Case Number: 3200205/2022

EMPLOYMENT TRIBUNALS

Claimant: **Mrs E McDonald**

Respondent: **Keltbray Management Service Limited**

Heard at: **East London Hearing Centre**

On: **3, 4 and 5 August 2022**

Before: **Employment Judge Russell**
Members: **Ms S Harwood**
Ms P Alford

Representation
Claimant: **Mr R Johns (Counsel)**
Respondent: **Mr M Palmer (Counsel)**

JUDGMENT having been sent to the parties on 9 August 2022 and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013.

REASONS

1. The Respondent is a construction and engineering company operating in a number of sectors including demolition, civil engineering, environmental, asbestos removal and rail.

2. The Claimant commenced employment with the Respondent on 27 April 2015 and at the material time was Team Leader of its Learning and Development team which comprised four members of staff. The Claimant was managed by Mr James Dawson who was in turn managed by Ms Holly Price. The employment relationship worked well.

3. The Claimant worked initially at an office at Burnt Mills Road in Basildon. The effect of the Covid-19 pandemic and consequent government advice was that from March 2020, the Learning and Development Team began to work from home instead of the office.

4. Around January or February 2021, the Respondent announced a decision to move its Basildon office to new premises at Brampton Way, Laindon. The Claimant visited the premises with Mr Dawson and Mr George in May 2021 and was involved in the fit out of the office, including the selection of desks and the choice of a seat by the window. Her evidence is that she informed them that the office was too small, with little natural light caused by film on the windows and that she asked for a CCTV screen in the office due to the security risk

caused by not being able to see who was coming in. The Claimant's case is that the office did not comply with health and safety requirements in respect of size and social distancing. By contrast, Mr George and Mr Dawson gave evidence that the Claimant raised only the issue about the film on the windows and said nothing about safety or security.

5. The Tribunal resolved the dispute of evidence by looking at contemporaneous documents in so far as they exist. There was nothing in May 2021 save for the Claimant's agreement dated 4 May 2021 changing her place of work from Basildon to Laindon. No concerns were raised in writing at the time. In her 14 November 2021 letter, the Claimant said that since she had received the office risk assessment, she could see that the office was not compliant with the two metre social distancing rule then in place. Read fairly we find that the letter is consistent with concerns about health and safety and social distancing being raised later and not at the time of the May 2021 office visit. On balance we find that in May 2021, the Claimant did ask for a CCTV screen as she was unable to see out of the window but did not refer to a security issue which had arisen whilst at the Basildon office. The November 2021 letter is not consistent with the Claimant's evidence now that she was speaking on behalf of her team. No other member of the team in May 2021 raised any specific concern or asked the Claimant to speak for them. The Tribunal finds on balance that she was raising concern about her own personal working conditions and not those of the team more generally. We also find that the information given by the Claimant on the site visit in May 2021 was not sufficient to tend to show that the health and safety of an individual was being, had been or would be endangered. The Claimant's concerns were entirely valid but they were also entirely personal to her.

6. From about 4 May 2021, the Claimant and her team began to attend the office for a couple of hours a day, a few days a week to collect post or carry out some administrative tasks. Generally they would leave by lunch time. The team was responsible for dealing with issues such as up to date contractor training and certification for safety and quality purposes. It was therefore important for the business that post was opened and dealt with in a timely manner. The attendance arrangements were very informal. There was no established pattern for any particular person to attend the office on any set day. Mr Dawson left it for the team to arrange between themselves but on a clear understanding that there had to be somebody attending the office every day. This was a small team, they knew their jobs well and worked closely such that a more formal arrangement was not required. The Tribunal finds that there was a significant level of trust between team members and by Mr Dawson in his team.

7. In or around summer 2021, the Government announced that all Covid-19 restrictions would be lifted, including social distancing, with effect from 19 July 2021. In anticipation of this change, on 9 July 2021 the Respondent sent a message to all employees stating that they would maintain current working practices until 16 August 2021, after which there would be a phased return to office working. The Respondent acknowledged that employees working from home would require time to re-establish support arrangements.

8. In July 2021 the Claimant enjoyed a period of annual leave. She told Mr Dawson that she had given a colleague, Ms Trinh, her contact number if she needed anything in her absence.

9. In July 2021, Mr Dawson completed an Occupational Health referral for Ms Trinh. It is clear from contemporaneous emails that Mr Dawson asked her to complete relevant sections of the form and send it back so that he could fill out his section.

10. On 13 August 2021, the Claimant and Mr Dawson attended a meeting together. The email confirmation for that meeting gives the subject as "**office rota and admin capacity**". The Claimant's evidence is that there was no discussion about producing a rota for attendance in the office and they spent the entire meeting brainstorming role changes. Mr Dawson, by contrast, said that they did discuss a rota to ensure that one member of the team was in the office to avoid the entire team working in the office following the general instruction for a return to office working. Mr Dawson did not see a draft and no formal rota was ever produced. The Tribunal finds that the ability to continue to work from home despite the general return to office working was a valuable concession for all of the team, including Mr Dawson. Given the subject title of the email and the timing of the meeting, shortly after the instruction to return to office working, the Tribunal prefers the evidence of Mr Dawson and finds that there was discussion about creating rota to ensure that there was always one member of the team working in the office.

