



EMPLOYMENT TRIBUNALS (SCOTLAND)

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Case No: 4105781/2022

Held in Edinburgh on 28-29 March & 24 July 2023

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Employment Judge Sangster

Mrs H Barclay

**Claimant
Represented by
Mr D Stevenson
Lay representative**

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Asda Stores Limited

**Respondent
Represented by
Ms A Akers
Barrister**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

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The judgment of the Tribunal is that the claimant's complaint of constructive dismissal succeeds. The respondent is ordered to pay the claimant the sum of **£8,962.30** by way of compensation

REASONS

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Introduction

1. The claimant presented a complaint of constructive unfair dismissal on 26 October 2022. Early conciliation had taken place from 4-6 October 2022.
2. The respondent resisted the complaint.
3. A joint bundle of documents was lodged in advance of the hearing, extending to 288 pages. 64 further pages were added to the bundle, with consent, during the hearing.

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ETZ4(WR)

4. The claimant gave evidence on her own behalf. The respondent led evidence from:
- a. Lindsay Fleming (**LF**), Senior People Manager for the respondent
 - 5 b. Hazel Heard (**HH**), Online Trading Manager for the respondent;
 - c. Alistair Brown (**AB**), George & General Merchandise Trading Manager for the respondent
 - d. Collette McSorely (**CM**), General Store Manager for the respondent.
- 10 5. The other individuals referenced in this judgment are as follows:
- a. Andrew Midgley (**AM**), Store Manager of the Jewel Store;
 - b. Donna McFadden (**DM**), the Fresh Counter Manager at the Jewel Store;
 - c. **LM** the claimant's line manager;
 - 15 d. Hazel Watt, (**HW**), Section Leader for the In Services Department.

Issues to be determined

6. The complaints brought were discussed at the outset of the hearing. It was noted that the only complaint before the Tribunal was of constructive dismissal. Parties had agreed a list of issues which was included in the joint bundle. That identified the issues to be determined by the Tribunal as follows:
- 20 *Constructive Unfair Dismissal*
7. Was the claimant constructively dismissed by way of her resignation on 29 September 2022?
- 25 8. Did the respondent breach any implied term of the claimant's contract of employment? The claimant relies on the following:
- a) From October 2021 until March 2022, both prior to and after lodging her grievance on 7 November 2021, the claimant complained to the respondent informally about harassment by LM but no sufficient action was taken.
 - 30 b) In about March 2022, during the grievance appeal process, the claimant was told that she would not be allowed to go back into the bakery.

- c) The grievance outcome was that LM was found to have harassed the claimant, but no disciplinary or other action was taken against her, whereas the claimant was moved to another section.
- d) The respondent failed to support the claimant in accordance with Occupational Health recommendations. It failed to allow her to use the quiet "Purple Room" when feeling anxious and failed to ask how she was feeling.
- e) In the summer of 2022, the claimant was transferred to a stressful department (checkouts and self-scan).
- f) After that, in the summer of 2022, LM pulled down her mask and sniggered at the claimant, but no action was taken against her.

The respondent denies that it acted in breach (whether fundamental, anticipatory, or otherwise) of any express or implied term of the claimant's contract of employment.

9. Did such a breach amount to a repudiatory breach of the contract of employment? The claimant says that the respondent's breached the implied term of trust and confidence.
10. Did the respondent, by the matters set out above (if proven) taken singly or cumulatively, without proper cause conduct itself in a manner which was calculated or likely to destroy or seriously damage the relationship of trust and confidence between itself and the claimant?
11. If so, was the behaviour such that would permit the claimant to resign and claim constructive dismissal?
12. If there was a repudiatory breach, did the claimant affirm the contract of employment and waive that breach? The respondent submits that she did, by waiting too long before resigning.
13. Did the claimant resign because of any such repudiatory breach?

Remedy - Unfair Dismissal

14. If the claimant's claims are upheld, the claimant seeks: compensation only
15. What financial loss, if any, has the claimant suffered as a result of any constructive unfair dismissal?
- 5 16. If the claimant has suffered financial loss, what financial compensation is appropriate in all of the circumstances?

