



EMPLOYMENT TRIBUNALS

Claimant: Mrs C Gibson

Respondent: Liverpool Victoria Financial Services Ltd

Heard at: Watford (Hybrid) **On:** 30 October – 2 November 2023

Before: Employment Judge Davey

Representation

Claimant: In person

Respondent: Ms Catherine Urquhart, counsel

RESERVED JUDGMENT

The claimant's claim of unfair dismissal pursuant to s95(1)(c) of the Employment Rights Act is not well founded and is dismissed.

REASONS

Introduction

1. By a claim form presented on 4 August 2022, following a period of early conciliation from 5-9 June 2022, the claimant brought complaints for unfair dismissal (constructive), age discrimination and unlawful deduction of wages in respect of holiday pay accrued but unpaid and wrongful dismissal in respect of her notice period.
2. By a response form presented on 17 September 2022, the respondent denied the claims. The respondent disputed that the claimant had been dismissed and asserted she had resigned, albeit it argued that if the tribunal concluded she was dismissed she was dismissed fairly in any event.
3. At a preliminary hearing on 1 February 2023, a list of issues was agreed and the claimant's claim for age discrimination was dismissed upon withdrawal.
4. The claims for holiday pay and notice pay were dismissed upon withdrawal on 25 July 2023.
5. The only claim before me was for constructive unfair dismissal.

The hearing

6. I heard the claim on 30 and 31 October, 1 and 2 November 2023. The hearing was a hybrid hearing.

The evidence

7. I had a hearing bundle of 825 pages.
8. There were eight witness statements and I heard oral evidence from these witnesses as set out below.
9. For the claimant:
 - 9.1 Mrs Caroline Gibson (the Claimant) who gave evidence in person.
 - 9.2 Mr Gregory Batterbee, (Chair of the Employee Consultative Forum [ECF] with the respondent until his employment ended) who gave evidence via CVP.
 - 9.3 Mrs Sarah Walters (Customer Service representative at the respondent until her employment with the respondent ended) who gave evidence via CVP.
 - 9.4 Ms Sophia Munford (Project Manager/ECF representative until her employment with the respondent ended) who gave evidence in person.
10. For the respondent:
 - 10.1 Mrs Elaine Roethenbaugh (Customer Services Manager) who gave evidence in person.
 - 10.2 Mrs Naomi Suttie (Customer Service Team Manager) who gave evidence via CVP.
 - 10.3 Ms Jude Nicol (Head of Customer Experience until her employment with the respondent ended) who gave evidence via CVP.
 - 10.4 Mr Richard Brown (Business Transformation Director) who gave evidence in person.

The issues for the tribunal to decide

11. Constructive unfair dismissal

- (i) Was the claimant dismissed, i.e.
 - (a) were matters in bold below a fundamental breach of the contract of employment, and/or did the respondent breach the so-called 'trust and confidence term', i.e. did it, without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously to damage the relationship of trust and confidence between it and the claimant?

- (b) if so, did the claimant affirm the contract of employment before resigning?
 - (c) if not, did the claimant resign in response to the respondent's conduct (to put it another way, was it a reason for the claimant's resignation –it need not be the reason for the resignation)?
- (ii) The conduct the claimant relies on as breaching the trust and confidence term is:
- (a) The Claimant claims that she was taken through a disciplinary in June 2021 when there was no evidence of any misconduct. The Claimant says this was evidence of the Senior Management Team's harassment and bullying. She claims that there were false accusations and lies made against her. She acknowledges that she was not issued with any formal sanctions at that time.
 - (b) The Respondent's decision to investigate a complaint received by the Respondent on 9 March 2022 from its third-party cleaning contractor reporting that a member of staff (subsequently identified as the Claimant) had been rude to one of the cleaners. The Claimant disputed what was alleged to have happened and denied swearing at the cleaner and/ or that her behaviour was bullying.
 - (c) Being accused of bullying the cleaner.
 - (d) The Claimant alleges that the Respondent used the incident as a means of making a series of accusations against her during a meeting on 21 March 2022 (conducted by Elaine Roethenbaugh). The Claimant alleges that she was being accused of being a liar during the meeting.
 - (e) The conduct of Elaine Roethenbaugh in calling the meeting on 29 March 2022 "a catch-up meeting" when it was intended to be something else. (It was intended to be a without prejudice/s111A meeting which was declined so the parties can refer to this meeting and its contents). Following this, she alleges that she was then informed by Elaine Roethenbaugh that the trust had broken down and that the disciplinary investigation would move to the next stage. (This was then placed on hold pending the outcome of a grievance raised by the Claimant against Elaine Roethenbaugh/ the Senior Management Team (based at Hitchin) ("SMT").)
 - (f) The Claimant alleges that the actions of Elaine Roethenbaugh (and the SMT) was a form of pay-back for her speaking out and standing up for herself and her colleagues. The Claimant contends that she was a valued member of the team and her line manager did not have any issues with the quality of her work.
 - (g) The Claimant alleges that the Respondent did not follow its Disciplinary procedures properly in relation to the cleaner incident. **[She relies on these matters as a breach of contract also]**. Her specific allegations in this respect are as follows:

a. The respondent broke their own disciplinary procedures when conducting the misconduct hearing in July 2021. At the initial Investigation stage, they failed to tell me that I was attending an investigation meeting, I was simply invited to a regular 'catch-up' meeting with my Team Leader. They then failed to investigate the claims against me properly. From initial 'investigation meeting' to a conclusion and notification that they would take it to a formal Misconduct Hearing, it took my Team Leader less than 3 hours to complete this whole process. Even when I was invited to the Misconduct Hearing, LV did not make it clear what I was being accused of. I was not found guilty of any Misconduct.