11. The Learning and Development Team continued to benefit from the more flexible approach to working from home even after 20 August 2021 when the Respondent announced that pandemic working from home arrangements would come to an end with effect from 1 September 2021. In that announcement, the CEO expressly stated that the Respondent would continue to work in an agile fashion but that specific individual arrangements for remote working must be role appropriate, must not impact performance or service and must be agreed by line managers. The announcement makes clear that some Covid measures were being retained but others, including social distancing, would be decided locally.

12. Mr Dawson was not always present at the Laindon office as he had other offices for which he was responsible and he did not monitor whether the office was being attended daily by rota system or otherwise. The Tribunal finds that he trusted the Claimant as Team Leader to arrange cover between herself and her colleagues and ensure that it was implemented without the need for his oversight or micromanagement. This demonstrates the level of trust and good working relationship enjoyed by the Claimant and Mr Dawson at that point.

13. On 12 October 2021 there was a remote team meeting attended by Ms Price, Mr Dawson and the four members of the Learning and Development team. Mr Dawson was in the car at the time and so attended by audio only. Ms Price attended by video. She observed that all members of the Learning and Development team appeared to be at home and, after the meeting, she telephoned Mr Dawson and raised this with him.

14. Mr Dawson next attended the Laindon office on 14 October 2021. When he arrived, none of the team were present. There was a large pile of unopened post, some of which had been received up to a week previously. The Tribunal finds that Mr Dawson was annoyed - he felt that his team had let him down when he had trusted them, had made him look foolish in front of his manager and the time critical business needs of the Respondent were not being met. He convened a team meeting that day remotely in which he asked the team when they were last in the office. They all went quiet. The Tribunal finds that Mr Dawson took this as confirmation that they had not in fact been attending the office as he had trusted them to do. As a result, Mr Dawson required the whole team to return to working from the office with effect from Monday 18 October 2021.

15. On 19 October 2021, the Claimant asked Mr Dawson for a catch up meeting. Both were present at Laindon office. The Claimant expressed her concern about a full-time return

to the office. It is not in dispute that she raised issues such as a desire to reduce her carbon footprint, the lack of natural light, the inability to see out of the windows, the lack of a dimmable light, problems with the office temperature and a door which slammed.

16. There is a dispute as to whether the Claimant also raised security and Covid concerns at this meeting. Mr Dawson took a note of the discussion but it is a summary rather than a full record of the topics discussed. The Tribunal also took into account the oral evidence of the Claimant and Mr Dawson. On balance, we prefer the evidence of Mr Dawson. The reference to not being able to see outside was about the unpleasant nature of the room and lack of natural light. Any concern about strangers being able to enter unseen and reference to a security incident at Basildon was only raised later as the Claimant became more discontented at being required to work in the office. The notes record that the Claimant asked if the office was Covid secure, with enough ventilation. The Claimant says that she also expressed concern about the lack of space and a possible breach of Covid regulations. Mr Dawson denies this. In cross-examination, the Claimant said that her question about whether the office was Covid secure, she meant in every way – implicitly covering ventilation, space and distancing. She did not allege that she had raised those concerns explicitly, rather she asked if the office was Covid secure and if she could see the risk assessment.

17. The Tribunal again had regard to the Claimant's letter of 14 November 2021. This confirms that the risk assessment was sent after a meeting on 8 November 2021 and the two metre social distancing rule is referred to by reference to that risk assessment. On balance the Tribunal finds that on 19 October 2021 the Claimant asked only if the office was Covid secure and about ventilation. She did not provide any information which tended to show that there was a breach of any Covid regulations regarding the two metre rule or in any other respect. Moreover, the Claimant asked the question in the context of her own displeasure at being required to return to working in the office and not on behalf of, or even thinking about, the health and safety of other members of the team or visitors. The number of visitors to the office had significantly reduced by reason of the fact that in person training was not taking place. There were four members of the team and there was no evidence to suggest that this was a collective complaint.

18. There was also a dispute as to whether or not the Claimant asked on 19 October 2021 to be allowed to work three days in the office and two days at home. The Claimant said that she made this request but, if not agreed, asked whether she could reduce to four days a week as an alternative. Mr Dawson said to leave it with him, spoke to Ms Price and, on 20 October 2021, told her that her request to work 3:2 had been refused but she could reduce to working four days a week. Mr Dawson's evidence was that the Claimant asked to work four days a week and there was no discussion about a 3:2 pattern. Ms Price's evidence was that the 3:2 working pattern was not raised with her on 20 October 2021, it was something mentioned by the Claimant in their subsequent meeting on 21 October 2021.