Matters Arising During Hearing

17. Following the conclusion of the claimant's evidence, Mr Stevenson confirmed that the claimant was no longer relying on the circumstances set out in paragraph 8.f) above, namely that in the summer of 2022, LM pulled down her mask and sniggered at the claimant, but no action was taken against her.
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18. On 10 July 2023, in an email sent to the Tribunal and copied to the respondent, Mr Stevenson confirmed that the claimant was not seeking an award in relation to pension loss, should her unfair dismissal claim succeed.

15 Findings in Fact

19. The Tribunal found the following facts, relevant to the issues to be determined, to be admitted or proven.
- 20 20. The respondent operates a Grievance Procedure. Under the heading 'The Grievance Outcome', the Grievance Procedure sets out that a Grievance Summary template document, which includes findings, a summary of the reasons for the outcome and recommended actions, must be completed when a grievance hearing has finished. It also states that the *'colleague who raised the original concern must be told the outcome of the grievance investigation. Each point of the colleague's original grievance and the reasons for the decision must be confirmed in writing within seven days, using the template letter in the toolkit.'* The Grievance Procedure states that *'where a colleague who was complained about has breached company standards and or policy so significantly that informal resolution isn't appropriate, the Disciplinary Policy will be applied'*. Under the heading 'Considerations' the Grievance Procedure
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states *'It's important when writing an outcome letter for a bullying and harassment case to consider the difference in style between this and an outcome letter for a grievance, for example: the outcome of a bullying and harassment complaint must be written sensitively as this is likely to relate to an individual's perceptions, feelings and emotions. The writer must acknowledge the complainant's feelings in the letter, no matter what the outcome of the hearing is.'*

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21. The claimant commenced employment with the respondent, as a Bakery Assistant, at their store at the Jewel, Edinburgh, on 7 May 1998. In around 10 October 2020, LM became the claimant's supervisor. Prior to that point, the claimant had had no issues in relation to her employment and enjoyed her job.
22. The claimant and LM did not have a good working relationship. The claimant 15 felt that LM spoke down to her and treated her differently to everyone else. She raised this with LM and DM, LM's line manager, on numerous occasions between November 2020 and March 2021, but there was no improvement. On 20 April 2021, the claimant commenced a period of sickness absence, due to stress at work. While she was off her father passed away. She returned to 20 work, following a period of bereavement leave, on 11 May 2021.
23. Following her return to work the claimant and LM participated in mediation to 25 try to resolve the relationship issues. The claimant explained that she felt that LM treated her differently to others and did not support her. She requested that LM treat her more sympathetically and speak to her in a more professional manner and tone. LM stated that she felt that she could not ask the claimant to do tasks, as she may not react well to that. It was agreed that they would try to work together civilly and that there would be weekly check-ins to see how the relationship was building.
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24. The claimant did not feel that LM's attitude towards her changed following the mediation. While DM asked her, in passing and when on the shop floor, whether she was OK, there was no formal follow up in relation to the mediation, which the claimant had understood would be done on a weekly basis, following 35 the mediation.

25. On 7 November 2021, the claimant sent a letter to AM, raising a grievance. She stated that she had been harassed and treated unfairly in the bakery since November 2020 and mediation had not resolved the situation. She stated that the outcome she was seeking was disciplinary action against LM.
26. The claimant commenced a period of absence due to work related stress from 9 November 2021. She attended occupational health on 3 December 2021. The report, provided to the respondent by occupational health, noted that the claimant loved her role in the bakery and felt would be unfair if she required to move from that role due to the situation with her colleague. On 7 December 2021, the claimant attended the store to hand her fit note to DM. She raised with DM that she did not want to be off work, but felt she could not return while LM was in the bakery. She stated that she felt that she had been unsupported by management since she had raised concerns about LM's attitude towards her. She indicated that she would be in a position to return to work on 21 December 2021 and would like her grievance hearing to take place that day.
27. The claimant returned to work on 21 December 2021, but did not undertake any work that day. Instead, her grievance hearing took place that day. HH conducted the meeting and was accompanied by a note taker. The claimant was accompanied by a trade union representative. The claimant explained the history of her issues with LM, the fact that they had participated in mediation, but that there had been no improvement and that she felt unsupported by management. She stated that she loved her job in the bakery, felt like she was being forced out and it should not be her who required to move departments. She stated however that, if LM was not moved from the bakery, she could not work there. The meeting was adjourned while HH spoke to AM about where the claimant should work. On her return HH informed the claimant that it was proposed that the claimant work in self-scan for a 3-week period, while the grievance was investigated. The claimant indicated that she would do so, feeling that she had little option but to agree.
28. The claimant commenced working in the self-scan department on 23 December 2021 (22 December 2021 being a non-working day for the