The following are all said to relate to a breach of the respondent's own disciplinary policies in respect of the cleaner incident:

b. It states that 'if you raise a related grievance during the disciplinary process, we'll normally deal with this at the same time, but not halt the disciplinary process'. LV threatened a further allegation against me during the grievance process but held off speaking to me about it until after the grievance process was finished.

c. It states that 'We'll do our best to make sure that no one investigating your case or chairing your Disciplinary hearing or appeal has a conflict of interest'. ER is a manager who has bullied and harassed me for a long time, and I can prove that she lied to me in 2019 where she alleged that two colleagues wrote emails to her complaining about my behaviours. I have proof of this and these conversations at the time, by way of emails and file notes made at the time. When making a recent Data Subject Access Request to LV, I specifically asked for these emails; they were not provided to me and clearly did not exist.

d. It states that "For most misconduct issues your manager will be best placed to chair the meeting and also look into the circumstances around your misconduct, although they may elect for another manager to do this". When I asked my manager Daisy Hardwick (DH) why I was being invited to an 'Investigation meeting' with ER on the 21/03/22 she informed me that she was not allowed to tell me what this investigation was about or even tell me why ER was conducting it.

e. It states that "If, we haven't been able to resolve things informally..... we'll start the formal disciplinary procedure". I should have been given at least 48 hours notice before any hearing or conclusion of the 'investigation' and this should have been in writing. In addition to this I should also have had the right to bring a companion (this is a statutory right) and been provided with evidence before the meeting. ER simply sent me an email asking me to attend a 'catch-up' meeting with less than

an hour's notice. I had to insist on a 3rd party being in attendance, which she reluctantly agreed to less than 10 minutes before I was due to meet with her. I was not informed on the results of the 'investigation' but told that trust had clearly broken down between us and that she wanted me to agree to an 'off the record chat' to leave the business. ER informed me I had to agree to this there and then. I asked for clarification of what they meant and then refused to have this conversation, as I was completely unprepared for such a turn of events.

f. It states that "If we're considering dismissing you or taking action short of dismissal, we will say so in the letter inviting you to the disciplinary hearing and your manager will consult HR". This did not happen, as stated above.

g. LV broke their own Discipline Procedures regarding their Senior Managers; "Our Regulators rules require our designated Senior Managers and 'key function holders' to be fit and proper to carry out their functions'. ER and other members of the SMT operated a culture of bullying and harassment that the Executive Committee were clearly aware of. Two members of the SMT left LV just two months after my departure from LV (Jude Nichol and Michelle Davies), which I believe confirms that the Executive Committed finally acted upon the level of complaints being made against the SMT.

h. LV's Disciplinary Procedures clearly states that Misconduct covers any unacceptable behaviour, the first of which is "Offensive or abusive language including swearing" yet a Senior Manager, Jude Nichol sent an email to all her employees on the 06/05/2022 stating "I have been known to use the odd profanity from time to time, so I will be doing a swear jar challenge. I'll keep you all updated on my progress and if I have to re-mortgage my house in the process..... ". This clearly related to the amount of swearing she did in the workplace! Managers at LV had one rule for them and another for their subordinates.

- (h) The Claimant relies on the grievance process and outcome of the grievance hearing on 30 May 2022 and the alleged failure to properly address all of the issues she raised and not uphold her grievances.
- (i) The Claimant alleges that she was not invited to attend the LV Engage meetings on 30 May 2022-1 June 2022 and was excluded from the same due to her grievance and that it was presumed she would leave soon.
- (iii) If the claimant was dismissed: what was the principal reason for dismissal and was it a potentially fair one in accordance with sections 98(1) and (2) of the Employment Rights Act 1996 ("ERA");
- (iv) If so, was the dismissal fair or unfair in accordance with ERA section 98(4), and, in particular, did the respondent in all respects act within the so-called 'band of reasonable responses'?

Findings of fact

12. The relevant facts are set out below. Where I have had to resolve any conflict of evidence, I indicate how I have done so at the material point. Most of the factual issues were not disputed.
13. The claimant was employed by the respondent from 17 July 2017, as a Customer Service Representative until her resignation on 7 June 2022, which took effect on 6 July 2022. The claimant worked full-time (35 hours) via a compacted hours contract between Monday and Thursday.
14. The respondent is a financial services company operating across three sites - Bournemouth (head office), Exeter and Hitchin. The claimant was based at the Hitchin site.
15. There is an employee consultative forum (ECF) within the respondent which is the staff representative body. The ECF worked with the respondent with regards to internal policies, practices and to voice staff concerns which it would feed back (anonymously) to HR and the senior management team (SMT). ECF representatives would also attend disciplinary and grievance meetings with colleagues.
16. As far as the claimant was concerned, there were various issues over the course of her employment that were of concern to her (and other colleagues). The claimant was never an ECF representative though took it upon herself to frequently raise concerns, often at meetings where employee feedback was an agenda item. This was not disputed by the respondent.
17. There was a whole company customer service meeting on 8 May 2019 which introduced Ms Linzi Harrison, Customer Experience Director and Ms Jude Nicol, Head of Customer Experience (retirement solutions). The claimant raised concerns at this meeting about poor staff retention, poor training and bullying. Ms Nicol and the claimant had a discussion after this meeting and at a follow up meeting on 14 May 2019.
18. On 11 July 2019, the claimant attended an 'open' door' event hosted by Ms Harrison with a view to stating her gratitude to Ms Nicol but raising concerns that things were still difficult for staff. The claimant stated at this meeting that she thought the meeting would not include managers (it did). This resulted in everybody, except for Ms Harrison and Ms Victoria Hughes leaving the meeting. The claimant and her colleague waited outside for 20 minutes then went back to their desks.
19. On 18 July 2019, the claimant attended a monthly '121' meeting with her line manager at the time, Mr Steven Blackmore and was told that the respondent was investigating her 'behaviours' with Ms Harrison at the 'open door' meeting the previous week. Ms Hughes was also present at this meeting. The claimant was alleged to have been 'disdainful' and 'rude' during the meeting and had 'made others in the meeting feel uncomfortable'. The claimant denied these allegations. No formal disciplinary action was taken but a note was placed on the claimant's personnel file.
20. There was a meeting between the claimant and Mrs Elaine Roethenbaugh on 12 November 2019. The claimant wanted to know why she had not been

