



# EMPLOYMENT TRIBUNALS

**Claimant:** Mrs J Costello

**Respondent:** The City of Liverpool College

**Heard at:** Manchester (by CVP)

**On:** 5-6 October 2022

**Before:** Employment Judge Parkin

## Representation

Claimant: In person

Respondent: Mrs K Skeaping, Solicitor

# RESERVED JUDGMENT

**The Judgment of the Tribunal is that** the claimant was not constructively dismissed and her claim of unfair dismissal is therefore dismissed.

# REASONS

## 1. The claim

The claimant presented her ET1 claim on 15 April 2022, claiming unfair constructive dismissal in respect of her resignation from her position as Workforce Skills Business Support Manager taking effect on 31 December 2021. She stated the respondent was in repeated breach of its duty of trust and confidence towards her as an employee. She had been placed under suspension on 6 October 2021 following a large download of data that raised suspicions about her conduct and was investigated and there was found to be no wrongdoing by her but the conduct of the organisation and its representatives along with a series of serious procedural failures in the period preceding and during her suspension meant she had no option other than to resign in December 2021. She specifically cited 8 matters: (1) being interviewed on 4 (actually 6) September 2021 in a locked room with no prior warning and no opportunity to seek representation, following the suspension of her line manager on allegations of bullying and harassment; (2) being questioned at a suspension meeting on 6 October 2021 regarding the download of data, in breach of college procedures.

She said she was unable to answer as she had no detail provided to her; (3) the college neglecting to inform the Information Commissioner's Office of the possible data breach in October 2021; (4) her discovery in October 2021 that she had been working for the organisation without a valid contract of employment since November 2018; (5) during the suspension, her workload and Inbox being seriously mismanaged, leading to questions from internal and external stakeholders regarding the nature of her absence; (6) being contacted regarding the investigation insensitively whilst on suspension during a period of sickness absence due to stress, contravening the sickness absence policy; (7) being suspended despite no breach of policies or procedures on her part. She said she had raised a formal grievance in November 2021 that policies were leaving employees at risk of harm, which was not addressed in the grievance outcome or her further appeal, and (8) that the college had consistently not met deadlines set out in its Grievance Policy.

## **2. The response**

By its response and detailed narrative grounds of resistance presented on 9 June 2022, the respondent resisted her claim. It denied any breach of express or implied terms of her contract of employment, or that any breach of contract was repudiatory. In various alternatives, it denied that any repudiatory breach was the cause of her resignation and that contended that she had delayed or affirmed the contract of employment in any event.

## **3. The Issues**

At the start of the hearing, the Tribunal discussed the issues with the parties. It was agreed the claimant would give evidence first since she bore the burden of proving that she was constructively dismissed by the respondent. Thus, did she prove the respondent had committed a repudiatory or fundamental breach of the implied term of trust and confidence in her contract of employment which she then accepted when she resigned? The claimant explained that she did rely upon a "last straw": the letter from Laura Rowan dated 15 December 2021 telling her there would be no grievance outcome that term and until the New Year. As the hearing progressed, she also cited ongoing lack of support and contact from the respondent whilst she was off sick up to 15 December as part of her "last straw". The respondent confirmed it put forward no alternative case as to any reason for dismissal making a constructive dismissal potentially fair in any event, but still relied upon its alternative cases of no repudiatory breach of contract, delay and affirmation. Accordingly, if the Tribunal found a constructive dismissal despite the respondent's arguments, it would follow that the dismissal was unfair.

## **4. The evidence**

4.1 There was an agreed bundle of documents (104 pages) In addition, during the hearing the respondent produced 3 pages of Vicky Leyden's handwritten notes from an investigatory meeting on 6 September 2021 and the claimant produced an e-mail chain dated 16 December 2021, showing the respondent had acknowledged her date of termination to be 31 December 2021 (as she maintained), not 31 January 2022 as set out in the ET3.

4.2 The claimant gave evidence followed by the respondent's two witnesses, Chris Bentley, Senior Technical Support Engineer and Laura Rowan, Director of Education Adults, with closing submissions in the reverse order.

4.3 As to credibility of the witnesses, that of the claimant was very much more important than that of the respondent's witnesses. Mr Bentley's evidence was largely technical and unchallenged, explaining why the investigation and suspension of the claimant's conduct had come about, and Ms Rowan's involvement as Grievance Manager was substantially documented and extended well beyond the claimant's date of giving notice of resignation and actual date of termination of employment. Nonetheless, the Tribunal did find Ms Rowan defensive in the way she gave evidence: very reluctant to accept any shortcomings in her dealing with and investigation of the claimant's Grievance or in her statement itself, such as when she maintained that she believed it accurate that Vicki Leyden had confirmed that the questioning of an employee during a suspension meeting was standard practice. She later had to accept this was the opposite of what Ms Leyden had said.

4.4 The Tribunal found that the claimant's evidence was influenced by the passage of time and her conviction as to the rectitude of her position, but was not always consistent or convincing. Her version that she had downloaded but then promptly deleted a massive number of files (1125 in number) when working at home on a Saturday yet had promptly completely forgotten doing so and then only remembered it when provided with details by Mr Heaton at the investigatory meeting on 10 November 2021 was extraordinary and not accepted by the Tribunal. In oral evidence, she said: "It was totally innocently done. I don't usually download that amount of information. Nobody asked me to do it. I deleted it there and then realising I shouldn't have done it. I will be completely honest - I forgot I'd done it. It was so inconsequential. I went into work the following week and didn't think to make anyone aware. It didn't occur to me". However, she also gave evidence of being specifically questioned by the respondent's HR personnel about a download of files by her apprentice colleague KM also involving student data; she had replied that she needed to refer to KM's line manager about it although she was 95% sure KM's action was not sinister. Notwithstanding Mr Heaton's later finding of "No case to answer" against her in disciplinary terms, the Tribunal found it inconceivable that she would have forgotten her own extraordinary download and deletion of a huge set of files very close in time to that by KM which she was questioned just afterwards especially as she gave evidence of how constantly worried she was by the fact of her suspension (just a week and a half after her download). The Tribunal was also troubled by her silence about this download and deletion of files in her detailed witness statement and similarly the failure to mention her ongoing involvement with Sophie Park. In her witness statement provided as her primary evidence, Ms Park was mentioned only at paragraphs 3-6 expressly in relation to the investigatory meeting on 6 September 2021. The claimant did not refer in her statement to any further meeting with Ms Park, still less to telephone discussions after her own suspension about the possibility of employment with Ms Park's new company and most significantly, her brief reference at paragraph 20: "Following my resignation I managed to secure employment on the similar salary scale with a private company very quickly..." made no reference to the similarity of that new role as Head of Operations at Hybrid Technical Services Ltd, reporting to the new Managing Director of that company, Ms Park or to Ms Park's proactive involvement in recruiting her. These omissions suggested the claimant was deliberately playing down both her own conduct in downloading data and her

close involvement with Ms Park (especially in connection with the possible role at Hybrid she did accept).

## **5. The Facts**

From the oral and documentary evidence, the Tribunal made the following key findings of fact on the balance of probabilities.

