



EMPLOYMENT TRIBUNALS (SCOTLAND)

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Case No: 4104134/2022

Hearing held in Edinburgh on 15, 16 and 18 November 2022

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Employment Judge McCluskey

Mrs ML Tomkins

**Claimant
In person**

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McKenzies Solicitors

**Respondent
Represented by:
Mr D Hay, Advocate**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Tribunal is that:

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The claimant's claim of unfair constructive dismissal is not well founded and is dismissed

REASONS

Introduction

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1. The claimant resigned from her employment and claims she was unfairly constructively dismissed. The claim is resisted.

2. ACAS Early Conciliation commenced on 4 July 2022 and ended on 21 July-2022. The claimant lodged her ET1 claim form with the Tribunal on 25 July 2022.

5 3. The claimant gave evidence on her own behalf and led evidence from her daughter, Ms Nichola Fyfe. The respondent led evidence from Mr Gordon Cooke, Partner in the respondent's practice, Mr Nigel Cooke also a Partner in the respondent's practice and Ms Heather Cameron, Cashier in the respondent's practice.

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4. The claimant prepared a bundle of documents extending to around 60 pages together with an index. The respondent prepared a supplemental bundle extending to 11 pages. Documents in both bundles were referred to by parties in the hearing. The Tribunal reminded parties that the Tribunal would only read and consider documents to which it was referred during the hearing.

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Issues

5. The acts and omissions relied upon in asserting a repudiatory breach of the duty of trust and confidence were identified by the claimant at the outset of the hearing as follows:

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a. Did the respondent do the following things:

i. On about 25 March 2020 the respondent sent the claimant home on furlough and had no contact with her thereafter until 20 October 2020

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ii. There was no follow up with the claimant by Mr Gordon Cooke after the 22 October 2020 meeting with her

iii. No contact with the claimant from 23 October 2020 until end September 2021, when the claimant remained on furlough

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iv. On the claimant's return to the office on 1 October 2021 her desk was moved and she was not supported by the respondent for around 7 weeks thereafter

v. For 7 weeks from 1 October 2021 the claimant was not given any cashier work to do and not allocated any work by the respondent

5 vi. From around end October 2021 until 19 November 2021 there was a delay in the respondent arranging a meeting with the claimant

vii. Manner and content of meeting on 19 November 2021

vii. After the meeting on 19 November 2021 the respondent refused to take the claimant's call

10 viii. From on or around 6 December 2021 until 4 July 2022 there was no contact from the respondent to enquire as to the claimant's wellbeing

ix Handling of phased return to work request from around 25 April 2022 to on or around 3 May 2022

15 x. There was no response to the claimant's email of 23 June 2022 about her returning to work

b. Did that breach the implied term of trust and confidence?

20 c. If so, did the claimant resign in response to the breach?

d. If so, did the claimant affirm the contract before resigning?

25 e. If not, what compensation should be paid, basic award and compensatory award?

Findings in fact

30 6. Based on the information provided, the Tribunal makes the following findings in fact which are relevant to the matters to be decided -

7. The claimant was employed as an Assistant Cashier by the respondent from 6 October 2010. She resigned with immediate effect on 4 July 2022.
8. The respondent is a solicitors' practice. It operates as a partnership. The partners in the partnership on 4 July 2022 were Mr Nigel Cooke, Mr Gordon Cooke and Ms Sally McKenzie. There were also around 11 employees including the claimant. The practice is based in Kirkaldy and deals with a range of work including residential conveyancing, executry and private client matters and criminal and civil court work.
9. The claimant had no written contract of employment or job description. Prior to 25 March 2020 the claimant's duties included dealing with reconciling ledgers, payment of balances, preparing estates for settlement, dealing with clients, taking payments and noting client identification for the file. The respondent's fee income to March 2020 was good. The market for conveyancing and leasing was buoyant. From the first national lockdown on or around 25 March 2020 the respondent's business came to a complete stop for a period. When business resumed it was at a much-reduced volume.
- 20 *No contact with claimant from 25 March 2020 to 20 October 2020*
10. On around 25 March 2020 the respondent closed its office to staff and clients. This was due to the first national lockdown in response to the Covid-19 global pandemic. The respondent was only able to offer a skeleton service to clients, with a few staff working from home. With the exception of Ms Cameron who was the cashier and two typists, all other staff, including the claimant, were placed on furlough.
11. The claimant was paid 80% of her wages each month by the respondent whilst she was on furlough in accordance with the UK Government Coronavirus Job Retention Scheme (furlough scheme).

12. A WhatsApp group was set up for staff. The claimant was added to the Whatsapp group by the respondent. The claimant did not access the Whatsapp group.
- 5 13. During the period 25 March 2020 to 20 October 2020 the respondent had very limited work. For most of the period the courts and Registers of Scotland were closed, then operating a very limited service. The conveyancing market collapsed. Transactions couldn't complete and lockdown restrictions prevented wills and powers of attorney from being completed. It was a very challenging
10 time for the respondent due to the lockdown. The respondent's focus was on trying to keep the firm going and providing the limited services which it could.
14. During this period the claimant's line manager, Ms Cameron, and the claimant were in contact by phone from time to time. They discussed how the claimant
15 and her family were doing during the pandemic.
15. On or around 20 October 2020 Mr G Cooke telephoned the claimant to invite her to a meeting on 22 October 2020. This was prompted by the respondent's understanding, at that time, that the furlough scheme was due to come to an
20 end on 31 October 2020.