transferred into the 'specialist team' and Mrs Roethenbaugh told her she had caused distress to two colleagues, Ms Gillian Grieves and Ms Clare Wills and Mrs Roethenbaugh had email evidence from both confirming the claimant's 'aggressive behaviour'. There was an email exchange between Mrs Roethenbaugh and the claimant in late November 2019, with the claimant requesting and Mrs Roethenbaugh refusing to provide copies of these emails.

21. On 17 June 2021, at 9.30am, the claimant attended what she thought was a 'catch-up' meeting with her line manager at the time, Ms Gaia Brooker. The meeting had been scheduled to start at 9am but due to IT issues, it started at 9.30am. The claimant was told at the beginning of this meeting it was fact finding investigation meeting about four matters of concern as set out below.

21.1 On 4 May 2021, there was a complaint from an independent financial adviser (IFA) following a call with the claimant that morning. The IFA was chasing payment for a fee which was 'indecent' (outside the respondent's agreed levels). The claimant commented to the IFA during the call 'that's a very large for an increase isn't it, gosh almighty, sometimes you just wince at these fees' and 'we get so many people that call us directly because they don't want to speak to their financial advisers because they know they are going to be charged a fortune'. She then went on to say that the matter was in a backlog and could not be progressed faster. This complaint was initially raised in with the claimant by Mr Brooker in May 2021 and it was dealt with, at the time, as a 121 and training issue.

21.2 There was a 'lync' conversation between the claimant and Mr Damien Vaz on 2 June 2021. Lync is the respondent's internal communication system. Mr Vaz said 'Hi Caroline, can you take the call that's been waiting 40 minutes please.' The claimant responded with 'I finish at 5.30 and am trying to finish an application – as I am not in for the rest of the week.' Mr Vaz responded with 'I sent the message at 5.19, if you are on the late you need to be available to take phone calls.' By an email dated 2 June 2021, Mr Vaz reported this to Mrs Roethenbaugh stating the message was sent at 5.19pm and cutting and pasting the lync message into this email though omitting to include the time the message was sent. The claimant asserted she received the message from Mr Vaz at 5.30pm, the end of her shift.

21.3 There was a lync conversation on 10 June 2021, between the claimant and Mr Conner Gray, Business Account Manager, who alleged the claimant had been rude in the conversation and complained about this to Ms Brooker on the same day. The claimant disputed that she had been rude.

21.4 The claimant attended a team Zoom meeting on 16 June 2021. Whilst in the meeting, she heard the song 'Celebrate Good Times' by Kool and the Gang playing and commented 'What good times do we have to celebrate?' She then saw members of the SMT appearing on her screen one by one. This was described by the respondent as a 'Zoom bomb', the purpose of which was to thank staff for their hard work. The claimant's response was considered to be bad for team morale whereas the claimant thought the Zoom bomb and song was inappropriate given the difficult working conditions of the team at the time.

22. On the same day, 1.30pm, the claimant attended the outcome of that morning's investigation meeting and was informed that Ms Brooker recommendation was to send this to a formal (disciplinary) hearing because 'of the content and also because there are a number of issues'. Ms Brooker thanked the claimant for providing the 'lync' conversation with Mr Gray and stated she did not think the claimant had been rude and confirmed this was being removed as a misconduct allegation at the forthcoming disciplinary hearing. Ms Brooker also stated she didn't know who the hearing manager would be to which the claimant responded it had to be someone who had not managed her previously as this would be 'utterly unfair'.

23. The claimant was unhappy about not being informed about the investigation meeting in advance and considered this to be a breach of both her statutory rights, with reference to taking a representative/companion, and the disciplinary policy. Its policy states the following:

There is no statutory right to representation during a fact finding/investigation meeting but we will always seriously consider any request to have someone with you and its appropriateness.

24. On 22 June, there was a conversation between Ms Brooker and Mrs Roethenbaugh about Ms Victoria Hughs being the hearing manager. The discussion revolved around the likelihood that the claimant would object to Ms Hughs due to past involvement (see paragraph 19). Mrs R's position was that 'you don't get to dictate who holds the meeting'. The respondent's policy in this regard states the following:

'We'll do our best to make sure that no one investigating your case or chairing your Disciplinary hearing or appeal has a conflict of interest. The manager holding the hearing will normally be more senior than you in the hierarchy.'