19. To resolve the dispute, the Tribunal had regard to the contemporaneous documents. There is an email exchange on 20 October 2021 at 1.40 where Mr Dawson writes to HR about the four day request and states that he has approved it. HR replies at 3.45 asking the Claimant to put her request in writing. At 4.11 Mr Dawson emails the Claimant to ask for the request in writing. The Claimant replies "**will do**". Twenty minutes later, the Claimant asked if it could be on a trial basis and, within half an hour after, Mr Dawson replied to say yes. The Tribunal consider it significant that there is no reference in any of the emails to a request to work three days in the office and two days at home, far

less that the four day amendment is being accepted as an alternative.

20. Ms Price had become aware of concerns about the sudden return to the office and called a team meeting on 20 October 2021, which she attended remotely. It is clear from a contemporaneous text exchange between the Claimant and Ms Price that the meeting must have been early in the morning. In her text, the Claimant asked to catch up with Ms Price stating that she was not "**in the best of places**". Ms Price replied that she understood and wanted to find a balance which was right for everyone. The Claimant replied thanking her and signing off with a "x", commonly taken to signify a friendly, but not intimate, kiss in a text message. It is not consistent with the Claimant's case that she had been told that day that Ms Price had refused her request to work three days in the office, two days at home.

21. Two other members of the team also agreed to work flexibly. On 19 October 2021, Mr Dawson agreed that one colleague could work from home two days a week to accommodate caring responsibilities for an elderly parent. On 21 October 2021, Mr Dawson agreed that Ms Trinh could work from home two days a week as recommended in the Occupational Health report which had been received.

22. Based upon the contemporaneous emails and texts, and in the context of becoming aware on 21 October 2021 that Ms Trinh was allowed to work from home two days a week, the Tribunal finds on balance that the Claimant first asked if she could work from home two days a week in her meeting with Ms Price on 21 October 2021. She did not make this request in her meeting with Mr Dawson on 19 October 2021.

23. The Claimant's case is that in the meeting on 21 October 2021, Ms Price was insensitive and dismissive of her health conditions, specifically by saying that anxiety of the type described by the Claimant did not come on that quickly. Ms Price denies making such a comment, her evidence being that she asked the Claimant whether her anxiety was an underlying health condition or if it had come on quickly since the 14 October 2021 instruction to return to the office. The Tribunal found Ms Price to be a credible witness. We accept her evidence that she was seeking to understand the Claimant's position in order better to support her. It is consistent with the Occupational Health referral which she immediately agreed to in the meeting on 21 October 2021 and the contemporaneous messages exchange between the two women. In reaching this finding, the Tribunal does not consider that the Claimant has lied rather she has misremembered or misinterpreted innocent comments through the lens of her subsequent unhappiness and ultimate resignation.

24. The Claimant decided to wait for the Occupational Health report before proceeding with her request to reduce to four days a week. On 25 October 2021, Mr Dawson sent the Occupational Health referral form to the Claimant for her to complete relevant sections of the form and send it back so that he could fill out the rest. This is exactly the same process as adopted for Ms Trinh and the Tribunal does not accept the Claimant's case that it was inappropriate.

25. The Claimant was absent from work due to ill health on 25 and 26 October 2021. She emailed to say that she was confused by the need to complete the form and asked if it could be left until her return from annual leave. The Claimant was then absent from work on annual leave on 27, 28 and 29 October 2021. Whilst on leave, Ms Trinh sent her a text about a booking. The text exchange is pleasant and cordial. The Claimant's case is that she had explicitly told Mr Dawson not to have any contact with her during her leave. Mr Dawson does not recall any such instruction being given. To resolve this dispute, the

Tribunal had regard to the contemporaneous documents. The email on 26 October 2021 refers only to the Occupational Health process and not other, routine contact of a type typical in the past. The Claimant did not refer to any such instruction at the meeting on 8 November 2021. Furthermore, the Particulars of Claim refer only to the Occupational Health referral being put on hold. On balance, the Tribunal finds that the Claimant wanted to have a complete break from work given the anxiety she was experiencing but had given no explicit instruction to Mr Dawson or anybody else that there should not be contact with her at all.

26. The Claimant was very upset to receive the text from Ms Tinh, so much so that she suffered a panic attack. The Tribunal accepts that the Claimant was struggling with her mental health and that contact from work whilst on annual leave was a tipping point. There was, we find, no malice in Mr Dawson's instruction to Ms Tinh to contact the Claimant as had been done previously. This was an innocent misunderstanding due to a lack of clarity on the part of the Claimant. When the Claimant subsequently made clear that she had been upset by the contact Mr Dawson immediately apologised.

27. When the Claimant returned to work on 1 November 2021, she was still very upset. At 8:07am, some 7 minutes after the start of her working day, she asked Mr Dawson to call her. He replied immediately to say that he would do so later that morning. At 11:09am, she chased him and he replied to say that he was in meetings and would call back. At 11:37am, the Claimant sent an email attaching a letter of resignation. The Claimant believed that she was required to resign by noon and could wait no longer to speak to Mr Dawson. The Claimant was acting in haste due to her levels of anxiety however the resignation letter was clear and unequivocal. The Claimant did not give reasons for her resignation but the letter made clear that she wanted to leave as soon as possible, using accrued annual leave as part of the notice period in order to reduce the number of days in the office.

