Case No. 2408868/2021

EMPLOYMENT TRIBUNALS

Claimant: Amanda Gordon

Respondent: Currys Group Limited

Heard at: Liverpool Employment Tribunal

On: 23rd, 24th and 25th May 2023

Before: Employment Judge Thompson (sitting alone)

REPRESENTATION:

Claimant: Mr Bronze, Counsel
Respondent: Miss Kight, Counsel

JUDGMENT

1. Currys Group Limited is substituted as the Respondent in the proceedings.

2. The complaint of constructive unfair dismissal pursuant to section 95(1)(c) of the Employment Rights Act 1996 is not well-founded and is dismissed.

3. The complaint of breach of contract in relation to notice pay is not well-founded and is dismissed.

WRITTEN REASONS

Claim and Issues

4. In this case, the Claimant claims that she was unfairly constructively dismissed. The Respondent's position is that its treatment of the Claimant did not amount to a fundamental breach or, in the alternative, that any breach did not cause the Claimant to resign. Moreover, the Respondent argues that the Claimant waived any breach of contract.

5. The Claimant has been represented before me by Mr Bronze. The Respondent has been represented by Miss Kight. I am very grateful for the helpful manner in which they have both presented their respective cases.

6. I have had the benefit of a bundle running to 680 pages that was agreed between the parties. I have been taken to the important documents in the course of evidence and submissions. Any references to pages within this judgment are to pages within the bundle.

7. I have heard evidence from the following witnesses:

   (a) The Claimant.
   (b) Mary Coulton.
   (c) Lee Grant.
   (d) Frank Doran.
   (e) David Horton.

8. The issues for me to determine were agreed with the parties at the outset of the hearing as follows:

   (a) *Did the Respondent fundamentally breach the Claimant's contract of employment*? The Claimant relies upon the implied term of trust and confidence. That requires an assessment as to whether there was any reasonable or proper cause for the Respondent's conduct and when viewed objectively whether that conduct was calculated or likely to seriously damage trust and confidence.
   (b) *If so, did the Claimant resign in response to that breach of contract*?
   (c) *If so, did the Claimant resign promptly, such that she could not be said to have waived or affirmed the breach*?

9. The Claimant is alleging that the Respondent breached the implied term of trust and confidence as follows:

(a) By commencing disciplinary action against the Claimant concerning unfounded allegations, which eventually contributed towards the Claimant's diagnosis of workplace stress and anxiety.
(b) By Mr. Latif / Ms. Wingersgill bullying the Claimant particularly on 12 February 2020 by openly mocking the Claimant and discussed her disciplinary investigation, in contravention of GDPR.
(c) By failing to sufficiently address the Claimant's grievance or suggest any resolution to attempt to repair the relationship between her and her colleagues.
(d) By refusing to continue to pay the Claimant sick pay, despite the length of time it took to investigate her grievance.
(e) By failing to uphold the Claimant's grievance appeal, despite the fact that it had partially upheld her original grievance.

10. On the third day of the hearing, Mr Bronze clarified that the Claimant was also bringing a claim for wrongful dismissal. Although the box for a claim for notice pay had not been ticked in the ET1, Miss Kight did not take any objection to this being included as an issue for me to determine as it had been referenced in the Particulars of Claim. Therefore, I am also determining this issue: *Did the Respondent breach the Claimant's contract of employment by dismissing her without notice*?

Findings of Fact

11. The Claimant commenced her employment with the Respondent in October 2005. She worked as an in store service advisor at the Respondent's Bromborough branch until her resignation with immediate effect on 3rd March 2021. The Claimant's resignation followed a long period of sick leave of just over a year during which time she had been signed off for work related anxiety and stress.

12. The events preceding the Claimant's resignation centre around a disciplinary procedure instigated in December 2019 after the Claimant is alleged to have failed to follow the Respondent's sickness reporting procedure and a grievance procedure instigated by the Claimant in March 2020. Both of these matters are said to have contributed to the Claimant's decision to resign in March 2021.

13. There was an earlier disciplinary process in June 2019 involving the Claimant. In around May 2019 allegations came to light whereby the Claimant was accused of shopping online using a company computer during work hours. The Claimant attended a disciplinary hearing on 22nd July 2019 to answer those allegations. The Claimant accepted that she had committed the offence alleged and apologised. She received a first written warning that was to remain on her record for 9 months.

14. The Claimant did not appeal against this disciplinary action. She said as part of her defence to the disciplinary proceedings at the time that she was not the only one who had been using the work computers for personal matters. Ms Coulston was the disciplinary officer and looked into that at the time and spoke to the Claimant's colleagues. One of the Claimant's colleagues, Ian Dunn, admitted to using the work computers to browse news websites. Mr Dunn was not disciplined. Another colleague, Steve Davies, had received the same sanction as the Claimant from Ms Coulston when in he was found to be using the work computer to watch football matches.

