

RESERVED JUDGEMENT



EMPLOYMENT TRIBUNALS

Claimant: Ms Claudine Marsh

Respondent: Allcap Limited

Heard at: Bristol ET (via VHS)

On: 8,9 March 2023

Before: Employment Judge Horder

Appearances

For the Claimant: In person

For the Respondent: E.Stenson (Counsel)

JUDGMENT

The judgment of the Tribunal is that:

1. The claim for constructive dismissal is not well founded and is dismissed.

REASONS

Preliminary and Case Management Issues

1. At the start of the hearing the parties helpfully discussed and agreed a list of issues as set out below. The Claimant also assisted the Tribunal by making it clear that her case was that she relied upon cumulative breaches of the implied term of mutual trust and confidence with an email exchange of 8.10.22 being what she described as the 'final straw'.
2. The size of the agreed hearing bundle was discussed. It exceeded the 150 pages set out in the Tribunal's previous directions. However, the further pages that the Claimant sought to rely on were relatively modest in number (36) and appeared to the Tribunal to be of relevance. As a result, and as agreed by both parties, the Tribunal agree to admit those extra pages into evidence.
3. During the course of evidence it became clear that an email relied on by the Claimant (dated 13.1.21) in her grievance against the Respondent had been omitted from the hearing bundle. Both parties agreed that that email and accompanying chain of

emails (totalling 2 pages in all) should be admitted into evidence and considered by the Tribunal.

4. On day 2, before the conclusion of the evidence, the Respondent's counsel provided the Tribunal with written closing submissions. At the conclusion of the live evidence on the afternoon of day 2, the Tribunal adjourned to allow the Claimant time to read those submissions.
5. The Tribunal had then intended and hoped to be able to hear both parties' final closing arguments. However, there was firstly a delay as the Claimant was unable to re-join the hearing via video due to a poor internet connection. Arrangements were then made to join her by telephone and she participated by telephone thereafter.
6. When the Claimant did re-join the hearing she asked to have the opportunity to set out her own closing submissions in writing. In light of the time (approaching 4pm) and the fact that judgement was going to have to be reserved in any event, the Tribunal agreed. Case management directions were then set for final closing submissions, not exceeding 3000 words, to be submitted no later than 4pm on 17.3.23.
7. The Tribunal subsequently received modestly revised written submissions from the Respondent dated 12.3.23 and submissions from the Claimant dated 15.3.23.

Claims and Issues

8. The Claimant commenced employment with the Respondent in the accounts department on 25.2.13. She resigned with effect from 13.10.21.
9. In her ET1 Claim form, dated 15.3.22, she claims that she was constructively dismissed and sets out a chronology of events. Those events include her raising a grievance with the Respondent, the outcome of which she considered unsatisfactory. She resigned by way of letter dated 13.10.21, setting out why she had lost 'trust and confidence' in being able to carry out her role.
10. The Respondent, in detailed grounds of resistance, denies that there were any acts or omissions that could amount to a fundamental breach of contract.
11. The list of issues agreed between the parties at the start of the hearing was as follows:
 1. Was an act or omission (or a series of acts or omissions) by the Respondent a cause of the Claimant's resignation
 2. Did the acts/omissions amount to a fundamental breach of contract in respect of the implied term of mutual trust and confidence. The Tribunal will need to decide:
 - 1.1.1 Whether the Respondent behaved in a way that was calculated or likely to destroy or seriously damage the trust and confidence between the claimant and the respondent; and

- 1.1.2 Whether it had reasonable and proper cause for doing so.
3. Was the breach so serious that the claimant was entitled to treat the contract as being at an end?
4. Did the Claimant resign because of the breach?
12. It was agreed that if any issues as to remedy arose they were to be considered once a decision on liability had been reached.

Evidence

13. The Tribunal was provided with an agreed bundle, totaling 150 pages and a further supplementary bundle of 36 pages.
14. The Claimant gave live evidence as did Steve Roderick (joint owner and Finance Director), Mark Ratcliff (Operations Manager) and Owen Lee (HR consultant) for the Respondent.
15. Both parties relied upon a large number of emails evidencing communication between the Claimant and Mr Roderick. These were included in the agreed bundle. Unfortunately, they have been very difficult to follow and have been presented in neither a logical nor chronological order. This has made the Tribunal's task much more difficult than it should have been.