25. There was a further 'lync' conversation on 24 June, Ms Brooker says to Mrs Roethenbaugh that Ms Hughs confirmed involvement in a previous investigation and the claimant thought she had been unfair, she went on to say 'bearing this in mind are we still ok for her to lead with this investigation as it is supposed to be impartial?' Mrs R responds with 'I think we should refer to Lorna (HR). I think we should run with it but if they object we can always try and find someone else maybe from another site'. Later that day Mrs Roethenbaugh says 'I have spoken to HR, we will take outside of S & R...totally impartial' to which Ms Brooker responds 'Okay, I do think that's best with what she's like'.

26. Ms Naomi Baumbach (now Mrs Suttie and referred to as such for the remainder of this decision) who was a 'Customer Service Team Manager' was appointed as the hearing manager and wrote to the claimant on 28 June inviting her to a disciplinary hearing on 21 July. The letter does not explicitly state the allegations, instead it states 'there have been a number of complaints against you regarding your behaviours'.

27. The claimant attended the disciplinary hearing on 21 July. At the beginning of the hearing, she said to Mrs Suttie 'I don't know what I have been accused of. I have been given evidence but not actual allegations'. Mrs Suttie stated 'As we go through the meeting we will clarify each allegation'. The claimant had prepared her own statement to support her position that none of the allegations were supported by evidence and that there was added stress and pressure to her role during this period due to backlogs, stressful calls from customers and

a lack of training and support. Her statement included information on the four allegations as set out in paragraph 21 above and two further 'potential allegations' – one from Mr Darsh Williams (who received the IFA complaint) who commented the claimant had been rude to him stating 'She laughed at me last week when I had a query for another adviser and was incredibly rude'. The other matter was about Ms Michelle Davis' comment 'I assume this will see her go straight to a disciplinary given recent history'. This was with reference to the complaint from Mr Vaz. The claimant relied on this statement during the hearing to set out her position in connection with the allegations and supplied a copy, by email, to Mrs Suttie. During the hearing, Ms Suttie confirmed the allegations were the IFA complaint, the complaint from Mr Vaz and the 'Zoom bomb' comment and explained she needed to make some further enquiries with Ms Brooker before considering the evidence and arranging a disciplinary outcome meeting.

28. Mrs Suttie made further enquiries with Ms Brooker who confirmed that after the IFA complaint she had discussed this with the claimant and had intended to arrange a 121 meeting and offer training and support via a performance improvement plan though this kept getting postponed and then the other complaints came in so training and support was never provided.
29. The disciplinary outcome meeting was held on 5 August. Mrs Suttie told the claimant that no disciplinary action would be taken. Mrs Suttie stated during the meeting that 'My conclusion in relation to all three allegations made against you, is that I feel a conversation should have been held with you at the time to explore the root cause and what support (if any) you needed to see immediate improvement occur. In all of the situations, I feel you should have been given the opportunity to explain your reasons and give context but I do not have evidence that this took place.' With reference to the IFA complaint, Mrs Suttie further explained that the claimant had been correct to question the fee, though she should not have done this directly with the IFA. Mrs Suttie reviewed the original lync messages, sent between 5.30pm and 5.32pm and confirmed the outcome of the claimant's refusal to take a call at 5.30pm was reasonable as this was the end of her shift though she did state it was not for the claimant to specify who should have taken the call in her place (as she did). Mrs Suttie acknowledges to the tribunal that with hindsight, she should have been clearer about the outcome of the 'Zoom bomb' incident' which she did not reference at the outcome meeting. She told the tribunal, with reference to this incident, that the claimant's behaviour could have been improved, again referencing a lack of support. She told the tribunal that the claimant would have been familiar with the respondent's expected behaviours as detailed in the personal development review provided to all employees. She recommended training and support via 121 meetings and a performance improvement plan (PIP). The claimant told the tribunal that Mrs Suttie 'seemed very fair and handled it very well'.
30. Mrs Suttie told the tribunal that in her view, the allegations were sufficient to warrant disciplinary action though should not have gone to a disciplinary because there wasn't a sufficient paper trail. She said 'To me, it didn't address each incident. A better conversation and a better plan should have been put in place so if something doesn't go right, it is easy to see what happened'.
31. There was a meeting between the claimant and Ms Brooker on 9 August. Following the recommendations of the disciplinary outcome, Ms Brooker discussed putting a PIP in place. The claimant was very resistant and upset

that the respondent planned to put her on a PIP despite being found to be 'not guilty'. She was also resistant to Ms Brooker's attempts to get the claimant 'back on the phones'. Taking calls was not the claimant's primary task at the respondent, she only took 'overflow calls'. The claimant was not taking calls from the public or IFAs at this time (albeit she was making calls). Her position was that she was finding the calls very stressful and wanted further training and support (as recommended by Mrs Suttie).