claimant). She had a return to work interview that day, which was conducted by HW. It was noted that the claimant was anxious about returning to a different department. HW stated that the claimant was *'doing the department a huge favour in supporting [them] in during this busy trading period' and that the claimant would be trained in the self-scan area and 'if [the claimant was] feeling overwhelmed she can take a timeout and [go] to the back office area to calm down.'* No procedure was specified for the claimant taking time out, when

29. The claimant was on holiday from 1-4 January 2022 inclusive and returned to work on 6 January 2022. She attended a meeting on 7 January 2022 with HH, where she was informed that her grievance was upheld.

30. HH completed a grievance outcome summary which stated, as the reason for upholding the grievance, *'[LM]'s different treatment of [the claimant]. Failure to get to know [the claimant]. Inability to build and maintain a working relationship. Unfair treatment due to the length of time its taken to deal with the situation. Lack of follow through of mediation and complaints. Evidence of [the claimant]'s mental health being affected well documented O/H.'* In relation to recommendation HH stated in her summary report *'Mediation to take place and follow-up to be adhered to. Both parties have agreed to this...harassment was going on for a period of time which is unacceptable, and the issues must be dealt in a timely manner.'*

31. On 11 January 2022, HH sent a letter to the claimant entitled 'Grievance Outcome'. The letter set out the grounds of the grievance and that there had been a meeting to discuss the grievance on 21 December 2021, which was adjourned to allow further investigation and reconvened on 7 January 2022. In relation to the outcome, the letter stated simply *'After careful consideration of all the facts, I can confirm my decision is: to uphold your original complaint'*.

32. The claimant submitted an appeal on/around 7 January 2022. She stated that the reasons for her appeal were that she disagreed with the way the grievance was handled and didn't believe that the respondent's policies were used fully on making the final decision.

33. A grievance appeal meeting, conducted by AB, took place on 11 February 2022. The claimant stated that she didn't believe that the appropriate action was taken against LM, given that it had been found that she had harassed the claimant and treated her differently. She stated that she understood that LM remained in her role, while the claimant herself had been forced out of her department after 24 years and she was unhappy working at self-scan. AB asked whether the mediation, referenced in the grievance outcome, had taken place. The claimant confirmed that she had not heard anything since her grievance outcome meeting. The appeal meeting was adjourned to allow AB to undertake further investigation and consider an outcome.
34. The claimant continued to work in the self-scan department following the grievance appeal meeting. She became unfit to work from 22 February 2022 as a result of stress. She remained certified as unfit to work by her GP until 30 March 2022. On that date she attended for an occupational health assessment, conducted by telephone. A report was provided to the respondent later that day stating that the claimant didn't feel supported by management in relation to her upheld grievance and that the claimant was *'experiencing symptoms of anxiety and depression in relation to occupational factors.'* Counselling was recommended.
35. The claimant returned to work on 1 April 2022. She undertook counselling sessions, provided through the respondent's occupational health service.
36. The grievance appeal meeting was reconvened on 12 April 2022. At that meeting AB informed the claimant that he was content that the grievance was correctly determined and that it was not appropriate to share with the claimant what, if any, action had been taken in relation to LM. He stated however that he was aware that no action had been taken in relation to LM as yet, and he had followed up re that. He acknowledged that mediation ought to have taken place, but had not. He indicated that this would be arranged as soon as possible. He stated that he had concluded that the claimant had agreed to move to self-scan/front end on a permanent basis during the grievance hearing. The claimant stated, repeatedly, that this was not the case. AB stated

that any move from front end back to the bakery now would require to be made by the store manager: AB could not make that decision in the appeal process.