No follow up with claimant after meeting on 22 October 2020

16. At the meeting with the claimant on 22 October 2020 she was advised that her role was at risk of redundancy due to a downturn in business because of Covid-
25 19. The respondent told the claimant in the meeting that no decision had been reached by it about making redundancies. The respondent was concerned that it could not afford to pay the wages of staff who were furloughed, once the furlough scheme stopped at the end of the month.
- 30 17. The claimant emailed Mr G Cooke on 3 November 2020 and 6 November 2020. She asked for an update on her position. Mr G Cooke had told the claimant in

the meeting that no decision had been reached by it about making redundancies.

18. Shortly after the meeting the UK government extended the furlough scheme. The respondent decided to keep the claimant on furlough. The respondent informed the claimant of this.

No contact with claimant from 23 October 2020 until end September 2021

19. The claimant remained on furlough until 30 September 2021 and continued to be paid 80% of her wages each month by the respondent.

20. For some of this period the claimant's line manager, Ms Cameron, and the claimant were in contact by phone from time to time. They discussed how the claimant and her family were doing during the pandemic.

21. On 20 September 2021 the respondent emailed the claimant. The respondent told the claimant that the furlough scheme was coming to an end and that she required to come back to work on 1 October 2021. The respondent attached an information sheet with Covid-19 protocols in the office for staff and clients.

Claimant's return to work on 1 October 2021 - desk moved and not supported

22. The claimant returned to work on 1 October 2021. She worked from the respondent's office. Prior to the office closing in March 2020 the cashroom where the claimant worked had been situated beside the reception. On return to the office on 1 October 2021 the claimant's desk had been moved into the typing room with the typists. Since returning to the office Ms Cameron was working with two screens and needed access to both. This meant there was less space in the reception area for both the claimant and Ms Cameron whilst complying with social distancing rules. The claimant was upset that her desk had been moved to the typists' room.

23. On her return to work on 1 October 2021 the claimant's computer had not been set up and she could not use it. Ms Cameron arranged for IT to set it up for the claimant the following day. The claimant could then access her emails and the ledgers, as before the pandemic. The claimant's computer did not have access to the internet. This was no different than before the claimant had been on furlough. Prior to furlough there had been two hacking incidents. The respondent understood this may have been through the cashroom computer, which was the computer the claimant used. For this reason, the claimant's computer did not have internet access.

24. On her return to work on 1 October 2021 the claimant arrived at 9am. Her line manager Ms Cameron arrived at 9.30am. Ms Cameron acknowledged to her that there was less work to do than before the pandemic. She told the claimant that work levels in the practice had not returned to pre-pandemic levels. She asked the claimant to check for outstanding balances against the ledgers and write an explanation for these. This was cashroom work. She told the claimant that she would pass work to her as it came up.

25. There was no return-to-work induction or refresher training for the claimant or for other staff members returning after furlough.

From 1 October 2021 for 7 weeks not given cashier work or other work

26. When the claimant returned to work the respondent's business was still in a period of flux. The respondent wanted to try to build the business back up. It was looking for flexibility around the tasks which its staff would be willing to do.

27. Ms Cameron was the claimant's line manager. Ms Cameron had a backlog of her own work which she was trying to complete. This impacted on available tasks for the claimant to carry out. Ms Cameron asked the claimant to go through old ledgers to check for outstanding sums due, seek payment and adjust the ledgers. This was cashroom work which the claimant had done prior to the pandemic. This task was more difficult to undertake as there was a

backlog of filing work due to the office having been closed during the pandemic. The task could have been progressed if the claimant had worked around this backlog, such as checking bank reconciliations. The claimant chose not to do so.

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28. The claimant carried out some administrative activities. The claimant carried out filing. The claimant assisted in answering the phones and taking mail to the post office. The claimant did client identification checking and processed payments when a client came into the office to pay.

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29. The claimant had cashier work and other work to do in the 7-week period from 1 October 2021 when she returned to work. This work did not occupy all of the claimant's working time. The respondent expected that work levels would return to pre-pandemic levels.

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30. Ms Cameron worked most days until around 4pm. This was in excess of her core hours. This had been her working practice before the pandemic and continued on the return to the respondent's office when it reopened. On occasion she would be required to stay much later, an example being when she stayed late before her annual leave to help Ms McKenzie with an executry transaction.

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From end October 2021 until 19 November 2021 - delay in arranging meeting

31. The claimant emailed Mr G Cooke on 4 November 2021 requesting a meeting with him and/or the other partners. She said she was concerned about her role and the lack of cashier work for her to do. She said Ms Cameron was working additional hours in the afternoon.

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32. The claimant's email of 4 November 2021 requested a meeting with Mr G Cooke and/or the other partners. As the concerns raised by the claimant were a partnership matter, Mr Cooke wanted the other two partners to attend the meeting with him. The other two partners had court and other work

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commitments. It took around a couple of weeks for him to speak to the other two partners and arrange a meeting.

Meeting on 19 November 2021- manner and content of meeting

5 33. The claimant met with Mr G Cooke, Mr N Cooke and Ms McKenzie on 19 November 2021 to discuss her email.

34. At the meeting the claimant was told that there was a backlog of criminal legal aid accounts to be submitted to the Scottish Legal Aid Board (SLAB). The
10 claimant was asked to take on the task of preparing and submitting these accounts when she returned from annual leave.