15. Although the Claimant affirmed the contract by continuing to work after this disciplinary action, she relies on this as evidence of a past repudiatory breach. She says now that the disciplinary action was excessive. I do not accept that the sanction imposed for this first set of disciplinary proceedings can properly be described as excessive. The Claimant on her own admission breached a policy; she was aware of the policy; and she received the lowest possible sanction. I do not find that there was any past repudiatory breach of contract relating to this historic disciplinary action.

16. The later disciplinary allegations arise out of the Claimant's absence from work on 16th December 2019. The Respondent has a procedure for reporting sickness that is set out in various documents that I have seen. It is crystal clear from those documents that the first day of absence needs to be reported by telephone to a manager. A text communication does not suffice. I refer to the AWOL policy at page 178 and the Memo that the Claimant signed for receipt of on 13th January 2019 (at page 192). The Claimant accepted in cross examination that she knew of the requirement to report sickness over the telephone.

17. The Respondent accepts that its reporting policy is not wholly inflexible and that there will be circumstances when a telephone call is not required. A good example of this is at page 273 when on 19th October 2019 the Claimant texted to effectively bypass the "*call a manager*" requirement because her symptoms were anxiety related (connected with the menopause). The manager, Ms Coulston, responded to the Claimant's text message by saying that it was "*no problem*" not to call in given the circumstances. The Claimant had on other occasions around this period been allowed to effectively dispense with the "*call a manager*" requirement, but that was because of the nature of her symptoms being anxiety related. The Claimant at no point suggested that she thought that she was being given an ongoing exemption from this requirement.

18. What is not as crystal clear about the Respondent's policy is exactly how soon the sickness needs to be reported by telephone. The Memo dated 13th January 2019 (at page 192) states that the call was to be made "*as near to your starting time as possible – but no later than one hour after you are due to start work*". The later version of the Memo dated 23rd January 2020 at page 363 refers to the call in time as being "*no later than 1 hour before your start time".*

19. The Respondent says that there are several reasons why it is important that staff call in when they are ill rather than send a text. Those reasons are set out at paragraph 8 of Lee Grant's statement and I will not repeat them here. One particular reason for this policy that is relevant to this case is that a manager needs to be contacted by telephone so that he or she can arrange cover as soon as possible. I find that adherence to the sickness reporting procedure is an issue that the Respondent takes seriously and that whilst it could in particular circumstances be flexible with its policy, it was there for a good reason.

20. On Monday 16th December 2019 the Claimant was due in work after 3 days off. Her start time was 12 noon. She was ready to go into work but about half an hour before her start time she felt that she was too unwell to go in. She had flu like symptoms, now thought to be Covid. She says that she tried calling as required by the procedure at about 11.25am. It is not in dispute that she tried to contact a manager, Ms Coulton, by text, to report her illness. Ms Coulton replied by text, reminding the Claimant that she needed to call in to report her illness. She was not lenient with the Claimant on this occasion as she had been in October because the reported symptoms were not anxiety related. Ms Coulton was also not in work when she received the text: she was in hospital looking after a sick relative and could not reasonably be expected to be sorting out the Claimant's cover in her off time. There is evidence of a cancelled call to the Respondent's store at 13.07(so just over an hour after her start time). I accept that this is likely to have been the Claimant calling in but no one being available to pick up the phone. It does not appear to be in issue that at about 13.28 the Claimant had managed to contact a manager, Mr Saj Latif, by telephone, to tell him she was too ill to come to work.

21. The Claimant in the end took 3 days off sick with her flu like symptoms. On 26th December 2019 she was asked to attend an investigation meeting to discuss this absence. The Claimant walked out of that meeting. She says in her statement that she was told the meeting was a "*chat*" and that she felt pressurised as it was her on her own with two managers. She says she left to speak to her trade union representative. I find that there was nothing untoward about inviting the Claimant into this meeting "*without warning*". There is no requirement under the Respondent's policy to give the Claimant notice of an investigation meeting (page 67). In any event, the meeting was reconvened later in the day after the Claimant was assured that it was just a fact finding meeting.

22. The Claimant's explanation to the alleged breach of the sickness reporting procedure has been consistent throughout. She says that that she knew the sickness reporting policy required her to make a telephone call to a manager. She did not ever argue that she was exempt based because a previous manager had been flexible with her. She says that she had tried to call at 11.25am but that she had not been able to get through. She says she can not be blamed if there was no one to answer her call.

23. What followed was interviews with Ms Coulston and Mr Latif, then an invitation on 31st December 2020 to attend a disciplinary hearing (at page 315) which took place on 15th January 2020. The notes are at page 317 to 337. The Claimant reiterated her account that she had tried to call the store at 11.25am.