Fact Finding

16. The following findings of fact were made on the balance of probabilities. Findings were limited to matters relevant to determine the key issues between the parties.
17. The Tribunal has considered all of the many emails and email chains placed before it. In arriving at the conclusions below it has had regard to the totality of those emails whether specific emails are cited below or not. It would be neither practicable, necessary nor helpful to the parties to set out and comment on every email exchange or thread. The same applies to each and every event set out chronologically in the Claimant's ET1. The Tribunal has focused on the key events necessary to determine the above list of issues.
18. The Claimant worked for the Respondent between 25.2.13 and 13.10.21. The Respondent is a supplier of tools and materials to the engineering and construction industries and employs approximately 35 employees.
19. The Claimant was an Accounts and Payroll Assistant. Her role included banking and cash processing and reconciliation, running the payroll and preparing finance reports.
20. In 2017 Steven Roderick, Finance Director and part owner of the business, became the Claimant's effective line manager and joined the business full time. He had ultimate accountability and responsibility for finance and operations and it was necessary for him to communicate with the Claimant regularly.

21. From 2017 onwards, the Respondent's business expanded and with it the demands on the finance, accounts and payroll departments increased. This led to inevitable changes to previous and historic processes and systems with Mr Roderick attempting to introduce controls and streamline working practices.
22. Mr Roderick's evidence was that he got the impression that the Claimant did not like many of the changes being made and that she did not welcome his involvement in areas that had previously been under her control. Although the Claimant did not accept this, for reasons set out below, the Tribunal finds that Mr Roderick's impression was broadly accurate.
23. The working relationship between the Claimant and Mr Roderick became strained, particularly between May and early August 2021. This was due in part to misunderstandings and poor communication but also, the Tribunal concludes, as a result of the Claimant having fixed and strong views about the way in which accounting/payroll issues should be handled. This clashed with the way Mr Roderick worked and the changes he made. He would often seek fine detail and request explanations for events and accounting issues as evidenced in the email chains before the Tribunal. He would also issue instructions that the Claimant often disliked or considered unnecessary. Matters were not helped by the fact that over this period, due to the Covid pandemic, both the Claimant and Mr Roderick worked remotely and almost all communication was via email.
24. By way of letter dated 5.8.21 the Claimant raised a formal grievance [p.104¹] in line with the Respondent's written disciplinary and grievance policy [p.32] Her grievance letter provides a useful guide to the main issues of concern to her and to many of the key elements she relies on in advancing her claim of constructive dismissal. However, it is important to note that she also relies on additional matters, including the response to her grievance and further events shortly before her resignation.
25. The grievance letter cites the following: lack of support, lack of respect, constant criticism and negativity (the Claimant added a dictionary definition of bullying), a lack of response to emails indicating her unhappiness, contradictory situations, inaccurate information, lack of understanding and unpleasantness. She grouped her complaints under 7 headings and attached documentary evidence in support.
26. The Tribunal has considered each of those 7 headings in turn, albeit there are common themes and much overlap between them.

Lloyds Bank

27. In about February 2020 the Claimant's contact at Lloyds Bank left and was replaced by two part time staff who lacked training. By Christmas 2020 a new Lloyd's senior Controller, Jackie Stroud, took over.

¹ Page numbers refer to those in the agreed hearing bundle

28. The Claimant asserted in her grievance letter that Ms Stroud and Mr Roderick misunderstood online financing, as demonstrated in email exchanges that culminated in July in August 2021. She also stated that the emails on this topic demonstrated a lack of support, lack of respect, negativity and lack of understanding by the Respondent.
29. Having reviewed all of the evidence relating to this issue the Tribunal does not agree. The Claimant was clearly and understandably frustrated by the work required to deal with enquiries and misunderstandings relating to Lloyds. Things clearly did not run as smoothly as previously or as she would wish.
30. However, Mr Roderick attempted to support and assist the Claimant. The Tribunal accepts that his aim was to ensure that the Respondent's vital business and financing relationship with Lloyds was not damaged in any way. In an email to the Claimant on 23.7.21 he explained "*unless we present the data in a way Lloyds can pick up there is always a risk that they cannot allocated correctly and do not understand what the item is*" [23.7.21 at 1200, p.78]. He later added "*this does seem to be a time soaker. And I agree with you, unless this is completely identical to before or crystal clear they do seem to struggle*" [15.31, p.79]. Later than day he expressed his gratitude for the Claimant dealing with Lloyds issues, commenting "*good job*" [16.35, 23.7.21 p.82]. Further, as the Claimant accepted in her oral evidence it was Mr Roderick who had previously helped ensure a change in Controller (to Jackie Stroud) in response to previous difficulties she had had with Lloyds.
31. Under this heading the Claimant also relied on an email chain on 25.8.21 [p.119-120]. Those emails show Mr Roderick again seeking further detail and raising queries in respect of Lloyds. At 1214 he asks, with a degree of frustration evident, "*does it not seem fair when I am asking this to provide the details? I know you do not like being asked questions but it is mine and Mark's debt on the line after all.*" In her questioning of Mr Roderick the Claimant suggested that this was excessive over what was only a relatively unimportant £118 payment. Whatever her personal opinion, Mr Roderick considered it important and the requests being made of the Claimant were not unreasonable or unwarranted. The Tribunal concludes that they were part and parcel of her job. The Tribunal accepts that Mr Roderick was simply trying to understand as best he could what was going on in the context of trying to protect the relationship with Lloyds. That maintenance of that relationship was crucial to the Respondent.
32. In her grievance letter the Claimant also states that she was "*having to deal with unhelpful and unproductive emails in connection with Lloyds generally*". Whilst that was clearly her view at the time, it was nonetheless a necessary, important and unavoidable part of her role.