35. The claimant said that she was not capable of doing the task. The claimant said that it was not her job. She believed the task was mainly typing and she
15 was not a typist. The respondent disagreed that she was not capable of doing the task. The respondent disagreed that it was not a task which could be asked of her as the assistant cashier. The task involved inserting figures into the accounts and preparing narratives. The respondent accepted that the claimant had not done this type of work before. As there was a downturn in the
20 claimant's pre-covid duties the respondent was seeking to find additional duties for the claimant. The respondent hoped that business would return to pre-pandemic levels. The claimant was told that she would be given training and assistance to prepare the accounts when she returned from annual leave.

25 36. The claimant's attitude to preparing and submitting the legal aid accounts to SLAB was negative. She said it wasn't her job and she couldn't do it. In response to a statement made by Mr N Cooke the claimant said "I don't believe that for a minute". Mr N Cooke said the claimant was being impertinent and raised his voice. Mr N Cooke became frustrated with the claimant due to her
30 negative attitude and her lack of co-operation and consideration of what was being said to her in the meeting.

37. The claimant said at the meeting that Ms Cameron was a part time employee who was working full time. The claimant believed that Ms Cameron was doing the claimant's duties. This was not the case. The claimant believed that her pre-covid duties were being deliberately withheld from her. This was not the case. The respondent explained that business had not yet returned to pre-pandemic levels which is why her workload was lower.

38. The claimant became upset and left the meeting. She left work early that day.

10 *19 November 2021 - refusal to take claimant's call*

39. Around 4.30pm on 19 November 2021, after the claimant had left work early, she tried to phone Mr Cooke. He did not phone her back that day.

40. The claimant emailed him shortly thereafter on 19 November 2021 asking the respondent to confirm the new job offer and job description.

41. On 23 November 2021 Mr G Cooke sent an email to the claimant to summarise what had been discussed at the meeting on 19 November 2021. The email stated that the claimant had not been offered a new job. Her job remained as assistant cashier on the same terms and conditions. There had been a transitional period since her return from furlough and that going forward the respondent wished her to prepare accounts for submission to SLAB. The email stated that it was within the remit of cashroom staff to prepare accounts with a view to ingathering sums due to the respondent.

42. The email of 23 November 2021 stated that business had not yet returned to pre-pandemic levels but hoped that business would return in 2022. The email stated that all staff roles had changed and had to be adapted and developed since the pandemic. The email stated that the claimant would be provided with all of the information, training and assistance required to prepare and submit the accounts when she returned from annual leave.

43. The claimant replied by email of 24 November 2021. She said she got upset as Mr N Cooke had shouted at her in the meeting and called her impertinent. She said she did not consider she would be capable of preparing the legal aid accounts for SLAB as she was not a typist. She stated that her understanding was that Ms Cameron was working more than her contracted hours. She stated that she wished the work which Ms Cameron was doing to be shared between Ms Cameron and the claimant. She stated that there had been no plan in place for her return to work on 1 October 2021. She stated that she was being asked to answer phones as part of her duties since her return but found it difficult to do so as her desk was in a different room.
44. Mr G Cooke replied by email of 1 December 2021. He reiterated that the respondent remained of the view that she was capable of preparing and submitting legal aid accounts to staff. He reiterated that any training and assistance she required would be provided.

From 6 December 2021 to 4 July 2022 - no contact to enquire as to wellbeing

45. The claimant began a period of annual leave on 22 November 2021. She was due to return to work on 6 December 2021. She did not return to work after her period of annual leave. The claimant prepared a formal grievance dated 6 December 2021. In error, this was not sent to the respondent
46. The claimant submitted a fit note to the respondent commencing 6 December 2021, citing stress. She remained absent from work, submitting a series of fit notes until 4 July 2022.
47. In the period from 6 December 2021 until 3 May 2022 the respondent did not contact the claimant. The respondent did not want to place the claimant under pressure whilst she was signed off sick. The respondent continued to receive her fit notes from her GP stating that she was unable to work.

From 25 April 2022 to 3 May 2022 - handling of phased return request

- 5 48. On 25 April 2022 the claimant emailed Mr G Cooke stating that after speaking with her doctor she wished to discuss returning to work. She stated that on the advice of her doctor, her return would be on a phased basis. She sent a reminder email to Mr G Cooke on 28 April 2022. Mr G Cooke required to discuss a phased return to work with his partners Mr N Cooke and Ms McKenzie before replying to the claimant.
- 10 49. On 29 April 2022 the claimant emailed Mr G Cooke, to raise a formal grievance.
- 15 50. On 3 May 2022 Mr G Cooke emailed the claimant to clarify the terms of her grievance. He asked what the claimant meant by a phased return to work. He noted that the claimant had made reference to medical advice in her email of 25 April 2022 but had not disclosed this advice to the respondent. The only information which the respondent had about the claimant's health was from the fit notes citing stress.
- 20 51. On 5 May 2022 the claimant emailed Mr G Cooke in response to his email of 3 May 2022. She said she would discuss her grievance, which was about the time taken to respond to her email of 29 April 2022, on her return to work. She said that the respondent would be better placed than her to suggest what would be acceptable by way of a phased return. She enclosed a further fit note from her GP dated 4 May 2022 citing stress. The fit note stated that the claimant may be fit for work taking account of the following advice: "a phased return to be agreed with line manager and patient". The fit note was for a period of 25 28 days. Beyond what was contained in the fit notes citing stress the respondent did not have any other information about the claimant's health or emotional state.
- 30 52. On 18 May 2022 the claimant emailed Mr G Cooke as she had not had a reply to her email of 5 May 2022.