24. I have heard from the disciplinary officer, Mr Grant. He tells me that he asked for HR guidance over the phone on sanctions. He became aware at that stage that the Claimant already had a first written warning that was still live. He could have issued a final written warning but decided to be lenient with the Claimant and he gave her another first written warning. It was put to him in evidence that he thought that he had to apply a disciplinary sanction having found a breach of the policy, but he did not accept this. His decision dated 21st January 2020 is at page 361 to 362.

25. The Claimant appealed against the disciplinary action. Her appeal letter is at page 365 and it was acknowledged by the Respondent on 31st January 2020 (at page 367). There was a delay in dealing with the appeal against the disciplinary action in light of the first Covid lockdown. Mr Doran had conduct of the disciplinary appeal. He interviewed Mr Latif and Graham Halliwell (who carried out the investigation). His decision is dated 3rd April 2020. He dismissed the appeal.

26. The Respondent's witnesses who had a role in the disciplinary matter were not convinced that the Claimant had made a phone call at 11.25am. The evidence they had was:

    (a) The text messages between Ms Coulston and the Claimant at page 276. The messages show that at 11.47 on 16th December the Claimant texted Ms Coulton and expressed that she was not feeling well. Ms Coulston's response at 12.18 was that "*You need to call in"*. The Claimant then sent Ms Coulton another text at 13.10 saying "*I know [that she had to call in] no answer.*." The Claimant also sent a text to Mr Latif at 11.49 which was similar in content to the text she sent Ms Coulton. Mr Latif did not respond as he was working.
    (b) Call logs of calls made on the Claimant's mobile phone from 16th December (at page 342) which showed what seem to be two attempted calls to the store at 13.07pm and 13.21pm, followed by a 3 minute call at 13.28 (which it is accepted was the call with Mr Latif in which the absence was reported).

27. Mr Latif (who was interviewed as part of the disciplinary process) was suspicious of whether or not the Claimant had called in at 11.25am. That was because no one had heard the phone ring and the business centre had at least 6 handsets which each manager would carry around at all times. I do accept that on occasions the phone would not be picked up and so the Claimant's account that she had tried calling at 11.25am and no one picked up was not implausible.

28. The Respondent did not ask for evidence of the Claimant's call logs: it was the Claimant who provided them of her own volition on around 31st December 2019 (following the investigatory interview). However, despite the Claimant saying that she called at 11.25am, she has never produced a call log to evidence that.

29. At the investigatory interview on 23rd December 2019 (at page 289) the Claimant said that she called at 11.25. When asked whether she had proof on her phone, she said no and that she had called on her husband's phone as her phone was out of charge. By the time of the disciplinary hearing on 15th January 2020 (at page 326), she had provided phone logs but not of the 11.25am call. Mr Grant asked her at that hearing why she would not just show him the screen shots of the alleged earlier call and she replied that it was "*because I am stubborn, he [Graham Halliwell] should have just believed me, I felt like he was calling me a liar and that's why I dug my heals in and wouldn't give them*".

30. The reasons the Claimant gave the Respondent at the time for refusing to provide any earlier call log which may have evidenced the alleged 11.25am call were obstructive and I can understand why the Respondent's witnesses were perplexed as to why she would just not provide them, particularly as she was willing to provide the other logs which evidenced later calls.

31. During the course of her evidence before me, the Claimant admitted that there was in fact no call log of the 11.25am call. She had tried to get it but says that by the time she thought of it, the conversation history was no longer available on her husband's phone. I have not had a satisfactory explanation as to why she led the Respondent's witnesses to believe that there were other call logs if she in fact never had them.

32. The Respondent's witnesses were under the erroneous impression when they prepared their witness statements that the Claimant had in the course of these proceedings provided the log for the 11.25am call that she had earlier refused to provide to them. As it turns out, she did not provide the log and it appears that the Respondent's solicitor made an error as to what logs had been provided. I accept the explanation that the errors in the Respondent's statements referred to above arose from a mistake by the solicitor who did not appreciate that some call logs were provided by the Claimant at some point between the investigatory and disciplinary meetings.

33. I turn to the grievance issues, which straddle some of this period. The grievance issues include the disciplinary matters that I have already referenced, insofar as the Claimant suggests that the disciplinary actions both in June 2019 and January 2020 were excessive.

34. The main part of the grievance stems from two covert recordings that the Claimant took on her mobile phone. The first covertly recorded conversation was on 23rd January 2020. The Claimant recorded a conversation between

herself and Mr Latif in which he asked her to tighten the leg of a table. She says that this was an unreasonable request and is evidence of bullying. The second covertly recorded conversation was between two of her colleagues, Mr Latif and Ms Wintersgill. That conversation was on 12th February 2020. The Claimant was not present. I have not heard the recordings but I have seen transcripts of what was said which are found at pages 634-640.