5.1 The respondent is a large Further Education college with numerous sites across the Liverpool city region.

5.2 The respondent has various formal policies, including its Attendance Management Policy and Procedure, Acceptable Use Policy - Stop Computer Use, Grievance Policy and Procedure and Disciplinary Policy and Procedure.

5.3 The detailed Attendance Management Policy includes paragraph 9 "Maintaining Contact with Absent Employees":

"Where an employee is likely to be absent long term i.e. for four or more weeks, the manager will be responsible for maintaining informal contact with the employee and will make every effort to keep them informed of work matters as appropriate. Such contact will be made sensitively, according to the nature of the absence and employee's circumstances. The primary purpose of this contact is to ensure that the member of staff who is off sick on a long-term basis is kept informed of developments at work, which will aid their re-integration into the work environment when they are fit to return to work.

In certain circumstances it may be necessary for the manager to contact a member of staff who is off sick for purposes not linked to the sickness absence for eg for purposes of consultation, to retrieve students work et cetera. Such contact will be made sensitively, depending on the nature of the absent employee's circumstances. If a manager receives information that a member of staff is off sick with stress or stress-related illness (eg anxiety common depression et cetera), they should immediately report that matter to human resource and an occupational health referral may be made, on the grounds that return to work from such illnesses is most successful where the cases are managed to next stage. If the employee believes that the stress is related to work, then the college would normally look to meet with the employee as soon as possible..." (44).

5.4 The Formal Procedure within the Grievance Policy & Procedure included that an HR representative would arrange for the grievance to be investigated and for a hearing to be conducted by inappropriate manager which would normally be held within 10 working days of receipt of the written grievance but that might vary depending on the nature of the grievance. later, it set out that following the hearing, a written response would be given to the employee within five working days although this might need to be extended depending on the length of the investigation and the availability of the appropriate manager (66A-66B).

5.5 Having commenced employment with the respondent in December 2003 as a Customer Support Officer, the claimant had been successively promoted. Her final promotion to Workplace Skills Business Support Manager within the

Learning & Development team was confirmed in July 2021. This had been supported by her line manager, Sophie Park, in whose team she had worked since 2018. The claimant had herself asked for the promotion to recognise and reflect the work she was then doing as Apprenticeship Coordinator with Learning & Development. This upgrade had been accepted by Ms Park's line manager, Karen Brownbill and approved by the respondent's Executive team.

5.6 This was the claimant's first role specifically in management with the respondent. Her pay was increased from about £28,000 to about £32,00 gross per annum and the rise was also backdated to the end of the previous year.

5.7 She valued her employment with the respondent highly and had good relationships with colleagues and her managers and with HR. In particular, she had a very good relationship with her manager Sophie Park who was direct and forceful with subordinates; the claimant worked well with and was able to stand up to her.

5.8 No formal new contract of employment or statement of terms was provided to the claimant recognising this promotion. However, no changed contract or revised statement of terms had been issued to her on her previous promotions. Indeed, the respondent's HR records revealed nothing more recent in terms of a contract of employment or statement of particulars than her initial 2003 contract, although the claimant remembered being told by her Unison trade union representative following a transfer of employer in about 2011 that she and others were now bound by new collective terms and conditions of employment. The claimant never queried the lack of issue of a new contract or statement of terms, in particular in July 2021 until she raised her grievance in November 2021.

5.9 In early September 2021, there were complaints raised with the respondent's senior management about the claimant's line manager, Sophie Park, by a number of employees to the effect that she bullied junior staff and operated a regime of preference and clique, with the claimant named as one of the beneficiaries of this alongside another named team manager and another member of the team.

5.10 As a result, the line manager Sophie Park was suspended pending investigation on or about 6 September 2022. The company solicitor, Mrs Skeaping, was brought in to accompany the HR Business Partner, Vicky Leyden, at interviews with a number of managers and members of the team.

5.11 The claimant had been notified of Sophie Park's absence from the college (which she correctly assumed to be as a result of suspension) earlier on 6 September 2021 by Karen Brownbill, Ms Park's line manager, who was due to attend and hold individual meetings that day.

5.12 Before she met Ms Brownbill, and entirely without warning, the claimant was asked to step outside the office by Vicky Leyden (who she did not know but who introduced herself) and taken to a side office or staff room where Mrs Skeaping (whom the claimant knew from prior contact) was waiting. Mrs Skeaping explained that the door would be locked for reasons of privacy and asked if the claimant would answer her questions in relation to Ms Park. The claimant was not given any opportunity of being accompanied. Mrs Skeaping explained that there had been complaints about the team culture and Ms Parks' behaviour but

that the claimant was not implicated. The claimant agreed to answer the questions and did not challenge the need for a locked door. She maintained that Ms Park was direct, loud and vocal, swore a lot and did not hide her feelings; she said she was not a bully and she treated everyone the same but held people accountable and had clear expectations of them. She did not find that Ms Park went over her head with her own staff and none of the team had raised concerns with her. When asked whether she and Ms Park were friends outside she said they had a good relationship and occasionally went for a drink. There was a culture of bad language in the office. (Respondent's handwritten notes 1-3)

5.13 Whilst the claimant may have felt surprised and pressurised to take part in and answer questions at this meeting because of the lack of warning and locked room, she did not raise any protest about the manner of the meeting, questioning or procedure at the time or via her experienced Unison Trade Union representative John Nolan.

5.14 Sophie Park resigned on about 6 September 2021 and there was no further investigation of Ms Park's conduct. She contacted the claimant (rather than any other member of staff) in mid or late September 2021 for the claimant to pick up and deliver some personal items from the office to her, which the claimant did. At that time Sophie Park told her she did not have a new role but was applying for jobs. Then or soon afterwards she also indicated she was thinking of joining and investing in Hybrid Technical Services Ltd (Hybrid).

5.15 After Ms Park's resignation, the claimant thereafter had closer contact with Karen Brownbill as effectively her own line manager. She took on additional responsibilities and she was working particularly hard to impress senior management including the Executive team.

5.16 On about 5 October 2021, Mr Bentley in the IT department become aware of a very significant downloading and deletion of data relating to a massive 1125 files from IT systems carried out from somebody's home over a weekend, on about 25 September 2021. The action was identified as being from the claimant's home IP address. The relatively new Office 365 system had presented a "red flag" highlighting this unusual activity.

5.17 Another more junior member of staff (the apprentice KM) was also suspended at about this time over what were also considered to be suspicious downloads a little earlier, again raising a "red flag". Indeed, the claimant who was not KM's actual line manager was approached by the respondent's HR team and asked whether she considered KM's download suspicious in terms of the content of the files he had viewed. Her reply was that she felt it 95% likely that KM was carrying out normal day-to-day work but she would need to speak with his actual line manager to confirm that the download was innocent.

5.18 The volume of the downloads and deletions by the claimant would have concerned Mr Bentley and made it likely he reported the matter to the HR team in any event, but the coincidence of other download by someone within the same team as the claimant within a short time of the suspension and resignation of Sophie Park made his decision to report clearer still. He discussed it first with his IT Director, Mark Heaton, and also his fellow Technical Manager and the IT

Operations Manager, who all agreed HR should be notified. He made the notification on 5 October 2021.