Ebay

33. In her grievance letter the Claimant here cited a lack of support and contradictory instructions. The context is that the Respondent had recently set up an eBay shop to sell excess stock.

34. On 23.4.21 the Claimant asked if she could deal with entering the Ebay figures for bank reconciliation. Mr Roderick agreed but asked the Claimant to write out the required steps to add to the Respondent's Operations manual [p.38]. He added "*let me know if you need any help with this*". There is no indication that the claimant was unhappy or unable to comply with that request at the time.
35. In June 2021 there was a further exchange of emails with Mr Roderick discussing what paperwork was generated/required and whether the eBay reconciliation was "*easy to follow through*" [p.44]. During that exchange Mr Roderick asked the claimant whether she had had an opportunity to write up the key steps required [p.42] as previously requested and whether she was having difficulty creating a process that tracked these transactions. The email exchange ended with an email in which he stated that "*we need a procedure and I am unhappy with not producing paperwork*" and "*would you like to draw up a procedure...or shall I*"? [p.40]. Mr Roderick was picking up on that previous request and, the Tribunal finds, was not in any way making an unreasonable or improper request or demand of the Claimant.
36. The Claimant's email response starts by stating that she had a "*very different recollection of the events as you have put them in the email below*" and ends with "*nothing I try and sort and do seems acceptable to you so it is unclear exactly what you require*" [p.39].
37. In her oral evidence the claimant stated that in respect of eBay she was looking at events from an accounting perspective but that there were additional documents/procedures beyond her control that required input from the sales team ('Scott'). The Tribunal accepts that but equally cannot identify a lack of support on this 'eBay' issue from Mr Roderick. It appears to the Tribunal that the real issue here is one of communication, with Mr Roderick and the Claimant having a different understanding and expectation about what the Claimant would and should do.

Year End and ANY Account on Purchases

38. The Tribunal deals with these topics together as there is considerable overlap. The Claimant suggested in her grievance that the email chains relating to these topics displayed a lack of understanding, unfair criticism, inaccurate remarks, a lack of respect and a dismissive and unfair attitude.
39. In her oral evidence the Claimant relied in particular on an exchange that culminated on 14.7.21 with Mr Roderick, messaging her saying "*this looks like an amazingly long list that is amazingly large in value. I have not realised we had lost so much control over this in recent months. I am aware other finance functions manage to trace paperwork so why are we losing so much control? I guess I should have asked you for a breakdown and pushed more and more until I got one rather than waiting for year-end*" [p.61].
40. The Tribunal accepts that the Claimant interpreted that as personal criticism. However the contents of that email, when read together with the entire chain, raised issues that a finance director would properly want to understand and obtain answers to. Mr Roderick's tone was direct but when an explanation was provided by the Claimant he accepted it and thanked her, replying "*Ok thanks*" [p.60].

41. In cross-examination Mr Roderick was asked about an email on 15.7.21 in which he stated that he would *"like to close down where we are"* and then raised a number of questions. His answer demonstrated the communication difficulties between him and the Claimant; he was not instructing her to 'close down' but saying he wanted to 'close down' but needed answers to a list of questions posed. By contrast, Ms Marsh appears to have interpreted that as an instruction to close down.
42. As a result, in an email dated 18.7.21 Mr Roderick questioned why she had closed off the June balance sheet before he had reviewed the trial balance first, ending it by saying *"I naturally find it frustrating when you consistently decide to ignore my requests and emails"* [p.69].
43. In his evidence before the Tribunal Mr Roderick indicated that he was frustrated that the Claimant had not been following through on his suggested actions. However, he accepted that that particular comment was unwarranted and unacceptable. That was a fair concession to make, albeit Mr Roderick did not apologise to the Claimant at the time. It was, the Tribunal finds, a sign of the frustration Mr Roderick had with the Claimant, resulting from the fact that the request made to her did not yield the information or actions he was expecting or hoping for.
44. In response to Mr Roderick's above comment [p.68 *"I naturally find it frustrating..."*], the Claimant accepted that she did not reply to earlier queries raised by Mr Roderick but that she was *"very disappointed"* at his attitude and what she understood to be contradictory instructions [p.68]. There then followed a frank exchange in which Mr Roderick sought to explain himself and stated that he *"did not think his request to work together"* was unreasonable and that he got "frustrated" when the Claimant on occasions ignored his requests.
45. On 21.7.21 Mr Roderick at 10.33 sent the Claimant a list of requests [p.71] that led to a further detailed exchange. At 15.16 Mr Roderick appears to again express his frustration by commenting *"Thanks Claudine, I really do not think we need another email on this. Please concentrate on the June/July items and concentrate on the ongoing"* [p.74].
46. In response the Claimant replied: *"I would like to point out that I am once again offended at your dismissive and unfair attitude. It implies that you are not happy with the hard work I have done on the ANY account, especially giving work to others and not willing to share the information that you expect them to obtain"* [p.74]. Mr Roderick did not reply and this unsurprisingly upset that Claimant.
47. In her oral evidence the Claimant explained that the reference to giving work to others was the fact that Mr Roderick took work off her. The Tribunal accepted Mr Roderick's explanation about this that when work was allocated to others, it was not done deliberately to undermine the Claimant. It was up to Mr Roderick to allocate work as he saw fit and an understandable and necessary part of his role. He was entitled to give certain tasks to whomever he felt best suited and able, at that particular moment, to complete them.