35. The Claimant went off sick with anxiety and stress shortly after the second covertly recorded conversation (on 17th February 2020) and remained signed off as unfit to work for the remainder of her employment (so over another year before she eventually resigned).

36. On 23rd March 2020, the first day of the national lockdown, the Claimant raised a formal grievance. The Respondent was not able to meet with the Claimant until 28th July 2020 to discuss her grievance. The minutes are at page 427. The Claimant was then informed of the outcome of that grievance on 27th August 2020 (at page 494). The outcome of the grievance was that it was upheld in part only. The Respondent accepted that Mr Latif had acted inappropriately. The recommendations at page 497 included mediation; the possibility of the Claimant moving to another store; and for appropriate action to be taken against Mr Latif in relation to his "*serious inappropriate behaviour"*.

37. The Claimant appealed against the grievance decision on 2nd September 2020. There were various postponements of the appeal hearing. The Claimant said in cross examination that the reasons for the delay were "*50/50*" , meaning it was partly her requests to adjourn and partly the Respondent's requests. She was informed of the grievance decision on 28th January 2021 (at page 568). She then waited until 3rd March 2021 to resign. She says this was to take legal advice. Her resignation letter is at page 587.

38. In the interim between her initial grievance and the appeal decision, and apparently unbeknownst to the Claimant, Mr Latif had been disciplined. The outcome of the disciplinary against Mr Latif is at page 665. He received a first written warning for allegations of "*serious inappropriate behaviour*".

39. Before moving onto my analysis, I will deal briefly with the delays that occurred during the disciplinary and grievance processes. As I have already indicated, these processes were taking place at the height of the Covid-19 pandemic. At this time, the Respondent was very busy, with members of the public panic buying before lockdown and the having to deal with the administration of getting staff on the furlough scheme. The Respondent had to prioritise the health and safety of its employees and concentrate on preserving the financial viability of the business. The Claimant was kept abreast of the reasons for the delays, as is evident from the letter dated 23rd April 2020 at page 419. She did not complain about the delays until 19th June 2020, and in the context of how unfair it was to be receiving work related messages about her contract when her grievance was on hold (at page 424). As previously indicated, she accepted

that the delays in the grievance appeal were partly her fault, and there is a detailed chronology which explains the delays to the appeal produced by Mr Horton at page 560. Whilst it is unfortunate that the delays had a detrimental impact on her mental health, I do not criticise the Respondent in light of the *"unprecedented circumstances*".

Applicable Law

40. Having established the above facts, I now apply the law.

41. Section 95(1)(c) of the Employment Rights Act 1996 provides that an employee will be dismissed by an employer if the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct.

42. If the employee's resignation can be construed as a dismissal, then the issue of fairness or otherwise is governed by section 98 of the Employment Rights Act 1996.

43. The best-known summary of the applicable test for a claim for constructive unfair dismissal was provided by Lord Denning in **Western Excavating (ECC) Limited v Sharp [1978] IRLR 27**:

> "*If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment; or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer's contract. He is constructively dismissed. The employee is entitled in these circumstances to leave at the instant without giving any notice at all or, alternatively, he may give notice and say that he is leaving at the end of notice. But conduct must in either case be sufficiently serious to entitle him to leave at once. Moreover, he must make up his mind soon after the conduct of which he complains: for, if he continues for any length of time without leaving, he will lose the right to treat himself as discharged, he will be regarded as having elected to affirm the contract."*

44. It follows from this decision that the 3 components of a constructive dismissal claim which I need to consider are:

    (a) Whether there is a breach which is sufficiently serious to entitle the employee to leave at once.
    (b) Whether the termination of the contract was by the employee because of that breach.
    (c) The employee must not have lost the right to resign by affirming the contract after the breach.

45. The Claimant relies upon the implied term of trust and confidence, which was formulated by Lord Steyn in the case of **Malik v Mahmoud v BCCI [1997] ICR 606** 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 the employer and employee."*

42. The case of **Baldwin v Brighton & Hove City Council [2007] IRLR 232** clarified that it is not necessary for the employer to act in a way which is both calculated and likely to destroy the relationship of trust and confidence, instead either requirement can be satisfied.

43. In order to constitute a breach, it is not necessary that the employer had the intention to repudiate the contract. The issue is whether the effect of the employer's conduct as a whole, judged reasonably and sensibly, is such that the employee cannot be expected to put up with it: see **Woods v WM Car Services (Peterborough) Ltd [1981] ICR 666**. Further, in **Malik**, Lord Steyn stated that: "*the motives of the employer cannot be determinative, or even relevant, in judging the employees' claims for breach [of the implied term of trust and confidence]*." The test is objective.