32. The claimant has stated that it was a very difficult work environment at the time of the investigation and disciplinary. This was due to a combination of a restructure and a return to office working following covid restrictions. Staff were dealing with huge backlogs and often very irate and angry callers whose claims and payments had not been processed resulting in poor staff retention and stress. The difficult working environment was acknowledged in evidence by Ms Nicol, Mrs Roethenbaugh and Mr Brown. Mr Battersea and Mrs Munford also confirmed that the ECF were dealing with feedback from employees, particularly the customer experience team (CEXP) working on the phones in Hitchin, where the claimant was based, that there was high staff turnover and increased workload and stress. Ms Munford told the tribunal that staff at the Hitchin site were not confident speaking up about these concerns for fear of reprisal from the SMT.
33. The claimant was never provided with the recommended training and support. Unfortunately, the claimant experienced the death of her brother in June 2021 and her father in August 2021, which resulted in a period of leave followed by a need to use up annual leave, resulting in the claimant spending less time in the workplace than usual for the remainder of 2021.
34. There was an 'all employee meeting (AEM) on 16 February 2022. This was a Zoom meeting and approximately 350 staff members and executive committee members were in attendance. The claimant attended in the afternoon and together with two colleagues, raised issues of concern including poor staff retention, overwork and understaffing. Following this meeting, the claimant had a meeting with Mr Martin Searle (who had taken over Mrs Roethenbaugh's role) and discussed the same with him. She also raised concerns that the SMT were not feeding back concerns to the executive committee and were also providing incorrect performance data, which Mr Searle disputed.
35. Following the AEM, the claimant was contacted by Mr Greg Batterbee, chair of the ECF who stated the ECF had been raising these concerns with the SLT though it was not reaching the Executive Committee. Mr Batterbee told the tribunal that following the AEM, the ECF would also feedback to Ms Deirdra Davies, a member of the Executive Committee.
36. In February 2022, the claimant moved into a new team under the management of Ms Daisy Hardwick. At the end of February, Ms Hardwick took the claimant off of the PIP stating 'Caroline is always here before me and does not leave 'til after me. I have no issues with the quality of work she produces'.
37. On 9 March, Mrs Roethenbaugh, who was at the Hitchin site at the time, received a complaint from 'Jackie' the cleaning manager at IFM, an external facilities provider (also based on the Hitchin site) that one of their cleaners 'Becca' had been cleaning the toilet area and an employee, subsequently identified by Becca as the claimant, was there cleaning her teeth. Becca was

running the hot water tap in one of the sinks which she had been instructed to do by her manager to flush through germs. The claimant asked her why she was doing this and in response to Becca's explanation, is alleged to have said 'that is total bullshit' and then walked out and this had left the cleaner feeling very upset.

38. The claimant was invited to a 'fact finding discussion' with Mrs Roethenbaugh on 21 March in connection with this incident. She was not given any further information about the nature of the incident in advance. Both parties made a note of the hearing. The claimant's note was produced on 30 March. The only date on the respondent's 'investigation meeting' note is the date of the meeting itself and a copy was not sent to the claimant after the meeting so it is not clear if this was a contemporaneous note. There is a significant overlap in the content of both sets of notes, so I have only reproduced the part of the claimant's note that substantially differs.

38.1 Extract respondent's investigation notes

ER Becca was cleaning and running the taps do you remember anything that you said to her?

CG I basically asked her why she was wasting water and running the taps. I said to her it was a waste of resources. Nothing more than that. She was running the tap for at least 5 minutes. I am an environmentalist and there are people out there that don't have access to water so I asked her why she would do this.

ER Do you deny saying to her that it was complete bullshit when she explained that she was just doing what she had been instructed to do?

CG It was a general chat. It's her word against mine.

ER Becca was very upset as a result of the incident

CG She did not seem upset to me.

ER Do you deny swearing at her? Can you think of any reason why Becca would say that you did?

CG I don't know why she would say that and don't remember her being upset.

ER From my perspective, Becca was just a young lady trying to do her job. She has no axe to grind with you. When she came to me about your behaviour, she did not know your name and this only came about once she pointed you out to me.

CG I explained about the waste of water. I have nothing else to add.

ER It is not acceptable to swear at anyone and I have given IFM my assurance that this will not happen again. This is not the first time I have had to speak to you about your pattern of behaviour.

CG There is no pattern of behaviour.

ER You have been spoken to before. Becca made it clear to me that you swore at her.

CG I did not swear at her. It's her word against mine.

38.2 Extract from the claimant's file note

Elaine also said that reflecting on my behaviour it borders on bullying. I replied that I had never been accused of bullying and could not see how a brief one-off conversation with someone would make me guilty of such a thing.....

You have a daughter, how would you feel if someone swore at her? I replied yet again that I did not swear at her.

39. The claimant was unhappy about Mrs Roethenbaugh being the investigation manager at this hearing for two reasons.

39.1 The first was because she considered Mrs Roethenbaugh to be conflicted (see policy extract at paragraph 24).

39.2 The second was with reference to the meeting not being conducted by the claimant's then line manager, Ms Hardwick. The policy states:

'For most misconduct issues your line manager will be best placed to chair the meeting and also look into the circumstances around your misconduct, although they may elect for another manager to do this. It may be necessary though, in the case of serious misconduct issues or those of gross misconduct, that we have separate investigation and hearing managers.'