28. The Claimant's evidence is that shortly after sending the resignation letter on 1 November 2021, she spoke to Mr Dawson. She immediately tried to retract her resignation as Wellbeing had advised her to wait for the Occupational Health report. The Claimant's evidence is that Mr Dawson told her that nothing was off the table. By contrast, Mr Dawson's evidence is that he called the Claimant upon receipt of her resignation letter. She explained that she was not in a good place and that she wanted to leave as soon as possible. He was disappointed but said that if she felt that it was the right move, they would support her during her notice period. Mr Dawson said that the Claimant did not ask to retract her resignation.

29. The Occupational Health referral proceeded despite the Claimant's resignation. The report was received on 3 November 2021 and makes no reference to resignation or an attempt to retract the same, simply recommending that the Claimant be allowed to work two days a week from home and that there be a meeting with management and HR.

30. On 4 November 2021, the Claimant and Mr Dawson met to discuss the Occupational Health report. Again there is a dispute as to what was said.

- The Claimant's evidence is that she asked if the Occupational Health recommendations would apply if she retracted her resignation. Mr Dawson refused, saying that it was with HR and had already been processed. They discussed the flexible working arrangements on medical grounds for Ms Trinh and Mr Dawson said that menopause is not a medical condition. As the meeting progressed, Mr Dawson became angry, interrupting her to say "**do not accuse me of managing you out of the business**" and then abruptly ended the meeting.

- Mr Dawson's evidence is that the meeting started with a discussion about the Claimant's outstanding leave entitlement and an agreement that she would work from home during her notice period in accordance with the Occupational Health recommendation. He says that he questioned the purpose of the recommended meeting with management and HR as the Claimant had already met with him and Ms Price. The Claimant replied that she was not valued and that everything she asked for was refused. Mr Dawson said that he felt hurt and set out all of the support that the Respondent and he personally had given the Claimant; to which the Claimant replied that she had not asked for it. They discussed the flexible working arrangements for Ms Trinh and the Claimant said she too had a medical condition, namely menopause. Mr Dawson says that he said: I am not saying it's not a medical condition but we did not have Occupational Health at the time. The Claimant asked what would happen if she asked to retract her resignation. He said that he did not know as it had been accepted and processed by HR. The Claimant started to say that she felt she was being managed out, the conversation became heated and the meeting ended.

31. In cross-examination, the Claimant accepted that on 1 November 2021 she had asked Mr Dawson only if she could "look to retract" her resignation. On 4 November 2021, she asked if the Occupational Health recommendations would apply *if* she retracted her resignation. Further, she said that on 4 November 2021, Mr Dawson had said that he had not realised that menopause was a medical condition until he received the Occupational Health report. In cross-examination, Mr Dawson said that the Claimant had never expressly asked to retract her resignation but accepted that the Claimant had asked what would happen if she did ask to retract. On balance, the Tribunal find that whilst the Claimant raised the possibility of retracting her resignation, at no stage did the Claimant actually ask to do so. On 1 November 2021, the conversation was predominantly about practical arrangements for the Claimant's departure from the company. Mr Dawson genuinely did not understand that the Claimant was even considering retracting her resignation. Nor, we find, was there any express request to retract on 4 November 2021. The Claimant was doing no more than exploring the possibility of what would happen if she stayed, in other words if she decided to retract her resignation, she did not ask to do so. Mr Dawson's response was not encouraging and the Tribunal accepts that it gave the clear impression that it was too late for the Claimant to change her mind even if he did not expressly refuse.

32. The Tribunal finds on balance that Mr Dawson did not say, nor did he imply, that menopause is not a medical condition or that the Claimant's symptoms were not serious. During the discussion about Ms Trinh's flexible working, Mr Dawson sought to explain that it was because she had a medical condition. The Claimant inferred from this that Mr Dawson was suggesting that she did not. The Tribunal disagrees. On her own evidence, Mr Dawson said that he had not realised that menopause was a medical condition until receipt of the Occupational Health report. In other words, that he did accept that it was. On balance, the Tribunal finds that Mr Dawson was trying to explain that Ms Trinh's medical condition and need to work from home was supported by Occupational Health recommendations whereas the Claimant's was not until her own Occupational Health report had been received.

33. The Tribunal finds on balance that the meeting did become heated and that Mr Dawson did make the "managing out" comment. Not because it was something that he was trying to achieve but because the nature of the Claimant's comments that she was not being

valued or supported gave the impression that this is what she believed. It was in the context of a difficult meeting and the Claimant beginning to make a comment about how she was being managed that Mr Dawson believed that she was going to say that she was being managed out and, irritated or hurt, interrupted her to complete the sentence. In other words, it was part of the disagreement and a reflection of the allegation that he believed that the Claimant was about to make. The Tribunal finds that as it progressed, the meeting became more tense and more heated on both sides, with each of the Claimant openly disagreeing with each other and becoming hurt as they felt that the other did not appreciate their position and was being unreasonable.