44. It is not the case that every action by an employer which can properly give rise to a complaint by an employee amount to a breach of trust and confidence. The formulation approved in **Malik** recognises that the conduct in question must be likely to destroy or seriously damage the relationship of trust and confidence. The case of **Frenkel Topping Limited v King UKEAT/106/15/LA** makes it clear that acting in an unreasonable manner is not sufficient.

45. A breach of trust and confidence may arise not because of any single event but because of a series of events. In such cases, a Claimant can rely on a "*last straw*" which does not itself have to be a repudiation of contract. The key cases are the decisions of the Court of Appeal in **London Borough of Waltham Forest v Omilaju [2005] IRLR 35** and **Kaur v Leeds Teaching Hospitals NHS Trust [2018] EWCA Civ 978**. If the last straw is entirely innocuous or trivial, and none of the preceding matters amount to a fundamental breach of contract, the claim will fail. Further, **Kaur** also confirmed that an employee can rely on earlier conduct by the employer even if he affirmed the contract after those earlier matters, as long as the last straw adds something new and effectively revives those earlier concerns.

46. A bungled approach to a disciplinary procedure can in itself amount to a repudiatory breach of the implied term of trust and confidence if it seriously destroys or damages the relationship between employer and employee: see **Gogay v Hertfordshire County Council [2000] IRLR 703, CA**. Further, the imposition of an unwarranted or disproportionate penalty under a disciplinary

procedure can constitute a repudiation: see **BBC v Beckett [1983] IRLR 43; Cawley v South Wales Electricity Board [1985] IRLR 89;** and **Stanley Cole (Wainfleet) Ltd v Sheridan [2003] IRLR 52**.

47. The fundamental breach of contract by the employer need only be a reason for the resignation: it does not matter if there are other reasons: **Wright v North Ayrshire Council [2014] IRLR 4**.

48. The contract is affirmed if after the breach the claimant behaves in a way which shows that he or she intends the contract to continue. Delay in resignation which occurs whilst an employee is not performing the contract, for example when on sick leave, is less likely to amount to an affirmation that if the employee carries on turning up for work: see **Chindove v William Morrisons Supermarkets PLC UKEAT/0201/13/BA**. Further, in **Gordon v J & D Pierce (Contracts) Ltd [2021] IRLR 266** it was held that by engaging in a grievance process, the employee had not affirmed the contract. Reliance was placed upon the dicta of Underhill LJ in **Kaur v Leeds Teaching Hospitals NHS Trust [2018] EWCA Civ 978, [2018] IRLR 833** that an employee "*exercising a right of appeal against what is said to be a seriously unfair disciplinary decision is not likely to be treated as an unequivocal affirmation of the contract*".

49. The Employment Tribunals Extension of Jurisdiction Order 1994 provides that proceedings for breach of contract may be brought before a Tribunal in respect of a claim for damages or any other sum (other than a claim for personal injuries and other excluded claims) where the claim arises or is outstanding on the termination of the employee's employment.

50. A claim for notice pay is a claim for breach of contract: see **Delaney v Staples 1992 ICR 483 HL**.

51. In **Neary v Dean of Westminster [1999] IRLR 288**, it was held that conduct amounting to gross misconduct justifying summary dismissal must so undermine the trust and confidence which is inherent in the particular contract of employment that the employer should no longer be required to retain the employee in his employment. The tribunal is not concerned with the reasonableness of the employer's decision to dismiss but with whether the employee is guilty of conduct so serious as to amount to a repudiatory breach of the contract of employment entitling the employer to summarily terminate the contract: see **Enable Care and Home Support Ltd v Perason EAT 0366/09**).

Application of law to the facts

Did the Respondent fundamentally breach the Claimant's contract of employment?

52. I now apply the law to the facts that I have found. I will deal with each of the issues that I identified at the outset. I note Miss Kight's concerns about the way

that there has been significant deviation from the issues that were identified at the outset. I note that the specific allegations were pleaded by the Claimant as cumulatively giving rise to a fundamental breach and it is now suggested that either cumulatively or singularly they amount to a fundamental breach.

53. I will look at each of the 5 allegations in turn.

54. I will deal firstly with the disciplinary allegations. The list of issues identifies the complaint as the commencement of disciplinary action against the Claimant concerning unfounded allegations. During evidence and submissions, Mr Bronze put the issue in a wider way and is critical of the whole disciplinary process, including the appeal.