- 5 37. The claimant remained working in the self-scan department following the grievance appeal outcome. She understood that her previous role had been filled by someone else prior to the conclusion of the grievance process. LM continued in the bakery. Mediation did not take place and the possibility of mediation was not raised again with the claimant. The claimant attended for a further review with occupational health on 12 May 2022. The report provided
10 to the respondent thereafter stated that the claimant *'would benefit from continuing support from management regarding her work situation'* and *'extra time out for breaks'*. It was agreed, in relation to the extra breaks, that she could use the 'Purple Room' for these. No process/procedure was indicated for the claimant taking those extra breaks.
- 15 38. The claimant attended a further occupational health assessment on 7 June 2022. The report provided to the respondent noted that the claimant was *'experiencing symptoms of anxiety and depression in relation to occupational stressors'* and *'does not feel supported by management with regards to a recent grievance case which was won in her favour'*. She was referred for, and
20 undertook, further counselling sessions thereafter.
39. On 8 August 2022, the claimant took time out in the Purple Room, as had been agreed. When she was there a colleague and a manager came in and told her
25 she could not be there, that she needed to *'get her arse out and get work done'* and return to the shop floor straight away. The claimant was extremely upset at this. Her anxiety was heightened as a result and she felt embarrassed and ashamed at requiring to use the Purple Room.
- 30 40. The claimant commenced a further period of absence due to sickness on 9 August 2022, returning to work on 22 August 2022. She raised a grievance in relation to the conduct of her colleague and the manager on her return, by letter dated 24 August 2022. The claimant was on annual leave from 25 August to 8 September 2022. On her return to work, on 8 September 2022, she meet
35 with CM and another manager to discuss her grievance. She agreed with CM's

suggestion that her grievance be dealt with informally, through mediation. An informal meeting was held between the claimant and her colleague (but not the manager) on 13 September 2023.

5 41. The claimant concluded that she could not continue in her role. She still felt extremely aggrieved about the way her previous grievance had been dealt with, including the fact that she had been moved from the bakery and no action had been taken against LM. She felt unsupported by management and, from the comments made to her on 8 August 2022, felt that this would continue to
10 be the case if she continued in her role.

42. On 13 September 2022, the claimant resigned from her employment, giving 2 weeks' notice. She stated in her letter that *'It is with regret I have come to this decision. I am left with no choice and feel bitterly disappointed at the lack of support and mistreatment I have suffered during the last 18 months, having
15 been forced out the bakery department I worked for 24 years through no fault of my own. This has led to a dramatic change in my mental health and lack of confidence within myself. It was very unfair I was put in a different department, after all I was harassed by [LM] & treated different. If this was dealt with correctly, I wouldn't have to leave the bakery department. I have been loyal
20 and hardworking within my 24 years service with Asda. Since been at front end it has been very difficult working in the department due to a working toxic [environment] & lack of support after occupation health recommendations were put in place. I feel I have no choice but to leave a job I previously loved for the sake of my health. Asda have failed to support me adequately. I feel it is [inexcusable] the way I have been treated in the last 18 months, especially
25 when the grievance outcome was found in my favour. So I hereby give you 2 weeks notice. My last day will be Thursday the 29th of September.'*

30 43. The claimant's employment terminated on 29 September 2022. An exit interview was conducted that day. The claimant then met LF about a complaint she had submitted to the respondent about her treatment. She handed in her keys and pass before leaving.