34. The Claimant went home sick after the meeting. She saw her GP and was signed as not fit for work. She did not return to work before the termination of her employment.

35. The Claimant spoke to Aaron Davis on 4 November 2021 and Ms Moran on 5 November 2021 about a retraction of her resignation. The Claimant's evidence was that she told Ms Moran that she wished to retract her resignation but Ms Moran had said that it was up to Mr Dawson. By contrast, Ms Moran maintained that the Claimant had said only that she had thought that she had to resign by noon on 1 November 2021, that the Claimant had not asked to retract her resignation and maintained that at all points the Claimant was only alluding to the possibility. Nevertheless, she accepted that she told the Claimant that if somebody wanted to retract their resignation, it would need to be agreed by the business.

36. The Tribunal found Ms Moran's evidence to be less than straightforward and candid. On balance, we prefer the evidence of the Claimant and do not accept that Ms Moran thought that the Claimant was only alluding to retraction by this point. The Tribunal finds that on 5 November 2021, it was clear to Ms Moran that the Claimant did want to retract her resignation and that this may cause a problem with Mr Dawson given the nature of the disagreement at the meeting on 4 November 2021.

37. The Claimant met Ms Price on 8 November 2021. We accept Ms Price's evidence that she intended the meeting to be an opportunity to discuss the situation, which could include any request by the Claimant to retract her resignation. As she said, this was a meeting to resolve the issues. In cross-examination, Ms Price candidly accepted that the meeting did not go as she had hoped. She had intended it to be an informal meeting but it turned out to be uncomfortable. The notes of the meeting are consistent with it being a difficult meeting. The Claimant attended with her husband who stated early in the meeting that there was no going back now. The clear inference being that there was no longer any question of the Claimant retracting her resignation and returning to work. When he said later in the meeting that one should speak to someone who has resigned, the Tribunal finds that he was referring to what should have happened on 1 November 2021 and not the situation on 8 November 2021 by which time it was too late. This is consistent with his reference to ACAS.

38. The Tribunal does not accept that Ms Price's attendance at the meeting was an attempt to create an oppressive situation for the Claimant. Ms Price and the Claimant had enjoyed a good working relationship as evidenced by their earlier texts which are informal and friendly, using terms such as "hun" and with "x" at the end of the message. Such texts are not indicative of a hierarchical relationship and certainly not one which would tend to suggest that Ms Price's presence would make the Claimant feel uncomfortable. The Claimant's dispute had been predominantly with Mr Dawson and it was sensible for Ms Price to be at that meeting because if the Claimant were to request to retract her resignation,

Ms Price was the ultimate decision maker.

Law

39. We refer to the appropriate sections of the Employment Rights Act 1996 and we took into account the statement of law produced by Mr Palmer which was not contentious.

Constructive Dismissal

40. Section 95(1)(c) ERA provides that a dismissal occurs if the employee terminates the contract under which they are employed (with or without notice) in circumstances in which they are entitled to do so by reason of the employer's conduct. Whether the employee was entitled to resign by reason of the employer's conduct must be determined in accordance with the law of contract. In essence, whether the conduct of the employer amounts to a fundamental breach going to the root of the contract or which shows that the employer no longer intended to be bound by one or more of the essential terms of the contract, **Western Excavating Ltd v Sharp** [1978] IRLR 27 CA.

41. The term of the contract which is breached may be an express term or it may be an implied one. In this case, the Claimant relies upon breach of the implied term of trust and confidence. This requires that the employer shall not without reasonable and proper cause conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between employer and employee. The employee bears the burden of identifying the term and satisfying the tribunal that it has been breached to the extent identified above. The employee may rely upon a single sufficiently serious breach or upon a series of actions which, even if not fundamental in their own right, when taken cumulatively evidence an intention not to be bound by the relevant term and therefore the contract. This is sometimes referred to as the "last straw" situation. This last straw need not itself be repudiatory, or even a breach of contract at all, but it must add something to the overall conduct, **Waltham Forest London Borough Council –v- Omilaju** [2005] IRLR 35.

42. The question of fundamental breach is not to be judged by reference to a range of reasonable responses, **Buckland v Bournemouth University Higher Education Corp** [2010] IRLR 445, CA. The tribunal must consider both the conduct of the employer and its effect upon the contract, rather than what the employer intended. In so doing, we must look at the circumstances objectively, that is from the perspective of a reasonable person in the claimant's position. The question of fundamental breach is not to be judged by a range of reasonable responses test.

43. In **Tullett Prebon Plc v BGC Brokers LLP** [2010] EWHC 484 QB, Jack J stated at paragraph 81 that the conduct must be so damaging that the employee should not be expected to continue to work for the employer and that:

> "**Conduct, which is mildly or moderately objectionable, will not do. The conduct must go to the heart of the relationship. To show some damage to the relationship is not enough**."