5.19 As a result, on 6 October 2021 (119-120), the claimant was suspended by Gill Banks, Deputy Principal. At this time the claimant was asked questions about the data loss: why had she downloaded the data, who asked her to do it, where the data was stored. However, no details of the data downloaded (such as the size of the download, date or place it happened) were provided to her and she said she was unable to answer the questions. This questioning was outside the normal suspension procedure which is limited to the actual suspension with questions put later in the course of an investigation. The respondent's Disciplinary Policy and Procedure at Appendix 2, paragraph 5.2 confirms that suspension is not a disciplinary sanction but an interim measure to facilitate an investigation and at 5.4 states: "The Suspending manager will then call the employee to an immediate meeting to confirm the details of suspension. The employee will be asked at this meeting to return or college properties such as mobile phone, laptop, access card, keys and any other devices issued by the college. Access to IT systems will also be revoked..."(63). However, the claimant and her Trade Union representative Mr Nolan did not raise any objection to it or complaint about it at the time or afterwards, before her grievance.

5.20 The claimant surrendered her laptop at the time of suspension; she did not have a college mobile phone.

5.21 On 7 October 2021, the claimant asked for a copy of her contract of employment. Vicky Leyden provided her with a copy of her 2003 contract.

5.22 In early October 2021 the claimant learnt from Sophie Park that she was in new employment as Managing Director at Hybrid and that she hoped there may be a position for the claimant in future.

5.23 On 11 October 2021 the claimant was signed off by her General Practitioner as unfit to work due to stress at work (126) by Fitness to Work certificate expiring on 24 October 2021. Under the respondent's standard approach, this prompted an immediate referral to Occupational Health by the HR team.

5.24 On 13 October 2021, the respondent's HR Business partner, Debbie Walsh, sent a letter by post requesting the return of any personal technical devices from the claimant (127). The request was not by a standard template letter and was somewhat heavy-handed in tone. It wrongly referred to the claimant having handed in a mobile phone (when she had never had a college phone). It reminded her of the confidentiality of information pertaining to the business, staff or students of the College which remained its property and went on to require her to bring any personal devices holding college data to the investigation meeting to be viewed by IT staff.

5.25 The claimant was very upset by the content and tone of this letter which she found crass and grossly insensitive; she knew it was inaccurate because it referred to her handing in a work phone. The claimant did not draw attention to the tone of the letter because she did not wish to be viewed as uncooperative. On 19 October 2021, she replied to Debbie Walsh (128-129):

"Hi Debbie. Hoping this finds you well.

I have received the attached letter from you today and just want to clarify that I did not hand over college mobile phone at the suspension meeting. to confirm I have not been allocated to college phone and IT are aware that I have been using my own device. this was also confirmed to Gill and Vicky at the meeting as I informed them that they would need to ask Chris Bentley to remove the divert from my desk number to my mobile.”

She confirmed there was no college data stored on any of her personal devices and that she would be happy to demonstrate that (but not hand over her phone to be searched). She also asked for and was provided with a copy of the respondent’s Acceptable Use Policy. Debbie Walsh apologised for the error in writing that the claimant had handed in a mobile phone when suspended (128).

5.26 On 20 October 2021, the Occupational Health Practitioner Dr Orton reported (144-145) that the claimant was not completely sure why she had been suspended, although there had been enquiries as to accessing private data. Her suspension had triggered a panic attack with significant emotional upset and her GP had given her a sick note for two weeks and medication to help with her anxiety. She was not taking the medication unless it was essential and had not been referred for any counselling. Although she was suffering significant anxiety and stress regarding the situation she was not fully aware of, she was unfit to attend the workplace but would be fully fit from the beginning of November to attend any investigatory or formal meetings with no specific adjustments or restrictions needed. She should be fully fit to return to work once investigation and judgement had been completed (144-145).

5.27 When the sick certificate ran out, the claimant took some pre-booked leave from 25-29 October 202 before returning to suspension.

5.28 By letter dated 2 November 2021, the claimant was invited to investigation meeting on 10 November (147-148) by Debbie Walsh. The letter lacked details about the matters for investigation, citing only non-specific bullet points:

- Data breach which could be a potential act of gross misconduct;
- Breach of contract which could be a potential act of gross misconduct;
- Potential financial detriment to the college which could be a potential act of gross misconduct;
- Breach of confidentiality which could be a potential act of gross misconduct;
- Inappropriate use of college systems and data which could be a potential act of gross misconduct

The letter stated that Mark Heaton, Director of IT, would investigate his allegations and stressed it was not a formal meeting but an investigation meeting at which she may be accompanied. Her TU representative, John Nolan, was notified.

5.29 During her suspension the claimant had heard from Sophie Park, with whom she had remained in contact, that a fellow manager, DY, had told a student that she was no longer at the college. In a letter to Debbie Walsh raising concerns about her questioning by Gill Banks at the suspension meeting and the



impartiality of Mark Heaton as investigating officer on 9 November 2021, she raised that she had learnt about DY saying this to the student. She deliberately did not name Sophie Park as her source or identify the student concerned, thereby limiting somewhat the respondent's opportunity to investigate this allegation. Her letter showed that Ms Park was interested to know whether she had a new job at that time (158-159). In the event, the claimant's concerns about the comments by DY and Mr Heaton's role and impartiality were not relied upon ultimately by the claimant in her ET1 claim form or at the hearing.

5.30 Full details and the date of the download and deletion were only given her at the 10 November 2021 meeting (160-162). Mr Heaton showed the claimant the exact record of the major download from SharePoint, explaining that it included student records, student assessment data and list of courses downloaded from a particular IP address on Saturday 25 September 2021 and showed the claimant the names of students the data related to. The claimant then told Mr Heaton she recollected that she had downloaded a large amount of data when working at home over the weekend; she had opened it and on seeing the content realised it was too big and wasn't going to be useful. Telling herself she was "trying too hard", she realised she should not have done so. She said her reason for doing this work at the weekend was to carry out extra work for the Executive Team Director Nicola Kumar, in connection with the WBL transformation project which she had been working on with Ms Kumar on the Friday when there had been computer outages; she said she was downloading it to impress a senior member of staff. She said she didn't store anything and deleted the data straight away on appreciating what she had downloaded was so big (160-162).

5.31 On 11 November 2021 the respondent's HR advisor Spencer Brew telephoned the claimant and informally told her that her suspension was being lifted and she had no disciplinary case to answer. She was being reinstated and could return to work the next day. The claimant explained that she was reluctant to return so soon. In her oral evidence, she accepted this was the respondent showing her sufficient trust to ask her to return to work immediately and she replied "Yes. But I did not want to go back to work physically". Mr Brew came back to her and said she need not return to the office the next day (a Friday) but could do so the following Monday, 15 November.