53. On 19 May 2022 Mr G Cooke wrote to the claimant. He stated that the respondent had been unable to consider her request to return on a phased basis as she had not put forward any meaningful proposal. He said the onus was not on the respondent to make a proposal when this was based on medical advice provided to her of which the respondent was not aware. He also asked her to clarify whether she was continuing with her grievance and to what it related.

54. On 20 May 2022 the claimant replied to Mr G Cooke. She set out a proposal for a phased return to work, working 2 hours daily in the first 2 weeks; 4 hours daily in weeks 3 and 4; and 6 hours daily in weeks 5 and 6. She stated that she was not continuing with her grievance.

55. The claimant received an automated email stating that Mr G Cooke was on annual leave until 6 June 2022. On 21 May 2022 the claimant forwarded her email of 20 May 2022 to Mr N Cooke and Ms McKenzie and asked them to deal with this in his absence.

56. On 24 May 2022 Ms McKenzie replied to the claimant and stated that she would ask Mr G Cooke to arrange a meeting with her on his return to the office on 6 June 2022.

57. On 27 May 2022 the claimant's representative emailed the respondent. The respondent understood from this email that the claimant wished the meeting with Mr G Cooke to be postponed. The claimant submitted a further fit note stating that she was not fit for work.

23 June 2022 - no response to email about return to work

58. On 23 June 2022 the claimant emailed Mr G Cooke. She stated that her fit note ended on 1 July 2022 and that she intended to return to work full time on 4 July 2022. She asked for confirmation that the email had been received. She asked

for confirmation that all adequate steps and support would be taken to ensure a smooth transition for her return to work.

- 5 59. Mr G Cooke did not reply to that email. He expected that the claimant would return to work on 4 July 2022. Her computer had been set up ready for her, the week before her return. Mr G Cooke understood from the correspondence from her representative on 27 May 2022 that she did not want a meeting with him.

Resignation

- 10 60. On 4 July 2022 the claimant wrote to Mr G Cooke. She resigned with immediate effect. She said that due to the lack of response to her and to her representative in recent weeks she believed it was clear that the respondent did not wish her to return to her role. She said that she understood the respondent had a duty of care to her. She said that the respondent's "reluctance to even acknowledge
15 my intimation to return to work and confirmation that this will be done in an orderly manner is another indication that you have no intention of fulfilling your legal obligations".

Observations on the evidence

- 20 61. It is not the function of the Tribunal to record all of the evidence presented to it and the Tribunal has not attempted to do so. The Tribunal has focused on those parts of the evidence which it considered most relevant to the issues it had to decide.
- 25 62. The standard of proof is on balance of probabilities, which means that if the Tribunal considers that, on the evidence, the occurrence of an event was more likely than not, then the Tribunal is satisfied that the event in fact occurred.
- 30 63. The Tribunal found the respondent's witnesses to be credible and reliable. There were a number of conflicts in the evidence. The Tribunal has resolved these mostly in favour of the respondent. The Tribunal did not regard the fact that it preferred the evidence of the respondent as tainting the claimant's

overall credibility. These were differences in recollection and differences in perception.

5 64. The respondent said that the claimant's desk was moved out of the reception area and into the typists' room to comply with Covid-19 social distancing requirements. The claimant did not agree with this. The claimant said that her desk was closer to the typists than when her desk had been located beside reception. The claimant's assessment was that her desk had been moved to isolate her and make things difficult for her. The Tribunal preferred the
10 evidence of the respondent. The Tribunal noted that the respondent had in place Covid-19 protocols in the office for all staff and clients. The Tribunal noted that on Ms Cameron's return to the office she was working with two screens and required more space. The Tribunal noted that the claimant was in a room with 2 typists and was not isolated in the sense that she was on her
15 own. The Tribunal was satisfied that her desk was moved by the respondent to comply with Covid-19 protocols and not for any reason which was personal to the claimant. The Tribunal was satisfied that the claimant was sitting with other employees and not isolated on her own.

20 65. The claimant's assertion was that she was given no cashier work to do on her return to the office. The respondent did not agree with this assertion. Ms Cameron acknowledged that there was less cashroom work for the claimant to do than before the pandemic as work levels had not resumed to
25 pre-pandemic levels. Ms Cameron gave evidence about cashroom work which she asked the claimant do to, working on the ledgers. The Tribunal accepted the evidence of Ms Cameron that the claimant was given cashroom work to do albeit that there was less of that work. The claimant acknowledged in evidence that she had been asked to do work on the ledgers. The Tribunal accepted that there was less cashroom work for the claimant to do and that the ledgers work
30 did not take up all of the working day. The Tribunal was satisfied on balance that the claimant did have cashier work to do.