44. In **Kaur v Leeds Teaching Hospitals NHS Trust** [2018] EWCA Civ 978, at paragraph 55, Underhill LJ suggested that in a constructive dismissal claim it is normally sufficient for a Tribunal to ask itself the following questions:

(1) What was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, her resignation?

(2) Has she affirmed the contract since that act?

(3) If not, was that act (or omission) by itself a repudiatory breach of contract?

(4) If not, was it nevertheless a part (applying the approach explained in **Omilaju**) of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a (repudiatory) breach of the **Malik** term? (If it was, there is no need for any separate consideration of a possible previous affirmation).

(5) Did the employee resign in response (or partly in response) to that breach?

45. Once an unequivocal resignation has been communicated to the employer, it cannot be unilaterally withdrawn and there is no requirement that the employer "accept" the same, **Wallace v Ladbrokes Betting and Gaming** UKEAT/0168/15/JOJ.

Protected Disclosure

46. A qualifying disclosure requires a 'disclosure of information' which in the reasonable belief of the worker tends to show, amongst other things, that the health or safety of any individual has been, is being, or is likely to be endangered, s.43B(1)(d) Employment Rights Act 1996.

47. **Williams v Michelle Brown AM** UKEAT/0044/19/OO: HHJ Auerbach five stage approach: (1) there must be a disclosure of information; (2) the worker must believe that the disclosure is made in the public interest; (3) such a belief must be reasonably held; (4) the worker must believe that the disclosure tends to show one of the matters listed in s.43(B)(1)(a) to (f); and (5) such belief must be reasonably held.

48. The ordinary meaning of 'giving information' is conveying facts and not simply making allegations, **Cavendish Munro Professional Risks Management Ltd v Geduld** [2010] IRLR 38, EAT at paragraph 24. A disclosure can include a failure to act as well as a positive act, **Millbank Financial Services Ltd v Crawford** [2014] IRLR 18.

49. The obligation breached need not be in strict legal language and there is no need to specify the precise legal basis of the wrongdoing asserted, **Twist DX v Armes** UKEAT/0030/20/JOJ.

50. The requirement for reasonable belief, which should not be conflated with good faith which is addressed below, involves an objective standard by reference to the circumstances of the discloser, including their qualifications, knowledge of the workplace and experience, **Koreshi v Abertawe Bro Morgannwg University Local Health Board** [2012] IRLR 4, EAT.

51. The employee must genuinely and reasonably believe that the disclosure in the public interest, **Simpson v Cantor Fitzgerald Europe** [2020] EWCA Civ 1601, applying **Chesterton Global Ltd v Nurmohamed** [2017] IRLR 837. Personal interests may also be in the public interest and the four factors set out at paragraph 34 of **Chesterton**, whilst not exhaustive, provide some helpful guidance. Firstly, the numbers in the group whose

interests the disclosure served. Secondly, the nature of the interests affected and the extent to which they are affected by the wrongdoing disclosed. Thirdly, the nature of the wrongdoing disclosed (disclosure of deliberate wrongdoing is more likely to be in the public interest than the disclosure of inadvertent wrongdoing affecting the same number of people). Finally, the identity of the alleged wrongdoer. The question of reasonable belief in the public interest is to be answered by the Tribunal on a consideration of all the circumstances of the particular case.

52. In **Fitzmaurice v Luton Irish Forum** EA-2020-000295-RN, the EAT summarised the correct approach to causation. In a detriment case, the protected disclosure need only be *a* material cause of the Respondent's reasons for its conduct. In an unfair dismissal case, the protected disclosure must be the sole or principal reason. Section 47B does not prohibit the drawing of a distinction between treatment resulting from the making of the protected disclosure itself as opposed to the manner in which it was made. Great care must be taken to ensure that the conduct relied upon is genuinely separable from the fact of making the protected disclosure and is the genuine reason why the employer acted as it did, in order to avoid possible in-roads into the protection offered to whistle-blowers. However, there is no requirement that the case be exceptional.

53. In **Blackbay Ventures Ltd v Gahir** [2014] IRLR 416, the EAT gave helpful guidance as to the approach to be adopted by a Tribunal considering a protected disclosure claim. This emphasised the need not to adopt a rolled up approach but to consider each disclosure by date and content, identify the risk to health and safety in each case and the detriment (if any) which is caused thereby.

Conclusions

Unfair Dismissal

54. The Claimant did not pursue her alternative case that this was a heat of the moment express dismissal and, therefore, it is to be decided as a constructive dismissal claim. The Tribunal has found that the Respondent did inform employees that they had to return to the office, both generally by its announcements on 9 July 2021 and 20 August 2021 and, specifically to the Learning and Development team, by Mr Dawson on 14 October 2021. The Respondent did so for business efficiency reasons. In the case of the Claimant's team, it was to ensure that post was dealt with in a timely manner where the previous informal arrangement had not been adhered to. Mr Dawson had tried an alternative to returning to office work by entrusting his team to devise an appropriate rota. When that failed over a period of time, not just by a day or two given the age of some of the post, he had reasonable and proper cause to require his team to return to office working.