48. The Tribunal concludes that Mr Roderick was not being deliberately dismissive or unfair towards the Claimant, rather that he did not find the Claimant easy to work or communicate with. Further, none of the requests made of the Claimant by Mr Roderick were unreasonable. Mr Roderick clearly had a keen eye for detail and wanted to satisfy himself that all tasks were completed properly. By contrast, the Claimant had not had to deal with such a pro-active finance director before. She also had her own strong views about how tasks should be completed.
49. However, Mr Roderick did clearly upset the Claimant with his *"I naturally find it frustrating"* comment. He also failed to directly respond to the Claimant's email of 21.7.21 citing his *"dismissive and unfair attitude"*. The Tribunal finds that his failure to do so further strained the relationship between him and the Claimant.

The Payroll issue

50. The Payroll issue is a relatively simple one. The Claimant in her grievance expressed her expectation that she should have received a well-prepared spreadsheet with information for the July payroll. Such a spreadsheet would of course have made her task easier and she had received such spreadsheets in the past. However, it is clear to the Tribunal that Mr Roderick responded promptly and in detail to her requests for further information as demonstrated in the emails at p.92-88. He even responded to the Claimant's requests/questions whilst he himself was in hospital. Further, receiving incomplete and/or inaccurate data is not an unforeseeable occurrence, however frustrating that personally may have been for the Claimant.
51. A further issue raised by the Claimant is that she calculated that the rate of pay for an employee worked out at £8.71 per hour, below the national minimum wage of £8.91 and asked whether it should be changed. The response from Mr Roderick, whilst still in hospital at the time was *"no leave it as it is, it increases in a few months' time"*. In his oral evidence Mr Roderick stated that in his mind the wage was about to be increased and that there would be a future opportunity to rectify it. The Claimant was correct to raise this, however the decision was one for Mr Roderick to make and the ultimate responsibility for such an issue was his.

Return to work

52. Having worked mainly from home during the COVID pandemic, the Claimant, along with other employees was asked to return physically to the office on 21.7.21.
53. She expressed her disappointment with this and by email raised a number of legitimate concerns and worries [p.97]. She specifically stated that she would not feel comfortable in a busy office without wearing a face mask at her desk. Her concerns were all responded to by the Respondent and there was discussion by email about ventilation.
54. In an email sent on 23.7.21, that sought to reassure the Claimant, Mr Roderick referred to the positions of screens (in the plural) around her desk space. In her response sent later that day the Claimant said *"thank you for the screens"*. In a further exchange, Mr Roderick offered to move the Claimant's desk nearer to a doorway entrance.

55. The Claimant returned to work on 28.7.21 and shortly after doing so, at 09.48 emailed Mr Roderick stating “I am in the office this morning and amazed to find a huge plastic screen on top of my desk? This is even more restricting to airflow. I would appreciate its removal” [p.95]. Mr Roderick responded by saying “I am a little surprised because you have asked for screens previously and when I wrote to you. Last week about them you appreciated that they had been put in place” [p.94].
56. Mr Roderick later stated that he would have no problem removing the screen in front of her desk but that he wanted to check with her colleague Mark [Ratcliffe, Operations Manager] that he felt comfortable with that. Later that day it was removed.
57. The Tribunal accepted the detailed and clear oral evidence that Mr Ratcliffe gave on this topic. He “*held his hands up*” to upsetting the Claimant over this issue. However, he had placed a large clear plastic screen on the Claimant’s desk because it would not fit on his nearby desk. His intention was to protect her given her previously expressed concerns. He also thought that a clear screen was better than a solid screen.
58. The Respondent cannot be criticised for how they dealt with this issue. By putting up two protective screens around her desk they had sought to provide the Claimant, who was nervous about returning to work, with additional protection. They had discussed the issue of “screens” with her in advance, albeit not the specification or positioning of the clear screen placed in front of her desk. Soon after she raised an objection the screen was removed as requested.
59. In her grievance letter the Claimant herself stated “*I am not sure if I was being misunderstood in this regard...*” [p.108]. That is, the Tribunal finds, an apt description of this issue. Any offence caused to the Claimant was wholly unintentional.