66. The claimant's assertion was that she was given no other work to do on her return to the office. The respondent did not agree with this assertion. Ms Cameron's evidence was that the claimant carried out some administrative tasks, filing, answering the phones, mail, client identification checking and processing payments when a client came into the office to pay. The claimant's evidence was also that she had carried out these tasks. The Tribunal accepted that there was less work for the claimant to do and that these tasks did not take up all of the working day. The Tribunal was satisfied on balance that the claimant did have other work to do in addition to cashier work.
67. The claimant asserted that Ms Cameron was doing the claimant's duties. In support of this assertion the claimant's evidence was that Ms Cameron was working more hours than she had worked before the pandemic. Ms Cameron's evidence was that this was not the case. Her evidence was that she had worked in excess of her core hours before the pandemic and that had continued after the pandemic and return to the office. The Tribunal accepted Ms Cameron's evidence about her working hours. Ms Cameron had given evidence about staying late to help Ms McKenzie with an executry transaction. It appeared to the Tribunal that as a cashier in a small practice Ms Cameron was called upon to carry out tasks which required her to work in excess of her core hours and that she did so. The respondent's evidence from all witnesses was that business had not yet returned to pre-pandemic levels. The respondent was hoping to build the business back up again. The Tribunal accepted the respondent's evidence that there was less work available for the claimant due to the pandemic and that Ms Cameron was not doing the claimant's duties.
68. The claimant prepared a formal grievance letter dated 6 December 2021. She thought this had been sent to the respondent. There was no email in the bundle of documents showing that the formal grievance letter had been sent. The respondent's evidence was that it had not received the grievance letter. The first time the respondent saw the document was during the exchange of documents for this hearing. There was no documentation in the bundle from

the respondent referring to the formal grievance letter. The claimant did not refer to the letter of 6 December 2021 in any subsequent correspondence. The Tribunal accepted that this letter had not been received by the respondent.

- 5 69. The respondent led evidence that that claimant had a countdown to retirement board behind her desk prior to the pandemic. When she turned 65 the board showed that she had 13 months to go until retirement. The respondent referred to various documents which were screenshots of social media posts by the claimant and her family. These posts referred to the claimant having retired on
10 4 July 2022. The respondent submitted that the countdown board and these posts showed that the claimant intended retiring in January 2021 when she reached state pension age and had retired as at 4 July 2022. The claimant submitted that her plans had changed during the pandemic. She had been earning 80% of her usual earnings during the pandemic and had used savings.
15 She wished to work for longer to make up these lost earnings. The events shown in the posts, such as a shopping trip and dinner had been organised by her family not her. The posts referring to her retirement had been posted by her family. The events had been organised to cheer her up.
- 20 70. The Tribunal accepted the claimant's evidence that her plans about retirement in around January 2021 had changed. This was evidenced by her return to work on 1 October 2021. The claimant was entitled to change her plans about retirement. The Tribunal did not accept that the retirement board in the office or the retirement posts on social media, posted by her family and friends and
25 not the claimant, evidenced that she had no intention to remain in the workplace when she returned on 1 October 202. The Tribunal did not accept that the claimant had essentially orchestrated matters in the workplace to facilitate a resignation on 4 July 2022. Nevertheless, in accepting the claimant's evidence that her plans about retirement had changed, that does
30 not lead to the conclusion that the claimant has been constructively dismissed.

Relevant law

71. The right not to be unfairly dismissed is found in section 94 of the Employment Rights Act 1996 ("ERA")-

"(1) An employee has the right not to be unfairly dismissed by his employer. "

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72. Section 95 ERA (circumstances in which an employee is dismissed) provides, so far as relevant to this case, as follows -

"(1)....an employee is dismissed by his employer if...

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

73. This is commonly referred to as "constructive dismissal".

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74. The test of whether an employee is entitled to terminate their contract of employment without notice is a contractual one: has the employer acted in a way amounting to a repudiatory breach of the contract or shown an intention not to be bound by an essential term of the contract: (Western Excavating (**ECC**) Ltd v Sharp [1978] ICR 221).

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Was there a repudiatory breach of contract?

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75. There must be a breach of contract by the employer. This may be a breach of an express or implied term. *"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."* (Western Excavating).

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76. The breach may consist of a one-off act amounting to a repudiatory breach. Alternatively, there may be a continuing course of conduct extending over a period and culminating in a “*last straw*” which considered together amount to a repudiatory breach. The “last straw” need not of itself amount to a breach of contract but it must contribute something to the repudiatory breach. Whilst the last straw must not be entirely innocuous or utterly trivial it does not require of itself to be unreasonable or blameworthy (London Borough of Waitham Forest v Omilaju [2005] IRLR 35).
77. In Kaur v Leeds Teaching Hospitals NHS Trust [2018] EWCA Civ 978 the Court of Appeal listed five questions that it should be sufficient to ask in order to determine whether an employee was constructively dismissed (i) 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? (ii) Has he or she affirmed the contract since that act? (iii) If not, was that act (or omission) by itself a repudiatory breach of contract? (iv) If not, was it nevertheless a part (applying the approach explained in Waitham Forest v Omilaju [2004] EWCA Civ 1493) of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a repudiatory breach of the implied term of trust and confidence? (If it was, there is no need for any separate consideration of a possible previous affirmation, because the effect of the final act is to revive the right to resign.) (v) Did the employee resign in response (or partly in response) to that breach?
78. Mr Hay also drew the Tribunal’s attention to the case of Bournemouth University Higher Education Corpn v Buckland CA [2010] ICR 908 to which he referred in submissions.

Submissions

79. Mr Hay for the respondent made his submissions first followed by the claimant. The Tribunal has not recorded the respondent’s submissions in full but has

recorded a short summary of certain relevant aspects of them. The submissions for the claimant, which were short, are recorded in full.