44. There was some discussion, by text and at the instigation of LF, about the claimant potentially taking up an alternative position at another Asda Store, following the termination of her employment. The claimant ultimately determined however that she could not return to work for the respondent.
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45. The claimant latterly earned £10.10 per hour in her employment with the respondent and worked 30 hours per week. Her weekly pay was £303 gross and £283 net.
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46. The claimant commenced alternative employment, as a housekeeper in a children's nursery, on 17 October 2022. She works 30 hours per week and earns £9.50 per hour. Her weekly pay is £285 gross and £271 net. The claimant remains in that role and is not seeking alternative employment.

Submissions

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47. Mr Stevenson, for the claimant, gave an oral submission. He referred to the relevant tests in section 95 ERA. In summary, he submitted that, viewed objectively, the facts demonstrated that there had been a fundamental breach of the implied term of trust and confidence, entitling the claimant to resign and claim constructive dismissal. He referred to the case of ***The Leeds Dental Team Ltd v Rose*** UKEAT/0016/13 regarding the relevant tests to be applied and
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- Waltons & Morse v Dorrington*** EAT/69/97 in relation to his assertion that the claimant should not be taken to have affirmed the contract.
48. Ms Akers, for the respondent, submitted, in summary, that the case of ***Malik v BCCI*** 1997 ICR 606, HL emphasised that a breach requires to be sufficiently
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- serious. There is accordingly a threshold to be met. The respondent's actions did not meet that threshold and did not amount to a breach of the duty of trust and confidence. The claimant's assertion that it did is undermined by the fact that she engaged in discussions with the respondent, following her resignation, about the possibility of returning to work in a different store. If there was a
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- breach, the claimant, by her actions, affirmed the contract. The respondent's evidence should be preferred to that of the claimant.

Relevant Law

49. Employees with more than two years' continuous employment have the right not to be unfairly dismissed, by virtue of s94 ERA. 'Dismissal' is defined in s95(1) ERA to include what is generally referred to as constructive dismissal. Constructive dismissal occurs where the employee terminates the contract under which he/she is employed (with or without notice) in circumstances in which he/she is entitled to terminate it by reason of the employer's conduct (s95(1)(c) ERA).
50. The test for whether an employee is entitled to terminate his contract of employment is a contractual one. The Tribunal requires to determine whether the employer has acted in a way amounting to a repudiatory breach of the contract, or shown an intention not to be bound by an essential term of the contract (***Western Excavating (ECC) Ltd v Sharp*** [1978] ICR 221). For this purpose, the essential terms of any contract of employment include the implied term that the employer will not, without reasonable and proper cause, act in such a way as is calculated or likely to destroy or seriously damage the mutual trust and confidence between the parties (***Malik v Bank of Credit and Commerce International Ltd*** [1998] AC 20).
51. Conduct calculated or likely to destroy mutual trust and confidence may be a single act. Alternatively, there may be a series of acts or omissions culminating in a 'last straw' (***Lewis v Motorworld Garages Ltd*** [1986] ICR 157).
52. As to what can constitute the last straw, the Court of Appeal in ***Omilaju v Waltham Forest London Borough Council*** [2005] IRLR 35 confirmed that the act or omission relied on need not be unreasonable or blameworthy (although it will usually be so), but it must in some way contribute to the breach of the implied obligation of trust and confidence. Necessarily, for there to be a last straw, there must have been earlier acts or omissions of sufficient significance that the addition of a last straw takes the employer's overall conduct across the threshold. An entirely innocuous act on the part of the employer cannot however be a final straw, even if the employee genuinely,

but mistakenly, interprets the act as hurtful and destructive of their trust and confidence in the employer.