55. The central factual issue in respect of the disciplinary matter was whether or not the Claimant had tried to call at 11.25am to report her absence. The Respondent's witnesses rightly accept that if she had tried to call at that time and had not been able to get through, then it would not have been appropriate to discipline her for breach of the sickness reporting procedure. The Respondent's position has not been that the Claimant was lying about trying to call at 11.25am, but rather that they had no evidence of the Claimant's attempted call at this time. I do not accept that the Respondent was constrained to either expressly find the Claimant to be a liar or accept what she said as truthful. Instead, what the Respondent was doing was looking to see if the evidence corroborated what the Claimant said. The Claimant's position is that she should not have been required to prove her innocence, and that her explanation ought to have been taken on face value as a longstanding employee and accepted by the Respondent, and the matter ought never have proceeded to the disciplinary stage at all after she had explained that she tried to call.

56. I do not accept that the Claimant's account should just have been taken at face value. I find that the Respondent was perfectly entitled to find on the evidence they had that the Claimant had not called in at 11.25 as she alleged. I make that finding for these reasons. First, there is no reference in the Claimant's text message to Ms Coulton at 11.47am to her having tried to call in or in the text message to Mr Latif at 11.49. By contrast, she does explicitly state this in her text message some time later, at 13.10, which is consistent with an attempted call at 13.07 evidenced in the call log. Second, the Claimant was the one who said that proof of an earlier call existed, but that she was too "*stubborn*" to produce it. Although Mr Horton used the word "***pedantic"*** to a characterise the call logs, the Claimant was the one who raised the existence of a call log that proved what she was saying, only to refuse to provide it as part of the disciplinary process. It is my view that the Respondent was perfectly entitled to take the view that it was odd that, if the Claimant did have the evidence that would in effect exonerate her, that she would not produce it. In fact, the Claimant said to me in her evidence that she never had a log of an 11.25 call, contrary to what she had led the Respondent to believe at every stage of the

process. She told me in evidence that by the time she had come to look for the call log, it could no longer be retrieved.

57. The Claimant in the alternative says that at best this was a minor breach of the policy as she had tried to contact the manager by text and had called on any case only 7 minutes after she was required to. I am invited to find that Mr Grant erroneously believed that he had to impose a sanction, having found a breach, and that if he had taken into account these and other mitigating features, the only decision that should have been reached was that no disciplinary sanction should be imposed. This is also in the context that on previous occasions the Claimant had been let out of the call in requirement, suggesting that the policy was not as important as the Respondent was making out.

58. I do not accept that the Claimant tried to call at 11.25. Although the Respondent's policy is not clear on exactly when the call needed to be made, the Claimant knew by 11.25 that she would not be coming in and was well enough to text at 11.47. That is when she ought to have called. That was "*as near to your starting time as possible".* I also note that the Claimant did not raise during the investigatory/disciplinary process any suggestion that she was confused about the time that she need to call in. She accepted that she had breached the policy.

59. In summary, I accept that the Respondent takes its absence reporting procedure seriously; the Claimant understood that policy and what was required of her; and the Respondent's conclusion that she had breached that policy was entirely justified. The Respondent had reasonable and proper cause to investigate the Claimant for breaching this policy and reasonable and proper cause to find her its breach of its policy. I do not accept that Mr Grant was under the impression that he had to impose a sanction. The sanction was the lightest one available. Given that the Claimant was already on a live written warning, the Respondent could have easily justified a harsher sanction. Moreover, I do not accept that the disciplinary appeal was pre-determined or a whitewash. I find that at all stages of the disciplinary process there was a fair and thorough consideration of the issues. This was not a "*bungled approach"* to a disciplinary procedure and the penalty imposed was entirely proportionate. The decision making throughout the disciplinary process was reasonable and proper and when viewed objectively was not conduct which was calculated or likely to seriously damage trust and confidence.

60. Next, I will deal with the failure to extend the Claimant's sick pay. The Claimant was paid for 26 weeks sickness absence. She had no contractual entitlement to be paid sick pay beyond the 26 week period. I am not even clear if there was a discretion to grant sick pay beyond the 26 week period. Mr Bronze invites me to find that the decision not to even look into extending the sick pay amounted to a fundamental breach of contract. That is not the way that the allegation in

put in the ET1. I have not been referred to any examples of sick pay having been extended beyond the contractual period. I have no basis to find that the decision not to extend the Claimant's sick pay was unreasonable or improper. Moreover, I have already found that the delays in the process were not unreasonable and that for the period of the grievance appeal, half of the delays were down to the Claimant in any event. Moreover, the Claimant conceded in cross examination that she did not resign because she was not paid sick pay. In light of that concession, I find that not only was there no fundamental breach in relation to sick pay, but if there was, the Claimant did not resign in response to that fundamental breach.

61. I turn to the grievance as it relates to the bullying allegations. Unusually, I have the benefit of the transcript of both of the alleged bullying incidents and so I am not reliant on witnesses giving me their recollections of what was said.