40. Mrs Roethenbaugh told the tribunal she appointed herself as hearing manager because she had taken the complaint, it was a third party, she was a senior manager based at Hitchin and she did not want to damage the claimant's relationship with Ms Hardwick.
41. There is a dispute of fact about whether Mrs Roethenbaugh accused the claimant of lying and that she stated the claimant's behaviour bordered on bullying. Mrs Roethenbaugh disputes this and the claimant told the tribunal 'I am not mistaken, those two comments really hurt me'. Mrs Roethenbaugh's comments - such as 'It is not acceptable to swear at anyone and I have given IFM my assurance that this will not happen again' and 'You have been spoken to before. Becca made it clear to me that you swore at her' implies that Mrs Roethenbaugh thought the claimant was lying. The respondent's meeting notes are not verbatim. Mrs Roethenbaugh was clearly aggrieved during this meeting, on balance, I find that she did state that the claimant's behaviour bordered on bullying.
42. On 29 March, at 3.08pm Mrs Roethenbaugh invited the claimant to a 'follow up' meeting at 4pm. The claimant asked if a HR representative would be present and was told by Mrs Roethenbaugh 'No, this meeting only needs you and I to attend'. There followed a series of emails between Mrs Roethenbaugh and the claimant and eventually, Mrs Roethenbaugh agreed to the presence of a HR representative.
43. The claimant had anticipated an investigation meeting follow up whereas this meeting was planned as an 'off the record' meeting under s111A Employment Rights Act 1996. The claimant told the tribunal that she was invited by Mrs Roethenbaugh to have an 'off the record' chat. Mrs Roethenbaugh told the tribunal she was reading from a script provided by HR and recalled stating that the relationship between the parties had broken down but did not recall referencing termination whereas the claimant says she referenced both. I prefer the claimant's evidence. I accept Mrs Roethenbaugh's evidence that she was reading from a script, however, the purpose of a s111A conversation is to discuss termination of employment so it would necessitate at least a reference to this at invite stage.
44. The claimant was shocked by this turn of events, asked what the conversation would involve and was told she would have to agree to it first. She declined to have this conversation. Following her decision, Mrs Roethenbaugh informed her that the respondent would take things to the next stage. The meeting ended.
45. On 2 April, the claimant submitted a grievance form. She supplemented this with a detailed email on 4 April. The claimant stated at the beginning of the grievance:

'This grievance is raised against Elaine Roethenbaugh and several members of the Hitchin Senior Management Team (SMT). They have harassed and victimised me over several

Case Number: 3310074/2022

years. I do not know for certain what it is that has prompted such awful behaviours from Elaine and the Hitchin SMT, but I suspect that it has its roots in the fact that I sometimes have the courage to speak out when managers treat me and others poorly. There is a culture of bullying by the Hitchin SMT which covers the complete range of behaviours from refusal to answer reasonable questions through to the use of disciplinary proceedings to harass and victimise people. I suspect that my "card was marked" the moment that I asked questions in open team meetings. It should be noted that on many occasions I had colleagues say to me "I'm so glad that you questioned or said that - I would never have been brave enough".

46. The claimant raised several specific complaints dating back to 2019, including the 2019 investigation resulting in the file note (see paragraph 19) and the dispute with Mrs Roethenbaugh over the two emails (see paragraph 20). In addition to the claimant's general complaints about the behaviour of the SMT towards her, she complained about the investigation and the disciplinary in 2021, the investigation meeting into 'the cleaner incident' on 21 March 2022 and the proposed s111A meeting on 29 March 2022. The claimant argued the latter two meetings were triggered by her decision to speak up at the AEM on 16 February about the working conditions of herself and colleagues (see paragraph 34).
47. On 13 April, the claimant received an email from HR informing her that Mr Warren Bright had been appointed to investigate her grievance. The claimant responded on 14 April to say that she objected to Mr Bright's appointment as he was closely associated with the Hitchin SMT and wanted a senior independent manager with no working relationship with Mrs Roethenbaugh and the SMT. On 27 April, the claimant was told that Mr Richard Brown (Business Transformation Director) who was based in Bournemouth had been appointed as the grievance hearing manager.
48. On 6 May staff were sent a 'Friday Round Up' from Ms Nicol. In one section in this email, Ms Nicol states 'being of Jock decent I have been known to use the odd profanity from time to time, so I will be doing a swear jar challenge. I'll keep you updated on my progress'.
49. On 11 May, the claimant attended a grievance hearing by Zoom with Mr Brown and Ms Suzie Tideswell (Strategic People Partner). The claimant stated she had been bullied for years and had three files of documents on Mrs Roethenbaugh. She stated that she had spoken up at the AEM in February about what is going on in Hitchin in terms of work environment and culture of bullying and consequently, she was now being investigated over a simple conversation with a cleaner which had turned into a massive incident. She stated she had fought and won before but was tired of it and that she had planned to work until her retirement in three years but now wanted to leave. The grievance hearing lasted about 45 minutes and the following day the claimant sent Mr Brown documents linked to her complaints.
50. On 24 May, the claimant received an email from Ms Hardwick that said 'we have had a complaint from a 3rd party, and we will be speaking to her about this following the conclusion of her grievance'. The claimant asked Ms Hardwick what this was about and was told that she had been instructed by Mr Searle to use these exact words in the email, which she did. The incident was from IFM who managed the reception area of the respondent. The claimant was alleged to have given the finger to a member of the reception staff when challenged about a parking issue. The claimant was never told about the nature

of the incident during her employment and only learned about it during these proceedings.

51. The grievance outcome hearing was held on 30 May. Mr Brown decided not to investigate matters dating back to 2019 and limited his investigation to incidents from and including the disciplinary in 2021 (the policy states that complaints that were more than six months old would not usually be investigated). In summary, the outcomes to the complaints were as follows:

51.1 The allegation that the claimant had been bullied and harassed by Mrs Roethenbaugh, on more than one occasion, was not upheld. Mr Brown said he found no evidence to support this allegation.

51.2 The allegation that the claimant had been bullied and harassed by Ms Nicol, on more than one occasion, was not upheld. Mr Brown said he had found no evidence to support this allegation.