Respondent's submissions

5 80. Mr Hay referred to the case of Bournemouth University Higher Education Corpn v Buckland CA [2010] ICR 908. He submitted that the case set out various legal propositions some of which concerned constructive dismissal and whether that was established. The Tribunal must have regard to all of the circumstances of the case by an examination of all of the facts to determine
10 whether there has been a repudiatory breach. The test is not a band of reasonable responses one, as applies in unfair dismissal cases.

81. In determining whether or not the employer is in fundamental breach the unvarnished test in Mahmud v Bank of Credit and Commerce International
15 SA [1977] ICR 606 should be applied. That is an objective test. It is not answered by the subjective views of one or other party. Rather it is answered by looking objectively, as an objective bystander. The test in Mahmud is a high one. The conduct must be calculated to or likely to destroy or seriously damage the relationship of trust and confidence.

20 82. The acts and omissions relied upon by the claimant in asserting a repudiatory breach of the duty of trust and confidence are not established on the evidence. They do not satisfy a breach having regard to the Mahmud test. One might say that it would have been better if matters had been responded to more
2- quickly. But did the respondent intend to no longer be bound by the contract. The answer is no. The respondent reassured the claimant that her role was not redundant, in correspondence then in the meeting of 19 November 2021. Nothing which happens thereafter is sufficient to displace that. The claimant
30 said she would return to work in July 2022 but that was not tested. None of the matters identified at the outset of the hearing amount to a breach, individually or cumulatively. The question of affirmation only arises if the last straw (not responding to an email about return to work) is established as a breach.

Claimant's submissions

83. The claimant was asked to return to work on 1 October 2021. She assumed that the level of business in the cashroom was as it had been before the pandemic. It quickly became obvious that this was not the case. Mr G Cooke admitted that there was not enough work for 2 roles in the cashroom. But rather than make the claimant redundant the respondent went down another path of bullying her and ignoring her requests and being unresponsive for around 6 months in the hope that she would resign.
84. The claimant reached the age when she was eligible for the state pension during covid and the respondent hoped to avoid paying her redundancy for her 11 years of service. The claimant enjoyed her job and hoped to continue working for another few years. The respondent provided no support to her and failed in its duty of care to her. The respondent knew that emotionally and mentally she was not strong enough to stand up to them. That proved to be the case so reluctantly she tendered her resignation, therefore denying her the opportunity to earn wages until she decided to retire.
85. The claimant submitted that her role no longer existed. She submitted that she was bullied and suffered mental illness and was unfairly constructively dismissed.

Discussions and decision

86. The Tribunal reminded itself of the terms of section 95(1)(c) ERA and the legal test for constructive dismissal as set out by Lord Denning in **Western Excavating**. There had to be a breach of contract which went to the root of the contract. It had to be sufficiently serious to entitle the claimant to resign immediately, regardless of whether she actually did so.
87. The claimant asserted that there was a breach of the implied duty of trust and confidence. She asserted a series of acts or omissions which were clarified

with her at the beginning of the hearing and which are set out in the list of issues. The Tribunal has dealt with these in turn.

No contact with claimant from 25 March 2020 to 20 October 2020

5 88. The claimant asserted that there had been no contact with her from 25 March 2020 when the office closed due to lockdown until Mr G Cooke contacted her on 20 October 2020 to invite her to a meeting. The Tribunal found that there had been some contact with the claimant as Ms Cameron and the claimant were in contact by phone from time to time and discussed how the claimant and her family were doing during the pandemic. There was also a Whatsapp group set up by the respondent to which the claimant was added, although the claimant chose not access this. The respondent was also in contact with the claimant each month in the sense that it continued to pay wages to the claimant each month at the 80% furlough rate.

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89. It appears to the Tribunal that there was some contact with the claimant during this period and an attempt to include her in Whatsapp messages. It also appeared to the Tribunal that at this time the partners of the respondent were doing all they could to keep the business going in what were very challenging and unprecedented circumstances for everyone.

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90. The Tribunal is satisfied that considering matters objectively, it was reasonable of the respondent to focus on dealing with new ways of working to keep the business operating. It was reasonable of them to focus on those who were working rather than those who were furloughed, like the claimant. The respondent complied with the furlough scheme and was in contact with the claimant to pay her wages along with contact between the claimant and her line manager.

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30 *No follow up with claimant after meeting on 22 October 2020*

91. The claimant asserted that there had been no follow up with the claimant after the meeting on 22 October 2020. The Tribunal found that there was follow up

with the claimant after the 31 October 2020 when the UK Government announced that the furlough scheme was to be extended. The claimant was told that she would remain on furlough.

5 92. The Tribunal can understand that the claimant would have been concerned about her job, having been told in the meeting on 22 October 2020 that her position was at risk of redundancy. The Tribunal is also mindful that a decision about potential redundancies is a big decision for an employer to make, particularly against the backdrop of the pandemic and uncertainties about the
10 continuation or otherwise of the furlough scheme.

93. The Tribunal is satisfied that considering matters objectively, it was reasonable of the respondent to take some time to consider the proposed redundancies. As the furlough scheme was then extended this meant that the claimant's role
15 could be retained and there was no need for redundancies.