5.32 The claimant became aware that no "Out of Office" message had been put on her email Inbox, meaning a backlog of emails and the need for her to contact internal and external contacts. The claimant was very sensitive about the need to explain her absence and anxious not to lie to any one she would be dealing with. It was not then standard practice to send an "Out of Office" message from the inbox of a suspended employee during their suspension, although Karen Brownbill was able to access the Inbox and view incoming messages.

5.33 On 11 November 2021 Karen Brownbill tried to contact her by telephone. The claimant was unable to take her call and texted Ms Brownbill to tell her this. She did not herself telephone Ms Brownbill and Ms Brownbill did not ring her again but left a further text message saying: "OK. Take care"

5.34 On 15 November 2021, the claimant wrote to the respondents HR director, Bill Harrop:

“Following my recent suspension on subsequent investigation I have been informed that I'm expected to return to work today. I however do not feel that this is an option for me at this time, I have notified Karen Brownbill that I will be self- certifying a sick for this coming week and will be contacting my doctor if necessary beyond this.

Unfortunately, I feel that I have no option at this time but to raise a formal grievance with the college.”

She cited numerous detailed points of concern: Intimidation and lack of appropriate support both prior to suspension, in particular the 6 September 2021 meeting; at her suspension being questioned with a presumption of guilt; and, during suspension, Debbie Walsh's insensitive letter, as well as her lack of a current valid contract of employment; being suspended despite the fact she was not in breach of any college policies; a colleague DY informing at least one student she had already left the college; lack of management of her Inbox and Out of Office message not being updated. She enclosed a number of supporting documents: emails between herself and Vicky Leyden about her contract of employment with the contract supplied to her; a copy of her doctor's note dated 11 October 2021 and Occupational Health Physician report dated 20 October 2021; a copy of the Debbie Walsh letter dated 13 October 2021 and subsequent emails with Debbie Walsh both about that letter and also her concerns about neutrality prior to the investigation meeting; Samples of emails coming into her e-mail Inbox to show mismanagement during her suspension.

She also extended her specific thanks to both Mark Heaton as the investigating officer and Spencer Brew as HR representative for their professional and sensitive behaviour during this time, setting out that the investigation meeting was carried out as per College policy and both demonstrated sensitivity to the impact of the process on her well-being (164-168).

5.35 The Grievance was allocated to Laura Rowan, Director of Education - Adults, who had experience of acting as a grievance investigation manager with HR support although not in respect of a grievance complaint with so many strands and such complexity, requiring such an extent of investigation as in this case. Ms Rowan was not connected with the claimant in her ordinary work or involved in any way in the disciplinary investigation. A grievance hearing was initially fixed for 29 November 2021 but then postponed to 9 December 2021.

5.36 On 15 November 2021, Mr Heaton wrote to the claimant confirming the outcome of the disciplinary investigation. He wrote:

“I can confirm that having considered the responses you provided to my questions and the opportunity to review the data relating to the downloads on 25 September 2021, and confident that no data breach occurred. I'm confident no data has been shared with others and your use of college systems and data has been in line with expectations of your role.

I do not believe there to be a gross misconduct case to answer, as such, no further action will be taken under the disciplinary policy and procedure. As this investigation has now been concluded your suspension has been has now been lifted with immediate effect.” (169-171)

5.37 On 22 November 2021 the claimant's GP provided another statement of fitness for work advising her she was not fit for work for 4 weeks due to "stress at work" (i.e. to 19 December 2021, after the end of the College term) (175).

5.38 The claimant was provided with details of the Employee Assistance Scheme, a confidential counselling service available to her. She was also referred for a further Occupational Health assessment.

5.39 On 8 December 2021 the OHP Dr Orton provided his second report (182-183). He reported that the claimant had been cleared of any wrongdoing but the process had unsettled her significantly particularly after 18 unblemished years. Since she had not breached any policy, she had concerns as to whether a full suspension was the appropriate action and had taken out a grievance about the procedure. He found her to be unfit to work through anxiety, with no adjustments or restrictions which would change the position; he did not prescribe medication but thought counselling through the College's service may benefit her. He considered that after her grievance meeting she would need to process her thoughts about continuing to work for her employer and there was a reasonable chance of her being able to return to work in January 2022, on a phased return.

5.40 The grievance meeting planned for 29 November 2021 was then put back to 9 December 2021. The claimant did not criticise this particular delay. She was again accompanied by her TU representative, John Nolan. An HR representative, Rebecca Osuji, attended with Laura Rowan. The claimant began by reading a prepared statement (189-190) in which she acknowledged her written statements of grievance and supporting evidence were fairly lengthy with a lot of points. She wished to make clear she required the college to consider the grievance as a whole rather than just the individual issues, stressing the impact the situation had had on her mental health and well-being, family and home life and the overwhelming challenges she felt were preventing her return to the workplace. She maintained that she did not believe the College to be a safe and productive environment to return to, reiterating her concern about being "quite literally locked in a room with no warning" to be questioned over events relating to Sophie Park, the prejudicial form of questioning when she was suspended, the insensitive letter from Debbie Walsh, all of which suggested the respondent had not treated her as an individual but as guilty by association. She relied again on the lack of written contract, the suspension with no opportunity to clarify her actions despite no breach of policy, discussion of her supposed departure from the College with students by another team member and again contended that she was not prepared to lie about the circumstances of her absence from work. Her statement concluded that she felt her trust in the management of the respondent had been severely broken since the College had shown it did not trust her as a member of staff, recognise her value or the impact of her work and had no regard for her wellbeing. Ms Rowan asked specific questions about the initial interview, suspension questioning and letter from Debbie Walsh. Mr Nolan felt that since the 6 September 2021 meeting was a formal meeting the claimant should have been able to have a representative with her. When asked about the colleague DY situation, she replied: "By chance a friend rang me who knows the student that had spoken to DY, I don't know all the details, but the impression was given that I had left the college. This student was having a conversation with my friend. My friend contacted me and said "Have you left the college?" I said No...". In oral

evidence, the claimant confirmed that the friend who had phoned her was Sophie Park. (184-188).

5.41 The claimant made clear on 9 December 2021 that she was considering resigning because of a series of failures by the respondent and the effect on her health. When asked what her desired outcome from the grievance would be, what she felt would support her in feeling more comfortable i.e. to return to work, she said she had not made a decision but didn't know if she would be able to return. Whilst she considered that Ms Rowan and Ms Osuji were sympathetic and they said they were keen to support her return to work, they offered no practical solutions but asked the claimant what she needed to be supported to return. Ms Osuji said they would try to resolve the matter as soon as possible but it may not be until the New Year. The claimant asked to have it resolved by the end of the year as she was seriously considering resigning. Ms Rowan said she would try it to resolve it before the New Year if possible. Later that day, the claimant sent a copy of her prepared to Rebecca Osuji and Laura Rowan: "Thank you for today, your time was very much appreciated..." (198).