53. In order for there to be a constructive dismissal, there must be a breach by the employer of an essential term, such as the trust and confidence obligation, and the employee must resign in response to that breach (although that need not be the sole reason - see **Nottinghamshire County Council v Meikle** [2004] IRLR 703). The right to treat the contract as repudiated must also not have been lost by the employee affirming the contract prior to resigning.
54. The Court of Appeal in **Kaur v Leeds Teaching Hospital NHS Trust** [2018] IRLR 833 set out guidance on the questions it will normally be sufficient for Tribunals to ask in order to decide whether an employee has been constructively dismissed, namely:
- a. What was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, his or her resignation?
 - b. Has he or she affirmed the contract since that act?
 - c. If not, was that act (or omission) by itself a repudiatory breach of contract?
 - d. 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 implied term of trust and confidence?
 - e. Did the employee resign in response (or partly in response) to that breach?
55. If an employee establishes that they have been constructively dismissed, the Tribunal must determine whether the dismissal was fair or unfair, applying the provisions of s98 ERA. It is for the employer to show the reason or principal reason for the dismissal, and that the reason shown is a potentially fair one within s98 ERA. If that is shown, it is then for the Tribunal to determine, the burden of proof at this point being neutral, whether in all the circumstances,

having regard to the size and administrative resources of the employer, and in accordance with equity and the substantial merits of the case, the employer acted reasonably or unreasonably in treating the reason as a sufficient reason to dismiss the employee (s98(4) ERA). In applying s98(4) ERA the Tribunal
5 must not substitute its own view for the matter for that of the employer, but must apply an objective test of whether dismissal was in the circumstances within the range of reasonable responses open to a reasonable employer.

Discussion & Decision

10 56. The claimant claimed that the respondent was in breach of her contract of employment by their actions which, cumulatively, breached the implied duty of trust and confidence.

15 57. In considering the claimant's claim of constructive dismissal based on actions which she asserts cumulatively breached the implied duty of trust and confidence, the Tribunal considered the tests set out in ***Kaur v Leeds Teaching Hospital NHS Trust***. The Tribunal's conclusions in relation to each element are set out below.

20 58. **What was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, his or her resignation?**
The most recent act relied upon by the claimant was the respondent's failure to allow her to use the Purple Room when she was feeling anxious on 8 August 2022.

25 59. **Has he or she affirmed the contract since that act?** The Tribunal found that the claimant had not affirmed the contract since the most recent act on the part of the respondent, which the claimant stated caused, or triggered, her resignation. She was absent due to illness immediately after the incident and raised a grievance about the incident during that period of absence. She
30 returned to work on 8 September 2022 and had a discussion about how her grievance would be addressed that day. She resigned a few days later. She did not affirm the contract in that period. The Tribunal noted that the claimant resigned giving two weeks' notice, but found that she did not affirm the

contract by doing so. The terms of s95(1)(c) ERA provide that a dismissal takes place where an employee resigns, with or without notice, in circumstances in which the employee is entitled to terminate the contract without notice by reason of the employer's conduct. Thus, in an unfair constructive dismissal claim, the act of giving notice cannot, by itself, constitute affirmation.

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60. **If not, was that act (or omission) by itself a repudiatory breach of contract?** The claimant did not assert this to be the case, so there was no requirement to consider this.

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61. **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**?** The Tribunal noted that the Court of Appeal in *Omilaju* stated that the act or omission relied upon need not be unreasonable or blameworthy, but it must, in some way, contribute to the breach of the implied obligation of trust and confidence. An entirely innocuous act on the part of the employer cannot be a final straw, even if the employee genuinely, but mistakenly, interprets the act as hurtful and destructive of their trust and confidence. The test of whether the employee's trust and confidence has been undermined is objective.

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62. The Tribunal found that the respondent's failure to allow the claimant to use the Purple Room on 8 August 2022 was not an innocuous act and could, in principle, amount to a final straw. That act did not 'land in an empty scale', it had to be considered in light of the other, previous, conduct relied upon. The Tribunal accordingly then considered whether the actions/omissions relied upon, viewed cumulatively, amounted to a repudiatory breach of the claimant's contract of employment. In doing so, it considered each of the acts relied upon by the claimant as cumulatively breaching the implied term of trust and confidence. The Tribunal reached the following conclusions in relation to each:

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- a. **From October 2021 until March 2022, both prior to and after lodging her grievance on 7 November 2021, the claimant complained to the respondent informally about harassment by LM but no sufficient action was taken.** The Tribunal accepted the claimant's assertion that insufficient action was taken in relation to the claimant's complaints in relation to LM's conduct towards her. Whilst they were investigated, the grievance findings were that the claimant had been harassed by LM. The claimant was not sufficiently supported by management during and after the grievance process: she was simply moved to a different department, contrary to her clear and, repeatedly expressed, wishes. Following the grievance outcome, no consideration was given to the claimant returning to work in the department she had worked in for 24 years, despite the fact that her complaint was upheld and LM's actions were found to have been inappropriate. Mediation was recommended, but this did not take place, even after it was identified during the appeal process that this action remained outstanding. Recommended actions in relation to LM were not progressed.
 - b. **In about March 2022, during the grievance appeal process, the claimant was told that she would not be allowed to go back into the bakery.** The Tribunal concluded that this conduct was established.
 - c. **The grievance outcome was that LM was found to have harassed the claimant, but no disciplinary or other action was taken against her, whereas the claimant was moved to another section.** This is linked to a. above and covered in the Tribunal's conclusions regarding that.
 - d. **In the summer of 2022, the claimant was transferred to a stressful department (checkouts and self-scan).** This is linked to the above points and covered in the Tribunal's conclusions regarding those.
 - e. **The respondent failed to support the claimant in accordance with Occupational Health recommendations. It failed to allow her to use the quiet "Purple Room" when feeling anxious and failed to ask how**

she was feeling. Occupational health reports received by the respondent repeatedly indicated that the claimant did not feel supported by management and that her symptoms of anxiety and depression were related to 'occupational stressors'. The respondent took no action in relation to these red flags: They did not discuss matters with the claimant or take any action to provide further support to the claimant in the workplace, other than indicating that she could use the 'Purple Room' when she was feeling anxious. Her use of that room was however entirely undermined by the respondent on 8 August 2022.

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63. The Tribunal concluded that the points established above, viewed cumulatively, amounted to a breach of the implied term that the employer will not, without reasonable and proper cause, act in such a way as is calculated or likely to destroy or seriously damage the mutual trust and confidence between the parties. A breach of the implied term of trust and confidence, is generally, by its nature, a repudiatory breach (*Morrow v Safeway Stores plc* 2002 IRLR 9, EAT). The Tribunal concluded that the respondent's conduct in this case amounted to a repudiatory breach of contract.

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20 64. **Did the employee resign in response (or partly in response) to that breach?** The Tribunal accepted the claimant's evidence that she resigned in response to the breach. This was also clear from the terms of her resignation letter.

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65. For the avoidance of doubt the Tribunal did not accept that the fact that the claimant engaged in some discussion about the possibility of returning to work in another Asda store undermined her position. The conversation was instigated by LF, following the claimant's resignation, and the claimant concluded relatively swiftly that she could not in fact return to work for the respondent.

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66. Given these findings the Tribunal concluded that the claimant was constructively dismissed by the respondent. The Tribunal found that this was an unfair dismissal.

Remedy

67. Having found that the complaint of unfair dismissal succeeds, the Tribunal moved on to consider remedy.

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Basic Award

68. Given the claimant's age at the date her employment terminated (52 years' old), length of service (24 years) and gross weekly salary (£303) the claimant's basic award is **£7,726.50**.

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Compensatory Award

69. The claimant's employment terminated on 29 September 2022. She secured alternative employment, commencing 17 October 2022. While her earnings in that role are very slightly less than they were with the respondent, the Tribunal concluded that it was not just and equitable to award losses from 17 October 2022 onwards, as the claimant is content in her current role and has not sought alternative employment since commencing in that role and does not intend to do so.

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20 70. The Tribunal calculated the financial losses incurred by the claimant as follows:

Loss of earnings - 2.6 weeks at £283	£ 735.80
Loss of statutory rights	£ 500.00
Total Compensatory Award	£1,235.80

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30 **Employment Judge: M Sangster**
Date of Judgment: 15 August 2023
Entered in register: 16 August 2023
and copied to parties

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