No contact with claimant from 23 October 2020 until end September 2021

94. The claimant asserted that there was no contact with her from 23 October 2020 until end September 2021. The Tribunal found that there had been some
20 contact with the claimant during this period as Ms Cameron and the claimant were in contact by phone from time to time and discussed how the claimant and her family were doing during the pandemic. The claimant continued to receive 80% of her wages from the respondent.

95. The Tribunal is satisfied that considering matters objectively, it was reasonable of the respondent to continue to focus on dealing with new ways of working to keep the business operating. It was reasonable of them to focus on those who were working rather than those who were furloughed, like the claimant. The respondent complied with the furlough scheme and was in contact with the
30 claimant to pay her wages along with contact between the claimant and her line manager.

Claimant's return to work on 1 October 2021 - desk moved and not supported

96. The claimant asserted that on her return to work her desk had been moved, she was isolated and she was not supported. The Tribunal found that on her return her desk had been moved to comply with social distancing rules. The Tribunal found that the claimant's desk was moved to a different room where she was with two other members of staff. It did not appear to the Tribunal that the claimant was isolated as she was with other colleagues.
97. The claimant asserted that she was not supported on her return to work. She stated that she had expected a return-to-work induction and refresher training. The respondent did not do this for the claimant or other staff. The claimant was an experienced member of staff with 11 years' service. She was returning to the same job as she had done before the pandemic, albeit there was less work. The administrative and other tasks that she was asked to complete were tasks she had carried out before. It did not appear to the Tribunal that a return-to-work induction or refresher training ought reasonably to have been provided by the respondent.
98. The claimant was given cashier tasks to do by Ms Cameron and also various other tasks as the amount of cashier work for the claimant was less than it had been before the pandemic.
99. The Tribunal is satisfied that considering matters objectively, it was reasonable of the respondent to have moved the claimant's desk. The claimant was told that there was less work available and the claimant was given some other tasks. It was reasonable for the respondent to wait to see if there would be the upturn in business which it expected and which would have resulted in more work for the firm and for the claimant.
- From 1 October 2021 for 7 weeks not given cashier work or other work*
100. The claimant asserted that she was given no cashier work and no other work for 7 weeks following her return to work. This was not supported by the

evidence. The Tribunal found that the claimant had carried out ledger work, administrative activities, filing, answering the phones, taking mail to the post office, client identification checking and payments processing.

- 5 101. The Tribunal is satisfied that considering matters objectively, it was reasonable of the respondent to give the work which it did to the claimant. It was reasonable of the respondent to wait to see if there would be the upturn in business which it expected and which would have resulted in more work for the firm and for the claimant.

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From end October 2021 until 19 November 2021 - delay in arranging meeting

102. The claimant asserted that from end October 2021 until 19 November 2021 there was a delay in arranging a meeting with her. The claimant emailed Mr G Cooke on 4 November 2021 requesting a meeting with him and/or the other partners. The other two partners had court and other work commitments. It took around a couple of weeks for him to speak to the other two partners and arrange a meeting.
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103. The Tribunal is satisfied that considering matters objectively, it was reasonable that it may take around two weeks to arrange the requested meeting with the claimant, taking account of the availability of the 3 partners.
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Meeting on 19 November 2021- manner and content of meeting

104. The claimant asserted that she had been intimidated and bullied at the meeting. The respondent did not agree with this assertion. At the meeting the respondent asked the claimant to take on the task of preparing and submitting the backlog of criminal legal aid accounts to SLAB when she returned from annual leave.
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105. The claimant's attitude to preparing and submitting the legal aid accounts to SLAB was negative. The claimant was offered training and support to prepare the accounts. She said it wasn't her job and she was not capable of doing it.
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In response to a statement made by h/lr N Cooke the claimant, said 'I don't believe that for a minute". Mr N Cooke replied that the claimant was being impertinent and raised his voice.

5 106. It appears to the Tribunal that the claimant was impertinent in her response to Mr N Cooke. It appeared that the respondent was looking for ways to give the claimant more work as she had complained that she did not have enough work. It appears to the Tribunal that the respondent acted reasonably in asking the claimant to prepare the legal aid accounts and to offer training to her to do so.
10 It appears to the Tribunal that the respondent was entitled to hold the meeting with the 3 partners. The claimant's request had been to meet with one or more of the partners and concerns raised by the claimant were a partnership matter. It appears to the Tribunal that there was a level of frustration in the meeting by both the claimant and the respondent. The Tribunal can understand that the
15 claimant may have been upset at the end of the meeting as it had not gone as she had expected. However, the Tribunal was satisfied that the claimant had not been bullied or intimidated in the meeting.

107. The Tribunal is satisfied that considering matters objectively, it was reasonable
20 of the respondent to conduct the meeting as it did and to ask the claimant to prepare the legal aid accounts, with training as required.

19 November 2021 - refusal to take claimant's call

108. The claimant asserted that after the claimant left work early on 19 November
25 2021 Mr G Cooke refused to take her call. The Tribunal found that Mr G Cooke did not return the claimant's call that day. After the claimant had tried to call Mr G Cooke she emailed him later that day. Thereafter the claimant and Mr G Cooke entered into an email exchange about the meeting and what had been said over a period of around 10 days.

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109. The Tribunal is satisfied that considering matters objectively, it was reasonable of Mr G Cooke to take some time to consider what had been said in the meeting

and to follow that up in writing rather than by a telephone call. In the subsequent email exchange between them the respondent set out its record of what had been said in the meeting to the claimant and what it expected when the claimant returned from annual leave.