5.42 On 13 December 2021 at 16.30, the claimant wrote to Laura Rowan and Rebecca Osuji:

"At my grievance hearing... you asked me what I would like to see as the outcome of the hearing process. As expressed at the time, at this point I am strongly considering tendering my resignation at the end of the week. I have reflected on this over the weekend and still feel strongly that this is the only course of action open to me at this time. As discussed during the meeting there has been no follow up welfare contact made by the organisation since I was signed off on 22 November. This and has served to further reinforce my belief that the organisation is no longer a safe place for me to work and that there is little to no regard for my well being as an individual.

Additionally, following last week's Occupational Health appointment and subsequent report, I have no desire to face the possibility of longer term sickness due to lack of support from the organisation - a possibility highlighted in the report itself...

I am open to discussion to look at what support the organisation thinks it can offer to help me move forward from this position before looking into any further action... (193-194)

5.43 Rebecca Osuji replied the next day, 14 December 2021 at 16.13 (193):

"...I am sorry to hear that you still feel the only course of action you have is to resign.

I have taken on board your ... comments and what I would ask of you, is if you could give us some feedback on what you feel from your point of view would help to support you in the workplace.

The reason I ask this, is the College may for example have 4 things it can offer but none of those will work for you or there is something that will help that we haven't thought of..."

5.44 Shortly afterwards, on the same day, 14 December at 16.56, the claimant wrote:

“Thank you for coming back to me so quickly.

As the grievance I have submitted is so wide-ranging I am unsure what, if anything, the college could practically put in place to support me to feel confident to return. Fundamentally my trust in the leadership and management of the organisation, the current policies and procedures and the legal representation of the college has been broken - and I know that these are things that cannot be changed. Whilst policies can be adapted and improved its the management attitude, behaviour and the level of risk I have been exposed to as a result that is giving me the most pause. I am however happy to hear any suggestions that the college may have to support me, as (like yourself) there may be something I haven't considered at this time. If you have some options that you think would work then please let me know and I will give them some serious consideration.” (196)

5.45 At some point in early December 2021, Sophie Park was in further contact with the claimant. She made a specific offer to the claimant that there was a job at Hybrid as Head of Operations which the claimant should apply for. There is no evidence of any advertisement of such a job as and it can be inferred it was created for the claimant at a time of restructure of its operations by Hybrid following recommendations made in an Ofsted inspection. The claimant provided an application form with career details to Hybrid as a matter of urgency on 14 December 2021 (190C-L), the same day she was formally invited by Sophie Park to an interview at Hybrid on 17 December 2021 (190M). The Tribunal concluded that on 14 December, when she provided her application form to Sophie Park, the claimant was almost certain that job would be offered to her; in her oral evidence she acknowledged: “I had a good idea it would be offered to me”, under tribunal inferred it was very likely indeed .

5.46 On 9, 14, 15 and 16 December 2021, Laura Rowan was actively engaged upon her investigation of the claimant’s grievance with assistance from Rebecca Osuji, including beginning investigation meetings and questioning procedures during suspension, unfitness during suspension and support of staff returning to work after suspension.

5,47 On 15 December 2021 at 14.19, Laura Rowan e-mailed the claimant:

“... I wanted to personally contact you before the break to provide an overview of where I am up to in relation to your grievance and the lines of enquiry I am undertaking as a result.

Over the past week we have met with a number of individuals. As a result of this, further meetings and communications are being drafted and scheduled. I have also begun to review policies and procedures we have in place in relation to some of the points you raised. Progress has been made, however I am not able to provide a formal outcome before we break for the holidays, as there is still further information I need to retrieve. I appreciate that going into the break with the outcome of the grievance spending will be difficult, however I want to ensure that I am conducting a

thorough investigation which will allow me to make confident judgments, recommendations and actions.

Becca (Osuji) is your contact should you require any support regarding the grievance and will give you further updates through the process as and when we have them. I do appreciate that this is a difficult time for you, and I trust that you understand the reason why I am unable to provide an outcome this week. Your grievance will continue to be a priority this week and following the break along with the outcome, and suggestions how we could support you in returning to work.”(196)

5.48 On 16 December 2021 at 14.42, the claimant submitted her resignation by email just before the closure for Christmas:

“As discussed during my grievance hearing last week, and again earlier this week, I am, with regret, formally tendering my resignation today (this is slightly earlier than expected due to the college closure tomorrow). My reasons for submitting my resignation today are two-fold - firstly I have no desire to extend my sickness absence any further (my fit to work note runs out tomorrow) and secondly I would like to formally end my relationship with the college before the approaching new year. I do not believe there is anything the college could implement to support me back to the workplace in a positive way, and as such would like a fresh start to seek further employment in 2022.

I would like to take this opportunity to thank both yourself and Laura for the sensitivity and professionalism you have demonstrated thus far in the grievance process. I also need to reiterate that I am keen for this process to be completed, despite my resignation, and look forward to receiving a timely outcome in response once Laura has completed her investigations. I will await the outcome of the investigation before I consider if any further actions will be necessary...

I currently have 21 days holiday owing to me until 31 July 2022... I estimate that once the Christmas break is taken into account in the pro rata remainder of my life is applied this should mean my notice period will be served on 31 December 2021- if my leave remaining is insufficient I am happy for any additional dates after the 31st to be taken unpaid...” (204).

5.49 The respondent’s HR Adviser Megan Ainsworth acknowledged receipt of the resignation letter saying that it had been agreed her leaving date from the College would be 31 December 2021 and that her final salary will be credited to her account at the end of March 2022 including 9.5 days outstanding annual leave. The claimant queried this immediately, asking why her final salary was payable in March and not January and pointing out that her notice period was recorded as one month and not 3 months in her contract. Spencer Brew then confirmed payment would be made in January 2022 (Claimant’s documents, 1-2)

5.50 On 20 December 2021, the claimant received formal confirmation from Hybrid’s Managing Director, Sophie Park, that the claimant had been successful in her application for the Head of Operations post and would start on or after 4 January 2022 (204A).

5.51 On 31 December 2021 the claimant's employment terminated.

5.52 On 4 January 2022, the claimant commenced her employment with Hybrid as Head of Operations. Her salary was £32,000 gross per annum, slightly more than she end with the respondent (but with lesser pension provision).

5.53 In January 2022, Laura Rowan finalised her grievance investigation and completed her grievance outcome on 19 January 2022 (207-211). Once she had been aware of the claimant's resignation, she no longer gave priority to the grievance investigation and her determination over her other responsibilities. Ms Rowan upheld the grievance in respect of the lack of new contract or variation confirmation letter following the claimant's change of roles in July 2021 apologised for the failure to provide this. She also acknowledged that an out of office notification could have been put on the claimant's inbox and she was recommending to HR that this would be done as well as restricting access to the Inbox. In general terms, however, she did not find any significant breach of policies and procedures on the respondent's part or evidence that DY had spoken to a student about her absence. Whilst the claimant appealed this outcome, her appeal before Ashley Griffiths, Dean of Academic Studies was unsuccessful (save for the two matters acknowledged by Ms Rowan).