55. The requirement for the Learning and Development team to return to office working was given with very short notice. The Tribunal considered whether such an abrupt instruction of itself could amount to a breach of the implied term of trust and confidence (even though not specifically identified in the list of issues we considered it potentially capable of supporting the Claimant's broader case about office working). Undoubtedly, Mr Dawson gave his team a far shorter adjustment period than that initially offered by the Respondent in recognition of the need to re-establish practical support arrangements. This, we conclude, was born of his irritation and feeling of having been let down by the team whom he had trusted. However, as Mr Palmer submitted, his instruction was only for a return to the contractual place of work to which the Claimant had agreed in May 2021.

Moreover, this was following ample warning by the Respondent that office working would once again become the expectation. Although Mr Dawson's initial requirement to return to office working was made abruptly, he soon relented and showed a degree of flexibility in consultation with the Claimant and others in the team. The Respondent's flexibility was also demonstrated by Ms Price's intervention and the meeting she held on 20 October 2021. For these reasons, we do not conclude that the short notice requirement to return to office working was of such a nature as to contribute to a breach of the implied term of trust and confidence.

56. Nor does the Tribunal conclude that the Respondent did ignore the Claimant's health and safety concerns or her request to work flexibly. At the time, the Claimant did not express health and safety concerns with the same clarity in detail as she has done now. The Respondent did address more her concerns about the working environment, albeit perhaps not keeping her fully up to date with every step and every detail at every turn. Nor did Mr Dawson ignore her flexible work request, rather they agreed her request to reduce to four days working and it was only later that the Claimant raised the possibility of working three days in the office, two days at home. When she did, the Respondent properly sought Occupational Health input as it had with Ms Tinh. Ms Tinh's request was agreed more swiftly only because the Occupational Health report had already been commissioned and received.

57. Mr Dawson did not pursue the reduction to four days when the Claimant said that she would rather await the outcome of Occupational Health referral. All of this took place over a very short period of time. The return to work in the office was with effect from 18 October 2021. The Claimant met Ms Price on 21 October 2021, by which date she was aware that Ms Tinh had been allowed to work from home two days a week on medical grounds. Ms Price immediately agreed to refer the Claimant to Occupational Health. The referral form was sent for completion on 25 October 2021. The Claimant's request that the process await her return from annual leave was honoured. She only returned to work on 1 November 2021. During this two week period, the Claimant had been absent due to ill health for two days and on annual leave for three days. Nevertheless, in this time she had a meeting with Mr Dawson, a text exchange in which Ms Price expressed a desire to help her and an Occupational Health referral.

58. The Claimant resigned within four hours of her return to work on 1 November 2021 and before the Occupational Health report had been received. In all of the circumstances, we are not satisfied that the Respondent ignored her concerns or her flexible working request as she asserts. It sought properly to understand her concerns and the medical reasons underpinning her request to work from home for two days a week.

59. The Claimant also relies upon the fact that she was contacted whilst on annual leave. The Tribunal has accepted that this was the last straw for the Claimant. However, we have not found that she expressly requested that there be no contact and have accepted that such contact was hitherto normal, indeed in July 2021 she told Mr Dawson that she had given Ms Tinh her telephone number for that very reason. It was, of course, the Claimant's right to change her mind later but she did not make that clear to her employer before going on leave. Mr Dawson simply did not know the depth of the Claimant's difficulties at the time and did not appreciate that the Claimant wanted no contact. There was a genuine legitimate business reason to make the contact and no reason to believe that it would be a problem. For these reasons, we conclude that this was not an act calculated or likely to breach the implied term of trust and confidence when looked at objectively.

60. The Tribunal considered the matters relied upon both individually and cumulatively, bearing in mind that we must consider the position of the objectively reasonable employee in the Claimant's position. As Mr Palmer submitted, ordinary disappointments and difficulties (bumps and trips as he put it) in an employment relationship will not of themselves lead to a breakdown in relationship of trust and confidence, it must be conduct which has the effect of destroying or seriously damaging that relationship.

61. This is an unfortunate case. The previously good working relationship between the Claimant and Mr Dawson deteriorated quickly, with a degree of mutual miscommunication and hurt. It was overwhelming clear to the Tribunal and, no doubt to Mr Dawson at the time, that the Claimant did not want to return to the office full-time. She gave the impression of throwing any and all reasons behind her attempts to avoid doing so. The Tribunal accepts that after a lengthy period of working from home, a full-time return to office working, and in a small and not particularly pleasant office, was a significant cause of anxiety and distress to the Claimant. The Respondent did not ignore the Claimant's concerns and took steps to support her. The Claimant's subjective upset was so great that even an ordinary telephone call from a colleague, which previously would have caused no problem, led to a serious panic attack and belief that she could no longer remain employed by the Respondent. Objectively, however, a reasonable employee in the Claimant's position could not have regarded the Respondent's conduct in this very short period of time, whilst Occupational Health input was still awaited before final decision was taken on working arrangements, as being in fundamental breach of the implied term of trust and confidence.