Derogatory/Sarcastic Remarks

60. The Claimant here cites an email from Mr Roderick to her on 13.1.21 in which he made a comment “Claudine you do get it!”. Whilst that comment can be read as sarcastic, the Tribunal notes the Claimant’s response to it. Her response (an email dated 13.1.21 at 1648) does not display any form of unhappiness or concern. That contrasts to other, later emails where she immediately expressed unhappiness with anything Mr Roderick wrote that she considered inappropriate or that she did not like. Further, this was a single email sent 7 months prior to her raising any grievance against the Respondent.
61. A further email relied upon by the Claimant under this heading is that of 8.6.21 where Mr Roderick stated “*So the way I see this is a good few weeks ago we have a discussion on this (via email as I am aware you do not like talking on the phone)...*” [p.39] and “*I know you like getting on with this things without my interference (Despite offering)*”. In the context of Mr Roderick chasing up a task the Claimant had previously agreed to do (writing out her procedure for dealing with eBay transactions) the Tribunal does not regard anything in that email as improper. It in fact

demonstrates Mr Roderick taking the time to explain in detail the issue as well as offering to do the task himself if the Claimant wished.

62. The Claimant's preferred method of communication was email. There were multiple emails passing to and from her and Mr Roderick on a daily basis. What the emails before the Tribunal in fact demonstrate, when viewed collectively is that, save on relatively few occasions identified above, Mr Roderick displayed considerable patience with the Claimant and masked any frustration with her that he had. He took the time to explain and discuss tasks or queries he had set and made significant efforts to respond to and engage with the Claimant on all issues raised by her. As the Finance Director and co-owner of the business he was entitled to expect the Claimant to be able to follow his instructions and action his requests as directed.

Events post grievance

63. The Claimant's grievance was dealt with under the Respondent's written grievance and disciplinary procedure [p.32]. A grievance meeting was held on 16.8.21, chaired by Mark Ratcliffe. A note taker was present and minutes later drafted [p.109-111]. The meeting lasted 1 hour 40 minutes and the minutes demonstrate a detailed discussion of all issues raised within the Claimant's written grievance letter.

64. Towards the end of the minutes it is recorded that the Claimant *"is not happy that she is not allowed to get on with things without interference"*. Mr Ratcliffe responds that as business owners Mr Roderick (and his brother Mark) are *"often demanding as they are trying to get things right which is why they seem to interfere. However, communication is key and we need to find a way to improve that"*. The meeting then ended with the Claimant confirming that she stood by everything she had said and she felt that she was being harassed [p.113].

65. On 23.8.21 the outcome of her grievance was communicated to the Claimant by letter [p.114]. All but one of her heads of complaint were rejected. The part of her complaint that was upheld related to her return to work, with the Respondent accepting that with hindsight it would have been better to have consulted the Claimant about the screen placed around her desk before purchasing it.

66. The outcome letter did identify that there were communication issues between the Claimant and Mr Roderick and that Mr Roderick does need to *"employ staff that do understand the process' and can communicate back to him when required"*. Further, the letter stated that *"this grievance shows that both Steve [Roderick] and Claudine [the Claimant] have to cease conducting business by email and should instead engage in face to face to discuss the issues that face both of them collectively..."* [p.117]. The following recommendations were expressly set out; mediation between the parties and daily face to face conversations. The letter finally recorded that this would be put in writing so that both parties knew what the expectations were.

67. The Claimant appealed the grievance outcome as she was entitled to do so under the Respondent's procedure. She set out detailed grounds in a letter dated 3.9.21 [p.121].