## **6. The respondent's submissions**

The respondent cited the well-known Court of Appeal authorities of Western Excavating v Sharp, Lewis v Motorworld Garages, Waltham Forest v Omilaju and Kaur v Leeds Teaching Hospital. It relied on its timeline and submissions document, contending the real reason for the claimant's resignation was the alternative position available for her in the New Year. Based on her friendship with Sophie Park, Ms Park had made her aware that she was looking at investing in Hybrid and they stayed in contact from October to December. As Managing Director, Ms Park conducted a reorganisation and created a role for the claimant at Hybrid similar to her job at the respondent; there is no evidence it was advertised or open to competition. The Tribunal could infer that the claimant knew the job was hers when she resigned and she secured a seamless transition into it. She was plainly told at the interview on 6 September 2021 that she was not implicated in the complaints against Ms Park; there was no complaint by her about the manner of interview or the locked room and instead she affirmed the contract with commitment to her work. As to 6 October 2021, she could not contest the fact of her suspension or the need for investigation and an investigation meeting. In the circumstances it was not unusual for questions to be put at the suspension meeting after such a large data loss and she and her experienced TU representative raised no objection (until her grievance letter). Likewise, nothing in the 13 October 2021 letter assisted her case of a breach of the implied term; when she replied to Debbie Walsh, she did not complain about the tone of the letter. As with the complaint about lack of a formal contract, this was disingenuous on her part; she was seeking to bolster her case and buy time. She was a senior and confident member of staff who had sought a promotion from Ms Park and had a good relationship with Karen Brownbill. Although she had a pay rise and her job title changed, her place of work, line manager and her holiday and sickness entitlements were all unchanged. The respondent did contact her during her suspension including two referrals to Occupational Health,

the opportunity to approach Employee Assistance counselling and some contact with the HR team. Karen Brownbill tried to contact her on 11 November 2021 and Spencer Brew, the HR officer did make contact. Lack of communication by Karen Brownbill specifically had never been the focus previously; the Tribunal should look at the whole contact from the respondent. Her evidence about mismanagement of her email Inbox was strange: while she maintained she didn't want to lie to people, she could readily have said "I'm sorry - I was away" without lying which would have been the same as an Out of Office message. Ms Rowan acknowledged in her grievance outcome that an Out of Office message for a suspended employee was better practice, but the claimant herself described this as only "a relatively small error". As to delay, the claimant did not rely upon the rearrangement of the grievance meeting yet still maintained delay was the final straw when Laura Rowan told her no outcome would be given until the New Year. The delay was not unreasonable when the claimant was away from the office, then met Laura Rowan on 9 December 2021 and Ms Rowan needed to carry out a thorough investigation, alongside carrying out her other duties at the end of the college term. The respondent contended there were no breaches of the implied term of trust and confidence but if there were earlier breaches such as on 6 September or 6 or 13 October 2021, the claimant affirmed her contract in carrying on her employment or she delayed too long in acting upon them. Viewed objectively, the final straw she relied upon on 15 December was no more than trivial or innocuous and could not justify resignation for a cumulative breach of the implied term.

## **7. The claimant's submissions**

The claimant relied upon the unreported EAT decision in Craig v Abellio 2022 EAT 43 for the enunciation of the "last straw" principle and the need for the Tribunal to be objective in its determination. She contended she was left with no option but to resign when all the individual incidents were viewed together; the respondent was guilty of a repudiatory breach of contract. While she may not have challenged some at the time, she was middle rather than senior management and her mental state made her unable to raise challenges. She accepted she had been fully engaged with the respondent following 6 September 2021 and was working very hard after having stepped up and taken on extra duties but the respondent should have behaved towards her as a responsible employer. The reason for her resignation was the accumulation of a series of incidents although, by engaging the grievance process, she made it very clear she wanted to return to the workplace. The last straw was the lack of grievance outcome before the end of the year and lack of contact from her employer. She felt unable to return when her sick note was running out on 16 December 2021. She had made it clear to the respondent that she had no interest in extending her sickness absence and therefore was expected to return to work on the 4 January 2022. As a matter of fairness and dignity, she wanted her grievance outcome; that outcome had led to changes which would benefit others even though it did not benefit her. She refuted the respondent's argument that she was intending to leave all along or keeping her powder dry until a job to go to came up; she could have taken sickness absence through to the end of the year and did not need to submit to the grievance process. She felt compelled to pursue her grievance and then to bring Tribunal proceedings, just as she had felt compelled to resign on 15



December 2021. It was a happy circumstance that she received an offer which enabled her to start her new job almost without a break, but she left the respondent with real regret and losing her job protection and pension entitlement.

## **8. The Law**

8.1 To its findings of fact, the Tribunal applied the relevant law in particular at part X of the Employment Rights Act 1996. Section 95(1) provides that an employee is dismissed by the employer if:

“...(c) the employee terminates the contract under which (she) is employed with or without notice in circumstances in which (she) is entitled to terminate it without notice by reason of the employers conduct.”

8.2 The burden of proving the constructive dismissal lay with the claimant and the contractual test was confirmed in the longstanding Court of Appeal authority of Western Excavation (ECC) v Sharp in 1978. In his judgment, Lord Denning MR said:

“If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment; or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract; then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer's conduct. He is constructively dismissed. The employee is entitled in those circumstances to leave at the instant without giving any notice at all or, alternatively, he may give notice and say he is leaving at the end of the notice. But the conduct must in either case be sufficiently serious to entitle him to leave at once. Moreover, he 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.”

8.4 The claimant may rely upon a breach of an express term of the contract of employment or, often as in this case, a breach of the implied term of trust and confidence. It is not material whether the employer subjectively intended any fundamental or repudiatory breach and there is no requirement that an employee must state the reason for leaving at the time of resigning, although a failure to do so may make it evidentially more difficult to establish a constructive dismissal.

8.5 Higher courts have often considered the law on constructive dismissal in breach of the implied term of trust and confidence and last straw cases and given guidance to first instance tribunals. In Kaur v Leeds Teaching Hospitals NHS Trust [2018] IRLR 833 (CA), at paragraphs 39-41, Underhill LJ cites from the judgment of Dyson LJ in Omilaju v Waltham Forest London BC (CA) [2005] IRLR 35 with approval:

"14 The following basic propositions of law can be derived from the authorities:

1. The test for constructive dismissal is whether the employer's actions or conduct amounted to a repudiatory breach of the contract of employment: Western Excavating (ECC) Ltd v Sharp [1978] IRLR 27.

2. It is an implied term of any 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: see, for example, Malik v Bank of Credit and Commerce International SA [1997] IRLR 462, 464 (Lord Nicholls) and 468 (Lord Steyn). I shall refer to this as “the implied term of trust and confidence”.

3. Any breach of the implied term of trust and confidence will amount to a repudiation of the contract see, for example, per Browne-Wilkinson J in Woods v WM Car Services (Peterborough) Ltd [1981] IRLR 347, 350. The very essence of the breach of the implied term is that it is “calculated or likely to destroy or seriously damage the relationship” (emphasis added).

4. The test of whether there has been a breach of the implied term of trust and confidence is objective. As Lord Nicholls said in Malik at p.464, the conduct relied on as constituting the breach must “impinge on the relationship in the sense that, looked at objectively, it is likely to destroy or seriously damage the degree of trust and confidence the employee is reasonably entitled to have in his employer” (emphasis added).

