the Tribunal concluded that the respondent had breached the duty of mutual trust and confidence with the claimant, that the claimant resigned in response, that she was entitled to do so and did not delay unduly in so doing.

Remedy

79. The Tribunal went on to consider the question of remedy. The claimant has set up in business on her own account. She has incurred expenses in so doing, such as purchase of a computer. She has continued to carry out her cake business and her income in that regard has been similar to when she was employed. The Tribunal therefore disregarded the income from the cake making business which would have been similar had the claimant remained in employment.

80. The claimant commenced her business on 4 April 2022. The Tribunal accepted that she would take some time to build up her business and that she would not have the same level of income as previously for a period of 6 to 12 months. From 1 May 2022 to 12 August 2022, she had income of £4084.07 gross before expenses. When employed her net income was £407 per week and the employer made 2% contribution to her pension at £32.56 per month.
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81. The claimant is entitled to a basic award of £9250 based on her age and length of service. Her income over the course of 52 weeks from 19 January 2022 would have been £21,164 plus pension contributions of £390.72 giving a total of £21,554.72. It is appropriate to make an award for loss of statutory rights of £500.
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82. Therefore, on the basis of the income received by the claimant in her new role over a four month period (from 4 April to 12 August) being £4084.07 gross, it could reasonably be estimated that the claimant would have further income of £9,000 until 19 January 2023. This is of course gross income but it would appear that there will be little tax liability for the claimant at this rate of income.
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83. In these circumstances, the Tribunal concluded that it would be just and equitable to make the following award:

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| | Basic Award | £9250.00 |
| | Loss of salary and pension | |
| 5 | 19 January 2022 to 19 January 2023 (52 weeks) | £21,554.72 |
| | Less estimated income | £9000 |
| | Total financial losses | £12,554.72 |
| | Loss of statutory rights | £500 |
| | Total compensatory award | £13,054.72 |
| 10 | Total award | £22,304.72 |

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|------------------------------|--------------------------|
| Employment Judge: | A Jones |
| Date of Judgment: | 26 September 2022 |
| Entered in register: | 27 September 2022 |
| and copied to parties | |

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