68. In her appeal letter the Claimant raised the fact that the minutes of the Grievance meeting were not verbatim and the gist was incorrect. This was a point the Claimant expanded upon in her oral evidence. She believed that she got misinterpreted and that what she said about banking/cash transfers was wrong. She highlighted that a comment *“started in June 2019”* [p.110] should have been included under the heading of ‘Lloyds Bank’.
69. The minutes were not and could not reasonably have been a complete verbatim note. Further, the Tribunal concludes that any discrepancy or lack of emphasis on certain points as identified by the Claimant would not have had any material impact on the outcome of her grievance. The Claimant had set out her complaints in writing in advance and the key points were addressed in the grievance outcome letter.
70. The Claimant’s appeal letter concludes by stating *“in summary there is a total lack of understanding and empathy as to my grievances”* and that *“I really do not know what role is anymore, it feels like I am being used as a servant. I am lacking trust and confidence both in trying to carry out work on a daily basis and now with this Grievance process”* [p.127].
71. The Respondent tasked an HR company, HR Champions who they had previously used, to deal with the appeal. Owen Lee, an HR Consultant was nominated to hear the appeal. He arranged an appeal hearing that took place on 1.10.22. A note taker was also present and the hearing lasted 1 hour 30 minutes.
72. Mr Lee set out the outcome of the Claimant’s appeal in a detailed 4 page written decision [p.128]. Whilst the outcome of the appeal was that most of the complaints and issues raised by the Claimant were rejected, Mr Roderick was not spared from criticism. Part of the Claimant’s complaint that he had not replied to emails in which the Claimant had expressed her frustration (i.e. that dated 21.7.21) was upheld. Her complaint that she had not received succinctly accurate payroll data was also partly upheld. On the issues of lack of understanding and communication issues Mr Lee concluded that both parties were equally culpable, stating:
- “As I have found elsewhere in his report the reliance on email rather than conversation and a deteriorating relationship has created misunderstanding and frustration by both parties. I do not find that any of the email correspondence from SR to CM is inappropriate. The content is commensurate in the context of a Director, who has multiple responsibilities and priorities, asking challenging questions, seeking guidance/clarification or providing instruction”.*
73. Mr Lee ended his appeal outcome decision by making the following recommendations: both parties to consider and agree to undertake mediation, to establish regular face to face meetings to discuss work related matter including the establishment of priorities, delegations of authority and activity planning, to agree a protocol for contact/dialogue when it is required outside regular or schedule meetings, to agree a “ground rule” that the default position is a conversation that require both parties to engage.
74. That decision was sent out by Mr Lee on the evening of 7.10.21 (a Thursday). Mr Roderick could not recall when he received a copy or when he read it.

75. The Claimant in her oral evidence and ET1 placed reliance on an email exchange with Mr Roderick the following day that included the following: *“you have not answered my question below about closing down on Monday”* and *“are you able to explain why you have not copied me to the upload email despite asking you twice to do so....”* [p.183]. The Claimant described that email as unacceptable. The Tribunal does not agree, albeit the situation would have been better resolved face to face. That email does reveal Mr Roderick’s ongoing frustration but he was entitled to point out that a previous question had been unanswered and to seek an explanation for why he had not received an upload he had twice requested in case, as he explained, he was *“missing something in a process that has changed”*.
76. In her closing written submissions the Claimant also referred to other emails post-dating her grievance. These included an email at p.172 relating to PAYE and further at pages 173-5 relating to payroll. The Tribunal considered these emails but did not find anything in them that demonstrated any form of unreasonable conduct by the Respondent.
77. On 13.10.21, the Claimant wrote to the Respondent resigning with immediate effect [p.132]. She stated that, having read the outcome of her grievance appeal, *“the issues have continued to have been glossed over and therefore it is an unsatisfactory outcome”*. She stated that she had received *“emails in a similar vein”* as raised in her grievance. She also stated that having a broke light fitment above her desk and *“very cold working conditions, particularly in the office”* had also contributed to her decision.
78. As to the lighting and temperature issues raised, the Tribunal heard and accepted that evidence of Mr Ratcliff on both issues. He explained that there had been an issue with overhead LED lights in the office the Claimant shared with others. He became aware of the issue on 24.9.21 but could not get it resolved quickly because the required bulb was no longer manufactured. As a result, an electrician was required and engaged but there was a delay in them attending. However, mitigating measures were put in place including temporary plug in lights being positioned around the office that provided adequate light.
79. As to the temperature issue he explained that there was a thermostat that could be adjusted on request and he was not made aware of any issue by the Claimant. He also highlighted the fact that the Claimant had previously in her employment complained about a heater being placed too near her and at her request that had been moved.
80. Having heard oral evidence from both Mr Ratcliff and the Claimant on these issues, the Tribunal preferred that of Mr Ratcliff. His evidence was detailed, measured and he displayed no ill-feeling towards the Claimant. He described the Claimant as *“coming across very well at the grievance meeting he chaired”* and gave both reasoned explanations for all issues he was questioned about.
81. By contrast, the Tribunal formed the view that the Claimant was using and exaggerating relatively minor issues regarding lighting and temperature in an attempt to bolster her case. Another example of exaggerating minor issues was the entry

dated 15.9.21 included in the Claimant's ET1. There she sets out that she showed Mr Roderick an email confirming a refund of £1,791.61 relating to water rates that she had managed to obtain. Her complaint is that Mr Roderick did not say "thank you". However, as the Claimant accepts he did later via email on 8.10.21 refer to the "good work you did on the refund".