51.3 The allegation that the SMT had given false data and hidden areas of concern from the executive committee was not upheld. Mr Brown's reason was that 'accurate service metrics and service issues have been raised with senior management and regular governance meetings during 2021 and 2022'.

51.4 The decisions to investigate the incident linked to the cleaner and for Mrs Roethenbaugh to conduct the investigation were not upheld. Mr Brown's reason was that a third party had made the complaint, Mrs Roethenbaugh had taken the lead as one of the most senior members of staff at the Hitchin site and the respondent was following agreed processes.

51.5 The allegation that the SMT were out to get the claimant following the AEM meeting was not upheld. Mr Brown's reason was that he had spoken to Mr Searle (who had discussed the claimant's concerns with her after the AEM) and Mr Searle had said that he and the claimant had 'an honest and open conversation and as far as he was concerned, the matter was closed'. He also stated that he and Ms Hardwick had no performance concerns about the claimant.

52. Mr Brown partially upheld the allegation about the disciplinary in 2021. He also commented on the relationship between the claimant, Mrs Roethenbaugh and the SMT. The outcome letter stated the following:

'You alleged that behaviours towards you by Elaine and other senior leaders in CEXP has been continually negative as you continue to speak up about areas of concern, and that you feel the working relationship between you all has broken down. After my investigation, I would agree that the relationship between all parties has broken down. I believe that both parties have shown some behaviours that were not in keeping with the values at LV due to the breakdown in the relationship. This can be shown in the 2021 investigation where a small cluster of low level incidences were combined into a formal investigation, which subsequently found no evidence of wrongdoing, but which I am sure was distressing to you. One of the outcomes given was that your conduct towards others, could have been more professional and it was recommended you receive additional training to support your personal development. Regrettably this training and support has not been forthcoming. As such this part of your grievance is partially upheld.

53. The grievance outcome letter concluded by stating that Mr Brown would be making recommendations to the CEXP leadership team on improvements in

leadership process and culture and that the claimant had seven days to appeal the decision.

54. The respondent held a series of 'LV engage meetings' between 30 May and 1 June. The claimant was not invited. In the claimant's evidence, she alleged she was the only member of her team excluded' and this was because of her grievance and because there was a perception she would soon be leaving whereas the respondent stated that approximately 1 in 4 members of staff were randomly invited to these meetings. I accept the respondent's position that not all staff were invited. The claimant's performance was not a concern at the time and she had a good relationship with Ms Hardwick and Mr Searle, there would have been no reason to exclude her from the LV engage meetings if all staff were invited.
55. On 7 June 2021, the claimant sent her resignation letter to Mr Brown and Ms Armstrong stating she considered that she had been constructively dismissed. An extract from the letter states the following:

Following the recent Grievance process that I instigated and the subsequent results of this, I no longer have any confidence, trust or faith in LV and its ability to handle matters fairly.

I am therefore considering myself constructively unfairly dismissed.

I have called in sick today and am consulting with my doctor regarding the levels of stress that I am experiencing as I no longer feel able to come into work under these conditions.

As stated, I no longer have any trust, faith, or confidence that I am being treated fairly by the managers of LV. I have been worn down by false allegations made against me. The latest alleged 'incident' with the cleaner is the last final straw. My physical and mental health have suffered greatly since being accused on the 21/03/22 of such a grossly exaggerated 'incident' which occurred on the 09/03/22. My Team Leader has been aware of this and has reported my distress to HR on several occasions, but still the harassment continues.

Even whilst waiting for the outcome of my Grievance Hearing, I am threatened yet again, by being told that "we have had a complaint from a third party, and we will be speaking to you about this following the conclusion of your grievance". I was not told who this complaint is from or what it relates to. I had to take a couple of days holiday after being presented with this information, to try and pull myself together. This has added yet more stress to an already very difficult situation, and I am in a complete state of shock at the way in which I am being treated.

56. The Claimant was signed off sick from 7 June for the remainder of her employment with work related stress.
57. Ms Armstrong responded to the resignation letter on 12 June to confirm if the claimant intended to resign as she had not explicitly given notice and offering her an extension to appeal the grievance if she wished to do this. The claimant replied by confirming the resignation and that her fit note was to cover her contractual notice period. The claimant also stated 'I am worrying all the time about what I will be accused of next, and it is mentally destroying me' and 'My health has suffered greatly over the past year and this latest 'grossly exaggerated incident' has shaken me to my core'. The latter presumably being a reference to the 'cleaner incident'.

Relevant law

58. Pursuant to s.94 of the Employment Rights Act 1996 (ERA), an employee is entitled not to be unfairly dismissed by his employer. An employee is dismissed by his employer if he 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 (s.95(1)(c) ERA).

59. Section 94 ERA 1996 provides as follows:

"The right.

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

(2) Subsection (1) has effect subject to the following provisions of this Part (in particular sections 108 to 110) and to the provisions of the M1Trade Union and Labour Relations (Consolidation) Act 1992 (in particular sections 237 to 239)."

60. Section 95 ERA provides as follows:

"95 Circumstances in which an employee is dismissed.

(1) For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2) F1. . . , only if)—

(a) the contract under which he is employed is terminated by the employer (whether with or without notice),

[F2(b) he is employed under a limited-term contract and that contract terminates by virtue of the limiting event without being renewed under the same contract, or]

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

61. Section 98 ERA 1996 provides as follows:

"98 General (1)

In determining for the purposes of this part whether the dismissal of an employee is fair or unfair, it is for the employer to show –

(a) The reason (or, if more than one, the principal reason) for the dismissal, and

(b) That it is either a reason falling within sub section (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held."