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From 6 December 2021 to 4 July 2022 - no contact to enquire as to wellbeing

110. The claimant asserted that from 6 December 2021 when she was signed off sick until 4 July 2022 there was no contact from the respondent to enquire as to her wellbeing. The Tribunal found that there was no such contact. The respondent asserted that it did not want to place the claimant under pressure when she was signed off sick and she was submitting fit notes from her GP citing stress.

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111. The Tribunal was surprised that there was no contact from the respondent enquiring as to her wellbeing when she was signed off sick. This could have been done in a way which did not put pressure on the claimant and is a common HR practice. That said, the Tribunal is satisfied that considering matters objectively, the lack of contact to enquire about wellbeing was not a significant breach going to the root of the contract of employment, or which showed that the respondent no longer intended to be bound by one or more of the essential terms of the contract. Rather, the claimant was signed off sick and the respondent took the view that contacting her could be construed as putting pressure on her when she was signed off work with stress. Considering matters objectively it was not unreasonable of the respondent to handle matters as it did.

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From 25 April 2022 to 3 May 2022 - handling of phased return request

112. The claimant asserted that her phased return request was not handled appropriately. The claimant emailed Mr G Cooke on Monday 25 April 2022 stating that on the advice of her doctor, her return would be on a phased basis. On Friday 29 April 2022 the claimant raised a formal grievance as she had not heard from the respondent. Mr G Cooke emailed her on 3 May 2022 in

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connection with her grievance and the phased return to work request. An email exchange then followed between the claimant and Mr Cooke.

113. The Tribunal is satisfied that considering matters objectively, it was reasonable
5 of Mr G Cooke to take several days before responding to the claimant's
correspondence about returning on a phased basis. The claimant had
contacted Mr G Cooke on the Monday of that week and had raised a formal
grievance on the Friday of the same week as she had not heard from him.
Whilst it may have assisted to alleviate any concerns if the claimant had heard
10 from the respondent more quickly, the Tribunal is satisfied that considering
matters objectively, the lack of a reply from Mr G Cooke for 4 days was not a
significant breach going to the root of the contract of employment, or which
showed that the respondent no longer intended to be bound by one or more of
the essential terms of the contract.

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23 June 2022 - no response to email about return to work

114. The claimant asserted that there was no response to her email of 23 June 2022
which stated that she would return to work on a full-time basis on 4 July 2022.
There was no dispute by the respondent who confirmed that there had been
20 no response. The evidence of the respondent, which the Tribunal accepted,
was that the respondent expected that the claimant would return to work on
4 July 2022 as she had stated. Her computer had been set up ready for her,
the week before her return.

25 115. During cross examination the claimant stated that if an employer wants an
employee back it would be polite to answer her and give reassurance that the
employer wanted her back. The Tribunal agreed that it would have been polite
for the respondent to have replied to the claimant's email of 23 June 2022, to
acknowledge receipt. The Tribunal considered that it would have been helpful
30 if the respondent had also stated that there would be a back to work discussion
with her on her return to the office. It is good HR practice for such a discussion

to take place following a return from sickness absence. It would have been helpful for the claimant to know in advance that this would take place.

5 116. The Tribunal did not, however, agree with the claimant's assertion that the respondent required to respond to her email of 23 June 2022 to give assurance that it wanted her back. The Tribunal did not agree with the claimant's assertion that because the respondent had not acknowledged her email and confirmed that her return to work would be done in an orderly manner this indicated that the respondent had no intention of fulfilling its legal obligations to her. The
10 claimant was an employee with statutory employment rights. She was entitled to return to work when fit to do so, without receiving confirmation from the respondent that it wanted her back or that its legal obligations to her would have been fulfilled.

15 117. The Tribunal is satisfied that considering matters objectively, the lack of response to her email of 23 June 2022, as she asserted, was not a significant breach going to the root of the contract of employment, or which showed that the respondent no longer intended to be bound by one or more of the essential terms of the contract. Rather, the claimant had said she was fit to return to work
2- and the respondent, not unreasonably, had elected simply to wait until she returned.

Conclusion

118. Objectively, the Tribunal is satisfied from the perspective of a reasonable
■ person in the position of the claimant that each of the acts or omissions upon which the claimant relied, when considered on their own and when considered together, did not constitute a course of conduct calculated or likely to destroy or damage the relationship of trust and confidence without reasonable and proper cause. There was no repudiatory breach and accordingly the claimant
30 did not terminate her contract in circumstances in which she was entitled to terminate it without notice by reason of the respondent's conduct.

119. In the claimant's submissions she asserted that she had been bullied, unsupported and ignored by the respondent in the hope that she would resign. For the reasons already given the Tribunal did not agree with this assertion. The claimant also asserted in submissions that emotionally and mentally she was not strong enough to stand up to the respondent and that the respondent knew this. The Tribunal did not agree with that assertion. The Tribunal noted that beyond what was contained in the fit notes citing stress, the respondent did not have any other information about the claimant's health or emotional state.

120. In the circumstances it is not necessary for the Tribunal to consider whether the alleged breach was a factor (i.e. played a part) in the claimant's resignation or whether the claimant affirmed the alleged breach.

121. Having found that the claimant resigned voluntarily, her claim of unfair constructive dismissal is not well founded and is dismissed

Employment Judge: J McCluskey
Date of Judgment: 21 December 2022
Entered in register: 23 December 2022
and copied to parties