Constructive dismissal

82. A dismissal is defined by section 95 of the ERA and includes the employee terminating 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, section 95(1)(c). This is otherwise known as a constructive dismissal.
83. An employee will be entitled to terminate his contract without notice to his employer only if the employer is in repudiatory breach of contract: see *Western Excavating (ECC) v Sharp [1978] ICR 221*. An employee would only be entitled to do so if the employer is guilty of a "significant breach going to the root of the contract or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract".
84. Breach of the implied term of trust and confidence will mean inevitably that there has been a fundamental or repudiatory breach going necessarily to the root of the contract (*Morrow v Safeway Stores Ltd [2002] IRLR 9, EAT*).
85. In *Mahmud v Bank of Credit and Commerce International SA [1997] ICR 606, [1997] IRLR 462*, the House of Lords held the implied term of trust and confidence to be as follows: '*The employer shall not without reasonable and proper cause conduct itself in a manner calculated and likely to destroy or seriously damage the relationship of confidence and trust between employer and employee.*' The italicised word 'and' is thought to be a transcription error and should read 'or'.
86. In employment relationships both employer and employee may from time to time behave unreasonably without being in breach of the implied term. It is not the law that an employee can resign without notice merely because an employer has behaved unreasonably in some respect. The bar is set much higher. The fundamental question is whether the employer's conduct, even if unreasonable, is calculated or likely to destroy or seriously damage the relationship of trust and confidence between employer and employee.
87. There is no breach of trust and confidence simply because the employee subjectively feels that such a breach has occurred no matter how genuinely this view is held. If, on an objective approach, there has been no breach then the employee's claim will fail (see *Omilaju v Waltham Forest London Borough Council [2005] EWCA Civ 1493, [2005] ICR 481, CA*). The legal test entails looking at the circumstances objectively, ie from the perspective of a reasonable person in the claimant's position. (*Tullett Prebon PLC v BGC Brokers LP [2011] IRLR 420, CA*).
88. The repudiatory breach or breaches need not be the sole cause of the claimant's resignation. The question is whether the claimant resigned, at least in part, in

response to that breach. (*Nottinghamshire County Council v Meikle* [2004] IRLR 703, CA; *Wright v North Ayrshire Council* UKEATS/0017/13.)

89. The duty not to undermine trust and confidence is capable of applying to a series of actions by the employer which individually can be justified as being within the four corners of the contract (*United Bank Ltd v Akhtar* [1989] IRLR 507, EAT).
90. A claimant may resign because of a 'final straw'. The final straw act need not be of the same quality as the previous acts relied on as cumulatively amounting to a breach of the implied term of trust and confidence, but it must, when taken in conjunction with the earlier acts, contribute something to that breach and be more than utterly trivial. An entirely innocuous act on the part of the employer cannot be a final straw, even if the employee genuinely (and subjectively) but mistakenly interprets the employer's act as destructive of the necessary trust and confidence. See for example the judgement of Langstaff J in *Lochuak v L B Sutton* UKEAT/0197/14.
91. The claimant must not 'affirm' the breach. A claimant may affirm a continuation of the contract in various ways. He may demonstrate by what he says or does an intention that the contract continue. Delay in resigning is not in itself affirmation, but it may be evidence of affirmation. Mere delay, unaccompanied by any other action affirming the contract, cannot amount to affirmation. However, prolonged delay may indicate implied affirmation. This must be seen in context. For some employees, giving up a job has more serious immediate financial or other consequences than others. That might affect how long it takes the employee to decide to resign.
92. In the context of affirmation, the Tribunal has considered in particular *Abrahall v Nottingham City Council* [2018] ICR 1425, CA in which it observed that it was not right to infer that an employee had agreed to a significant diminution in their rights unless the conduct, viewed objectively, clearly evidenced an intention to do so.

Conclusions

93. The Tribunal now applies the law to the facts to determine the issues.

Was an act of omission (or a series of acts of omissions) by the Respondent a cause of the Claimant's resignation?

94. Yes. This was not in dispute between the parties.
95. The Claimant resigned for the reasons set out in her letter of resignation. She considered that the issues raised in her original grievance and then subsequent appeal had been glossed over and she was unhappy with the outcome.
96. Further, she objected to what she perceived as further similar emails to those complained about and the conduct of Mr Roderick.
97. However, whilst she also cited the broken light fitting and office temperature as factors, the Tribunal does not accept that these were in fact significant factors that

contributed to her decision to resign. The Tribunal views them as minor complaints that were added to bolster her case against the Respondent.

Did the acts/omissions amount to a fundamental breach of contract in respect of the implied term of mutual trust and confidence.