5. A relatively minor act may be sufficient to entitle the employee to resign and leave his employment if it is the last straw in a series of incidents. It is well put at para. [480] in Harvey on Industrial Relations and Employment Law:

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

15. The last straw principle has been explained in a number of cases, perhaps most clearly in Lewis v Motorworld Garages Ltd [1985] IRLR 465, [1986] ICR 157. Neill LJ said (p 167C) that the repudiatory conduct may consist of a series of acts or incidents, some of them perhaps quite trivial, which cumulatively amount to a repudiatory breach of the implied term of trust and confidence. Glidewell LJ said at p 169F:

“(3) The breach of this implied obligation of trust and confidence may consist of a series of actions on the part of the employer which cumulatively amount to a breach of the term, though each individual incident may not do so. In particular in such a case the last action of the employer which leads to the employee leaving need not itself be a breach of contract; the question is, does the cumulative series of acts taken

together amount to a breach of the implied term? ... This is the 'last straw' situation."

16. Although the final straw may be relatively insignificant, it must not be utterly trivial: the principle that the law is not concerned with very small things (more elegantly expressed in the maxim "de minimis non curat lex") is of general application....

19. The quality that the final straw must have is that it should be an act in a series whose cumulative effect is to amount to a breach of the implied term. I do not use the phrase "an act in a series" in a precise or technical sense. The act does not have to be of the same character as the earlier acts. Its essential quality is that, when taken in conjunction with the earlier acts on which the employee relies, it amounts to a breach of the implied term of trust and confidence. It must contribute something to that breach, although what it adds may be relatively insignificant.

20. I see no need to characterise the final straw as "unreasonable" or "blameworthy" conduct. It may be true that an act which is the last in a series of acts which, taken together, amounts to a breach of the implied term of trust and confidence will usually be unreasonable and, perhaps, even blameworthy. But, viewed in isolation, the final straw may not always be unreasonable, still less blameworthy. Nor do I see any reason why it should be. The only question is whether the final straw is the last in a series of acts or incidents which cumulatively amount to a repudiation of the contract by the employer. The last straw must contribute, however slightly, to the breach of the implied term of trust and confidence. Some unreasonable behaviour may be so unrelated to the obligation of trust and confidence that it lacks the essential quality to which I have referred.

21. If the final straw is not capable of contributing to a series of earlier acts which cumulatively amount to a breach of the implied term of trust and confidence, there is no need to examine the earlier history to see whether the alleged final straw does in fact have that effect. Suppose that an employer has committed a series of acts which amount to a breach of the implied term of trust and confidence, but the employee does not resign his employment. Instead, he soldiers on and affirms the contract. He cannot subsequently rely on these acts to justify a constructive dismissal unless he can point to a later act which enables him to do so. If the later act on which he seeks to rely is entirely innocuous, it is not necessary to examine the earlier conduct in order to determine that the later act does not permit the employee to invoke the final straw principle."

At paragraph 55, Underhill LJ continued:

"In the normal case where an employee claims to have been constructively dismissed it is sufficient for a tribunal to ask itself the following questions:

(1) 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?

- (2) Has he or she affirmed the contract since that act?
- (3) If not, was that act (or omission) by itself a repudiatory breach of contract?
- (4) If not, was it nevertheless a part (applying the approach explained in *Omilaju*) of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a (repudiatory)<sup>6</sup> breach of the Malik term? (If it was, there is no need for any separate consideration of a possible previous affirmation...)
- (5) Did the employee resign in response (or partly in response) to that breach?

None of those questions is conceptually problematic, though of course answering them in the circumstances of a particular case may not be easy.”

8.6 Applying the contractual test objectively, in this case there were a number of matters to be determined: firstly, did the claimant prove the respondent committed a repudiatory or fundamental breach of her contract of employment (in the sense of accumulation of matters amounting to a breach of the implied term of trust and confidence) and if so, did she act on that breach in resigning (in circumstances where she was entitled to resign without notice) i.e. was it the real reason for her (notice of) resignation on 16 December 2021 or was there really another reason (her desiring to move to a new job with her former manager, Sophie Park)? Did the respondent’s actions in Laura Rowan’s letter dated 15 December 2021 and/or its lack of support amount to a “last straw” sufficient for the claimant to rely on in terms of a cumulative breach and did she resign promptly without excessive delay or did she affirm any breach of her contract of employment? Following the approach of the Court of Appeal in *Kaur*, consideration of the quality of these final matters the claimant said triggered her resignation as last straw was most important.

## **9. Conclusion**

9.1 Having stood back and considered its extensive fact-finding, the Tribunal concluded that the claimant’s resignation on 16 December 2021 was triggered by the almost complete assurance that she had a good and equivalent job (save for employment protection and beneficial pension entitlement) to go to at Hybrid in the New Year. That was the context for the claimant resigning when she did and pressing for a termination date of 31 December 2021, which would enable her to commence employment for her new employer the start of January 2022.

9.2 Notwithstanding the claimant’s concerns about her overall treatment by the respondent and lack of support following the removal of her suspension when she remained off sick, the Tribunal did not accept that the “last straw” or trigger was Laura Rowan’s notification on 15 December 2021 that the grievance outcome would not come until the New Year. As at 9 December 2021 and even in her resignation letter, the claimant acknowledged the efforts of Laura Rowan and Rebecca Osuji were making in respect of the grievance. The Tribunal concluded that Ms Rowan’s notification of a delayed grievance outcome was no

more than the convenient hook for the claimant to hang her hat upon once she had made the decision to leave and take up the offer of new employment which by then she knew was extremely likely. The Tribunal inferred that what changed between the claimant's letter of 13 December 2021, when she said she was open to discussion of what support the College could offer her (i.e. to assist a return to work), and her resignation on 16 December 2021 was this very strong likelihood of the job offer and resumption of her working relationship with Sophie Park. This inference is supported by the claimant's drive to have 31 December 2021 as the proposed date for termination of her contract of employment with the respondent. This proposed date was very much hers, because it entirely suited the likelihood of her commencing employment with Hybrid in January 2022. Yet had she sought to give one month's notice of termination in line with her contract of employment (as set out in her reply email to Megan Ainsworth's letter of 16 December 2021), she would have put forward 15 January 2022 as the date for expiry of notice. Once notice is given, the parties can of course agree a date of termination between them which is not the exact date for notice to expire, but the Tribunal found the claimant's zeal for this date founded on much more than wanting a clean slate for the New Year.