62. So, what do I make of the conversation that the Claimant recorded on 12th February 2020 which is at the core of her complaint about Mr Latif? I start with how that conversation came to be recorded in the first instance. The Claimant said in her evidence that when she recorded the conversation, she did not know who would be in the vicinity of where she left her phone. When she was asked why she had left her phone to record conversations amongst her colleagues, she said that she "*had a feeling that something was going on, she could not put her finger on it*". That does not suggest to me that she thought she was being "*bullied*" (at least before that point): instead, she just wanted to hear what people were saying about her behind her back. I asked Mr Horton some questions when he was giving evidence to understand how, if at all, the fact that this was a covertly recorded conversation affected his view of what was said. The individuals who had been recorded both expressed their concern that the Claimant's behaviour was devious. However, Mr Horton was clear that he was able to put the manner in which the recording had been made to one side and focus instead on the substance of the conversation. The fact that this was a meant to be a private conversation is part of the factual matrix which I have to consider, but I remind myself that the motives of the employer cannot be determinative, or even relevant, in judging the employees' claims for breach.

63. Mr Latif and Ms Wintergill were discussing the Claimant's disciplinary issues when they should not have been. Mr Latif said a number of things in that conversation that were entirely inappropriate for a manager to say, including his reference to the "*fucking audacity of her*" (the Claimant). Mr Latif said that he wanted to "*grill*" the Claimant about the length of her breaks but had decided not to as it would be "*too emotional*" after the disciplinary hearing. I do not accept that when viewed objectively it can be said that conversation was evidence of a conspiracy as the Claimant alleges or that it shows that Mr Latif was trying to manage her out of the business. Mr Latif was expressing his frustration that the Claimant may turn her breach of the policy into a complaint

against him. I agree with the characterisation of it as "*venting*". Further, although there is a suggestion from Mr Latif that Frank (Mr Doran) having already made up his mind, that was at best Mr Latif's opinion and I do not find having heard Mr Doran give evidence that his decision was in any way predetermined or influenced by Mr Latif.

64. I am also mindful of the way that the Claimant spoke about Mr Latif when he was not around. At the end of the transcript of the recording from 23rd January 2020, she comments on a couple of occasions that she was "*fucking fuming*" about the way he had treated her. This suggests to me the Claimant too was prepared to use rude and disrespectful language: indeed, she told me that she would have said this to Mr Latif's face had he been there. I am also mindful that Melanie Dover said as part of her evidence in the grievance process that she knew about the Claimant's disciplinary as the Claimant had told her and that the Claimant openly discussed the confidential disciplinary matter.

65. In summary, my conclusion is that I accept that this conversation was inappropriate and it upset the Claimant. It was not pleasant for her to hear her colleagues talk about her behind her back in a derogatory way. However, the effect of the employer's conduct as a whole, judged reasonably and sensibly, was not such that I can find that the Claimant could not be expected to put up with it. I make this finding because: (1) on an objective interpretation, Mr Latif was not conspiring or trying to manage the Claimant out of the business; (2) the use of "*industrial*" language was not uncommon and the Claimant used similar language herself to describe Mr Latif; and (3) although Mr Latif had been discussing the Claimants disciplinary when he should not have been, I find that the Claimant herself openly discussed her disciplinary allegations with other staff.

66. There was another covert recording that I will address. The Claimant invites me to find that the request made by Mr Latif for her to tighten the screws on a table was bullying. I have seen the transcript of that conversation. The Claimant says that Mr Latif was asking her to move a heavy table when he knew that she had medical problems that would make that difficult for her. However, she was not on any restricted duties at work. Moreover, Mr Latif was not asking her to lift a table. She was being asked to tighten a screw with an Allen key. I am invited to infer that he must have known that by asking her to tighten the screw, he would have known that she would have to lift a heavy table. I do not accept that I have the evidence to make that leap. The Claimant did not realise when she was asked to tighten the screw she would have to lift the table. She did not object to the instruction. By the time she realised that she needed to lift the table in order to tighten the screw, Mr Latif had left. She then asked a colleague to help her. She could at that point have refused to lift the table if she believed it may aggravate her injury. Moreover, her comments made at the end of the transcript at page 635 after the table had been moved do not reference the table being heavy: instead, her anger is over the fact that she seemed to have been targeted for this task because she was having a coffee. Mr Horton says that he

did not see this as an inappropriate instruction let alone something that could be perceived as bullying. It is my view that when viewed objectively, there was nothing inappropriate whatsoever with Mr Latif's request.

67. The Respondent did not condone Mr Latif's behaviour on 12th February 2020. He was subject to a disciplinary procedure and received a first written warning. No attempt is made by the Respondent's witnesses to justify Mr Latif's conduct which has been described consistently as inappropriate.