98. The Tribunal reminds itself that this is an objective test and not whether the Claimant subjectively feels that such a breach has occurred. It is not sufficient that the Claimant subjectively feels there has been such a breach nor is it enough that the Respondent acted unreasonably in some regards. The bar is set higher than that.
99. The Tribunal concludes that the none of the acts cited by the Claimant either individually or collectively amount to a fundamental breach of the implied term of mutual trust and confidence. Further, the Tribunal does not accept the Claimant's contention that there was any form of bullying, undue criticism or lack of support.
100. The Tribunal recognises that the Claimant became increasingly frustrated with having to work with Mr Roderick. She was an experienced professional and considered his way of working to involve unnecessary interference and challenge. A large part of the breakdown in the relationship between them was as a result of his involvement in areas that that Claimant had previously been left to get on with without close scrutiny. The situation was hindered by the fact that email was the primary method of communication between the two of them.
101. Some of the communications from Mr Roderick were curt and at times he failed to hide his frustration with the Claimant. He rightly conceded the "*I naturally find it frustrating...*" email was unacceptable. Further, the Claimant was right to feel aggrieved by his failure to directly respond to her email of 21.7.21 citing his "*dismissive and unfair attitude*".
102. However, the Tribunal does not find that Mr Roderick's instructions to or communications with the Claimant amount to a fundamental breach as alleged. When the entirety of communications between them is viewed collectively the Tribunal concludes that he in fact generally displayed great patience with the Claimant, responded to and engaged with her when she raised queries or things that she did not agree with or understand. Further, the Tribunal does not consider any of the requests he made in terms of tasks to complete or information he required to be improper, overbearing or unreasonable. The types of requests made of the Claimant appear entirely consistent with those of a proactive and diligent Finance Director.
103. The Tribunal also does not consider that any of the other issues relied upon by the Claimant amount to such a breach. For example, the issue relating to the covid screen is best described as an unfortunate mis-understanding. The Respondent had good reason to install the screen and in fact, had they not taken the Claimant's understandable concerns about returning to work as seriously as they did, they would have faced legitimate criticism.
104. Further, the Respondent treated the Claimant's concerns and formal grievance seriously. Her complaints were investigated thoroughly and she was able to appeal

the findings to an outside HR consultant. That HR consultant identified a lack of understanding and communication problems as an underlying issue with both the Claimant and Mr Roderick being equally culpable. The Tribunal agrees and observes that the Claimant resigned before there was a reasonable opportunity for the Respondent to implement that sensible recommendations that Mr Lee made at the conclusion of his report [p.131].

105. As to the ‘final straw’ emails on 8.10.21, the language was curt and Mr Roderick did little to disguise his views on the issue. However, he was raising legitimate issues and the Tribunal does not regard this as a fundamental breach in itself or indeed as something that adds to previous conduct so as collectively to amount to a breach.

Was the breach so serious that the Claimant was entitled to treat the contract as being at an end [issue.1.3].

106. In light of the above conclusion that there was no breach, the Tribunal does not need to consider this issue further.

Did the Claimant resign because of the breach?

107. This is another issue that the Tribunal does not need to consider in light of the above findings.

Employment Judge Horder
Written reasons dated: 30 March 2023

Judgment & Reasons sent to the Parties: 06 April 2023

For the Tribunal Office

Useful information

1. The Tribunal is required to maintain a register of all judgments and written reasons. The register must be accessible to the public. It has recently been moved online. All judgments and reasons since February 2017 are now available at: <https://www.gov.uk/employment-tribunal-decisions>.
The ET has no power to refuse to place a judgment or reasons on the online register, or to remove a judgment or reasons from the register once they have been placed there. If you consider that these documents should be anonymised in any way prior to publication, you will need to apply to the ET for an order to that effect under Rule 50 of the ET's Rules of Procedure. Such an application would need to be copied to all other parties for comment and it would be carefully scrutinised by a judge (where appropriate, with panel members) before deciding whether (and to what extent) anonymity should be granted to a party or a witness.
2. There is information about Employment Tribunal procedures, including case management and preparation, compensation for injury to feelings, and pension loss, here: <https://www.judiciary.uk/publications/employment-rules-and-legislation-practice-directions/>
3. The Employment Tribunals Rules of Procedure are here: <https://www.gov.uk/government/publications/employment-tribunal-procedure-rules>
4. *Presidential Guidance - General Case Management*:
<https://www.judiciary.gov.uk/wp-content/uploads/2013/08/presidential-guidance-general-case-management-20180122.pdf>
5. You can appeal to the Employment Appeal Tribunal if you think a legal mistake was made in an Employment Tribunal decision. There is more information here: <https://www.gov.uk/appeal-employment-appeal-tribunal>