9.3 As the claimant accepted in her oral evidence, all the respondent's actions to do with the download/deletion of data had a reasonable and proper cause. In contrast to her including the fact of her suspension whilst not in breach of any policy as a ground for her grievance and in her claim form as a supporting factor making the respondent in repudiatory breach of contract and entitling her to resign (and indeed as a major concern voiced to the OHP Dr Orton), the claimant took a very different approach in her oral evidence at the hearing. She was very clear in accepting then that she was legitimately suspended, that an investigation was necessary and that she had no concerns about the investigation and investigatory meeting or the procedure adopted by Mr Heaton and the outcome he reached. The Tribunal considered that this admission, which was entirely realistic on her part, significantly diminished the overall force of matters raised in her grievance and indeed her constructive dismissal claim. There is a great difference between an employer which without reasonable and proper cause acts in such a way which when viewed objectively destroys or seriously damages the relationship of trust and confidence between employer and employee and the employee believing that the relationship has been undermined or lost, in circumstances where the employer did indeed have a very valid reason for acting as it did, which was the case in relation to suspension and investigation following the claimant's downloads and deletion of files.

9.4 Looking down her end of the telescope, the claimant may well have considered the respondent had lost trust in her whereas viewed objectively it had reinstated her formally on 15 November 2021 after having told her informally 4 days earlier she could return. Whilst she may still have felt she was not fully trusted, Mr Heaton had effectively given her a "clean bill of health". Whilst arguments about claimants delaying excessively or affirming the contract when their employer had breached their contract of employment are often difficult to determine in cases alleging a cumulative breach or breaches of the implied term of trust and confidence, the Tribunal needed to look especially closely at the history after the claimant's grievance letter and her formal reinstatement, which

coincided on 15 November 2021, including the way the respondent dealt with that grievance. The facts above at paragraph 5.34 to 5.48 cover the claimant's grievance letter through to her resignation email. The Tribunal did not find that there were significant matters within that final month which the claimant could rely upon in support of her claim that the respondent was in repudiatory breach of contract.

9.5 Testing this conclusion, the Tribunal returned to the statement of the claimant's case found in her ET1 claim form. It found that the claimant's allegations (1) and (2): without warning being expected to answer questions without representation in a locked room and being questioned outside the respondent's disciplinary procedure at the suspension interview in a manner suggested pre-judgment (albeit by a senior manager of the respondent who had no other apparent involvement in the claimant's case whatsoever) could indeed form part of a cumulative repudiatory breach of the implied term of trust and confidence. However, the claimant certainly did not act promptly and challenge the respondent's actions in respect of either of those incidents at the time. The next in time was (6) Debbie Walsh's insensitive (and inaccurate) letter of 13 October 2021 which again could have formed part of a cumulative breach of the implied term. Item (5) was the Inbox mismanagement by the respondent. Whilst inept, the failure to record the claimant as being Out of Office in her inbox certainly does not amount to a breach of the implied term in itself. Following the justified suspension, it does not even sit easily alongside (1),(2) and (6) in amounting to a repudiatory breach of the implied term. What of (7) the claimant's suspension, despite not being in breach of any policy, and continuing suspension until the finding of no case to answer? At the hearing, the claimant conceded that she could not validly criticise the fact of suspension, the need for an investigation, the conduct of the investigatory meeting on the outcome of the investigatory meeting and indeed her correspondence suggests she was very appreciative of the roles of Mark Heaton and Spencer Brew. On this aspect, the "without reasonable and proper cause" for any undermining of trust and confidence looms large. The Tribunal considering this matter objectively cannot criticise the respondent for its actions suspending and investigating the claimant following its discovery of an exceptionally large downloading and then deletion of files while she was working at home on her own laptop one weekend. The claimant's actions cried out for an early reporting by her and an early explanation from her of those actions, which she said resulted from her zeal and eagerness to impress the senior manager, Nicola Kumar. At the hearing, she was simply unable to raise any complaint whatsoever about them. In short, nothing in relation to that whole incident/episode adds to her case that the respondent conducted itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee without reasonable or proper cause. Item (3): failure to report to the Information Commissioner's Office was abandoned by the claimant and, in the judgment of the Tribunal, could not have formed part of any such repudiatory breach in any event; it was a makeweight. Item (4) was her reliance upon her lack of an updated written contract or statement of terms. She had a contract of employment and relied upon the notice provision when writing to the respondent about date of termination on 16 December 2021; whilst she lacked an updated contract or statement of terms and particulars based on her promotion in July 2021 (and

apparently on many previous promotions), this did not cause her concern until she relied upon it as part of her grievance. In the context of this case, the Tribunal considered this too a very minor matter or a makeweight relied upon when she was seeking to bolster her grievance and later her claim of constructive dismissal. Item (8) is the delays in meeting deadlines within the grievance procedure. Only Laura Rowan's delay prior to the claimant's resignation comes into play here. The Tribunal did not conclude that the delay from the claimant's grievance letter dated 15 November 2021 until the grievance hearing on 9 December 2021 or the delay notified on 15 December 2021 into the New Year for the grievance outcome were outside the tolerance afforded by the Grievance Procedure wording or unreasonable. The timings need to be viewed in the context of the very detailed grievance raised by the claimant and the necessary investigations of that, even following speaking with the claimant online December, by Laura Rowan.

9.6 Accordingly, as set out above, the Tribunal found no significant "last straw" adding to any accumulation of incidents which together could form a repudiatory breach of contract arose from that grievance delay. Whilst not included in the claim form items (which is strictly the pleading of the claimant's case alleging constructive unfair dismissal), she also relied upon lack of contact from the respondent during sickness absence, in particular once the suspension was lifted. Indeed, at the hearing, she shifted ground somewhat to pin personal blame on Karen Brownbill in terms of lack of contact. An employer in this situation faces a dilemma particularly when stress at work is reported and blamed as the cause for sickness absence. Its own Attendance Management Policy requires any contact to be sensitive. There had been a second referral to Occupational Health, notification of an opportunity to undergo counselling under the Employee Assistance Programme and a very limited attempt at contact by the line manager Karen Brownbill and more sympathetic but again brief contact from the HR representative, Spencer Brew. Moreover, there was a grievance from the claimant to be dealt with. Weighing all this in the balance, the Tribunal would not have concluded that there was any substantial "last straw" in the sense of something more than trivial or innocuous which "refreshed" any previously waived incidents which might form part of a repudiatory breach term of trust and confidence arising from the lack of contact or support from the respondent (in particular Karen Brownbill) whether viewed separately or together with the grievance delay.

9.7 In conclusion, when considered objectively on the balance of probabilities, the Tribunal concluded that the claimant had not proved a cumulative breach of the implied term of trust and confidence which she acted upon in resigning, with or without notice, such that she had established a constructive dismissal. As at 16 December 2021, there was no such cumulative repudiatory breach to rely on. The Tribunal concluded that the cause of and not merely the trigger for her resignation was her confidence from 14 December 2021 that Sophie Park was to offer her new employment with Hybrid at a similar salary to commence in the New Year, rather than a repudiatory breach of contract by the respondent. This caused the claimant to shift from her preparedness to consider future suggestions made by Laura Rowan and Rebecca Osuji within the grievance process which might have led to her returning to work, to firming up her decision

to resign. Ultimately, she has not proved that she was constructively dismissed and her unfair dismissal claim must therefore be dismissed.

Employment Judge Parkin

Date: 27 October 2022

JUDGMENT & REASONS

SENT TO THE PARTIES ON

28 October 2022

FOR THE TRIBUNAL OFFICE

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