68. So, what did the Claimant want out of the grievance process? She was asked this by Mr Horton and said it was "*in the hands of my solicitors*". In her evidence before me, she said she wanted an apology from Mr Latif, for Mr Latif to move locations and/or for Mr Latif to be dismissed. I am not at all clear as to why she did not express this to the Respondent. She told me it was because she was off sick, but she did have solicitors and the assistance of a trade union representative. I interpret her failure to offer any constructive solution as an indication that she just did not want to go back to work for the Respondent at all unless her grievance was upheld in full.

69. Mr Horton confirmed in his evidence to me that the first two options were possible, had the Claimant expressed them. He said that he would "*absolutely*" have considered an apology and that Mr Latif moving was also something that he was open to. I do not think these were empty words from Mr Horton after the event, as he rightly acknowledged that Mr Latif's behaviour was unacceptable.

70. Mr Horton said he would not have asked for Mr Latif to be dismissed just because that was the result the Claimant wanted. He considered that the disciplinary sanction that had been imposed was appropriate given the nature of the offence.

71. I asked the Claimant why she did not take up the offer in an attempt to resolve her issues with Mr Latif. Mediation may well have nipped the issues she had with Mr Latif in the bud. The Claimant said in her evidence that she had no faith in the mediation process. She clarified that by that she meant that she did not think it would be independent. I have seen nothing whatsoever to support that belief. The Claimant was after an apology from Mr Latif, and mediation is exactly the sort of process that may have elicited an apology if that was indeed what the Claimant wanted. Mediation would also have been the avenue to explore alternative work locations for the Claimant and Mr Latif. I am particularly mindful of the fact that although the Claimant did not get on with Mr Latif, this was not a case of a campaign of bullying. This was exactly the type of case that I consider would have been amenable to a good outcome through mediation.

72. I also do not accept that the onus lies entirely on the Respondent to put forward resolutions. If the Claimant was not happy with the proposals for resolution put forward, it was entirely open her to suggest other ways to resolve the matter. It was after all her grievance and without her expressing what she was after, all

the Respondent could do was put forward its own proposals, which it did, and wait to hear back from the Claimant.

73. I do not accept that the grievance procedure was a whitewash. Indeed, the Claimant herself accepted that the issue had been thoroughly investigated. I have seen lengthy interviews and reviews of documents. As Miss Kight rightly points out, the process does not have to go to the tenth degree to investigate everything as this was a review.

74. In summary on the grievance, my views are as follows. The grievance outcome can not be viewed objectively as conduct calculated or likely to seriously damage trust and confidence. The Respondent was not obliged to give the Claimant the outcome that she wanted because it found Mr Latif's conduct on 12th February 2020 to be inappropriate. The Claimant did herself no favours by not making it clear what she wanted out of the grievance. Reasonable outcomes were offered to her but she refused to even consider them. Moreover, her stated aims to me of an apology and/or Mr Latif to move stores were issues that would in all likelihood have been explored in mediation had she been open to it (as Mr Latif was). I do not accept that failing to dismiss Mr Latif for what was a one of incident of inappropriate behaviour was conduct calculated or likely to seriously damage trust and confidence.

75. In conclusion, I have not been able to identify any conduct by the Respondent, either individually or cumulatively, which was improper or unreasonable or calculated or likely to seriously damage trust and confidence. The claim therefore fails on this basis.

Did the Claimant resign in response to that breach of contract?

76. I do not accept the suggestion made by the Respondent that the Claimant planned to retire in any event. That seems to be at odds with the fact that she has found another job (with BT) post her resignation. Further, I do not accept that the Claimant resigned to avoid having to have her illness addressed through the Respondent's long term sickness procedure. I accept that the Claimant genuinely experienced stress and anxiety as a result of listening to the covert recording and was unlikely to go back after that point unless her grievance was upheld in full. However, for the reasons I have already explained, I do not find this or any of the other matters complained of amount to a fundamental breach.

Did the Claimant resign promptly, such that she could not be said to have waived or affirmed the breach?

77. I find that it was unlikely that the Claimant was going to go back to work once she lodged her grievance. However, I do not accept that she had closed off her

mind to that possibility until after she exhausted the Respondent's internal procedures and that she may well have returned if her grievance had been upheld in full. Although she delayed by 5 weeks after having received the grievance outcome, she was not at work and there is minimal interaction between the Claimant and the Respondent. She was still on sick leave and was consulting solicitors about her options at that time. However, for reasons that I have already explained, the Claimant's claim fails for other reasons, as she has not established a fundamental breach of contract.

Did the Respondent breach the Claimant's contract of employment by dismissing her without notice?

78. I find that the Respondent did not breach the Claimant's contract of employment and the claim for breach of contract in respect of notice pay therefore fails.

Employment Judge Thompson
Date 3 July 2023

JUDGMENT SENT TO
THE PARTIES ON 7 JULY 2023

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