62. Two of the matters identified in the list of issues post-dated the Claimant's resignation, namely the alleged comment that her menopause symptoms were not serious and the heated discussion on 4 November 2021. The Tribunal has found as a fact that no negative comment was made by Mr Dawson about menopause. Mr Dawson was trying to explain that Ms Trinh's medical condition and need to work from home was supported by Occupational Health recommendations whereas the Claimant's was not until her own Occupational Health report had been received. The Tribunal has also found that the meeting on 4 November 2021 did become heated, on both sides, and that Mr Dawson did make the "managing out" comment because he anticipated that this was an allegation that the Claimant was about to meet. The meeting on 4 November 2021 did not cause the Claimant to resign but it did affect the likelihood that the Claimant would ask to retract her resignation or that Mr Dawson would agree to letting her do so. The Tribunal concludes that up until 4 November 2021, had the Claimant explicitly asked to retract her resignation, it is likely that it would have been agreed. However, this changed on 4 November 2021 and the relationship broke down beyond repair. This was not because the Claimant had made a protected disclosure about health and safety issues or concealment but because Mr Dawson was hurt that the Claimant did not appreciate what he had done to try to support her and had essentially alleged that he was managing her out and because the Claimant was hurt that Mr Dawson did not understand the effect upon her of being required to return to work in the office and that she was not being permitted to work two days a week at home where colleagues were.

63. To answer the **Kaur** questions: the act which triggered the resignation was the contact from Ms Tinh whilst the Claimant was on holiday. The Claimant did not affirm the contract as she resigned on her first day back at work. That contact was not, of itself, a repudiatory breach. Nor was it a part of a course of conduct which viewed cumulatively amounted to a repudiatory breach of the implied term of trust and confidence. For all of

these reasons, the Tribunal concludes that the Claimant was not entitled to treat herself as dismissed and the unfair dismissal fails.

Protected Disclosure

64. The second paragraph of the narrative attached to the ET1 (relied upon as containing alleged protected disclosures) also relies upon disclosure of information tending to show that the office was oppressive and claustrophobic, with little natural light and no surveillance causing a security risk, finally that its small size was such that it did not comply with Health and Safety requirements and social distancing requirements.

65. The Tribunal has found that in May 2021, the Claimant asked only for a CCTV screen as she could not see out of the window but she did not refer to security risks or concerns. Nor was she speaking on behalf of the team but entirely about her own personal working conditions. The Claimant has not proved that she disclosed information which she reasonably believed tended to show that the health and safety of an individual was being, or was likely to be endangered, or that it was in the public interest in her discussions about the office.

66. Nor has the Tribunal found that the Claimant disclosed information tending to show a relevant breach of health and safety requirements or social distancing requirements in September 2021 (more accurately, in evidence this was said to have been in the meeting with Mr Dawson on 19 October 2021). The Claimant did complain that it was not possible to see out of the windows but this was about the unpleasant nature of the room and lack of natural light. Any concern about strangers being able to enter unseen and reference to a security incident at Basildon was only raised later as the Claimant became more discontented at being required to work in the office. The Claimant asked a question about whether the office was Covid secure, with enough ventilation. She did not disclose information which she reasonably believed tended to show that there was a breach of any Covid regulations regarding the two metre rule or in any other respect. In particular, the issue about the social distancing rule arose only after the risk assessment was sent to the Claimant following the meeting on 8 November 2021. Having regard to our findings of fact and the **Nurmohamed** factors, we conclude that the Claimant did not reasonably believe that she was raising the issue about the office in the public interest whether of her team or visitors.

67. Even if there had been a protected disclosure or disclosures, the Tribunal would not have concluded the Claimant was subjected to a detriment because of the same. The Claimant's request for flexible working was not refused. She initially asked for a four day week which the Respondent agreed. The Claimant then asked to await the outcome of an Occupational Health referral which, again, was agreed. By the time that the Occupational Health report had been received, the Claimant had resigned. There was a discussion about the recommendations on 4 November 2021 but the meeting became heated and the question of flexible working had become academic because, by this point, the Claimant was working her notice period out of the office as much as possible. For the reasons set out above, the Claimant did not expressly ask to retract her resignation. Had she done so it was likely that, until the meeting on 4 November 2021, it would have been agreed. However, the relationship broke down beyond repair that day for reasons that had nothing to do with health and safety issues or concealment but because Mr Dawson was hurt that the Claimant did not appreciate what he had done to try to support her and had essentially alleged that he was managing her out and because the Claimant was hurt that Mr Dawson did not

understand the effect upon her of being required to return to work in the office and that she was not being permitted to work two days a week at home where colleagues were.

68. For those reasons therefore the claims are dismissed. The Tribunal would like to take this opportunity to thank both Counsel for the professional and helpful way in which they put their client's cases.

Employment Judge Russell

21 April 2023