62. S111A ERA 1996 provides as follows:

111A Confidentiality of negotiations before termination of employment

(1) Evidence of pre-termination negotiations is inadmissible in any proceedings on a complaint under section 111.

This is subject to subsections (3) to (5).

(2) In subsection (1) " pre-termination negotiations " means any offer made or discussions held, before the termination of the employment in question, with a view to it being terminated on terms agreed between the employer and the employee.

- (3) Subsection (1) does not apply where, according to the complainant's case, the circumstances are such that a provision (whenever made) contained in, or made under, this or any other Act requires the complainant to be regarded for the purposes of this Part as unfairly dismissed.
- (4) In relation to anything said or done which in the tribunal's opinion was improper, or was connected with improper behaviour, subsection (1) applies only to the extent that the tribunal considers just.
- (5) Subsection (1) does not affect the admissibility, on any question as to costs or expenses, of evidence relating to an offer made on the basis that the right to refer to it on any such question is reserved.]

63. S10 Employee Relations Act 1999 provides as follows:

10 Right to be accompanied.

(1) This section applies where a worker—

- (a) is required or invited by his employer to attend a disciplinary or grievance hearing, and
- (b) reasonably requests to be accompanied at the hearing.

[F1(2A) Where this section applies, the employer must permit the worker to be accompanied at the hearing by one companion who—

- (a) is chosen by the worker; and
- (c) is within subsection (3).

64. To establish constructive dismissal, the employee must prove that the employer was in fundamental breach of his contract, that he resigned in response to the breach, and that he did not act prior to resignation in such a way as to affirm the contract (*Western Excavating (ECC) Ltd v Sharp* [1978] ICR 221).

65. In *Malik v BCCI* [1997] IRLR 462, the House of Lords confirmed that a term is implied into every employment contract 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 confidence and trust between employer and employee. The test is objective.

66. A breach of the implied term of mutual trust and confidence is always such a fundamental breach (*Woods v WM Car Services (Peterborough) Ltd* [1981] IRLR 347). With reference to a 'fundamental breach', in *Frenkel Topping Limited v King* UKEAT/0106/15/LA - the EAT observed "the need for Tribunals to be mindful that for there to be a breach of the implied term of trust and confidence the conduct complained of must be really serious". It is not enough for an employer to have behaved unreasonably, although unreasonable behaviour might be an indicator of a fundamental breach, the test is a contractual one (*Buckland v Bournemouth University Higher Education Corporation* [2010] EWCA Civ 121).

67. The test does not require the tribunal to ask what the actual intention was. The employer's subjective intention is irrelevant. If the employer acts in such a way that, considered objectively that his conduct is likely to seriously damage the relationship of trust and confidence, then he is taken to have the objective intention spoken of (Leeds Dental Team Ltd v Rose [2014] IRLR. 8, EAT). Equally, an employee's subject belief that the relationship of trust and confidence has been breached, no matter how strongly held, is equally irrelevant (London Borough of Waltham Forest v Omilaju [2005] IRLR 35).
68. A breach of trust and confidence might arise not because of any single event but because of a series of events. In the latter kind of case an employee can rely on a "last straw" which does not itself have to be a repudiation of the contract. The key cases are the decisions of the Court of Appeal in London Borough of Waltham Forest v Omilaju [2005] IRLR 35, more recently reaffirmed in 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 of constructive dismissal will fail.
69. A serious breach of the employer's disciplinary and/or grievance process at both original and appeal stages is capable of constituting a breach of the implied term of trust and confidence (Blackburn v Aldi Stores Ltd [2013] IRLR, 846). In BBC v Beckett [1983] IRLR 43 the EAT accepted that it can be a breach of contract for an employer to impose a disciplinary sanction which is out of all proportion to the offence.
70. A delay in resignation which occurs whilst an employee is not otherwise performing the contract (typically, when on sick leave) is less likely to amount to affirmation than if the employee carries on turning up for work. This was discussed in Chindove v William Morrisons Supermarkets PLC UKEAT/0201/13/BA.

Relevant law and conclusions

71. I have used the numbering for each of the issues as set out above, with a brief description of each issue, for the sake of brevity.

Issues (a) and (g), sub-issue a - The 2021 investigation and subsequent disciplinary

72. As there is considerable overlap with the above issues they will be dealt with together.
73. The claimant's position was that she should have been forewarned about the investigation meeting and she had a right to take a representative with her. She told the tribunal she felt 'ambushed'. The disciplinary policy is silent on whether an employee should be given advanced notice of a fact finding/investigation meeting and the respondent's witnesses were unable to confirm any protocol in place that was used to decide when advanced warning was appropriate. The respondents' witnesses also gave conflicting evidence on the appropriateness of not forewarning employees about factfinding/investigation meetings. Ms Nicol did not think it was reasonable for employees not to be forewarned about

the nature of the allegations being investigated and Mrs Roethenbaugh thought it would sometimes be appropriate and this was within policy. Ms Munford confirmed that in her experience as an ECF representative, this was left to the discretion of each manager and I find her evidence on this to be more reliable given the conflicting position of the respondents' witnesses and the lack of any protocol. My finding is that in the absence of any protocol, it was for each manager to decide, on a case by case basis, whether to give advanced notice.

74. The policy correctly states that there is no statutory right to take a representative to an investigation hearing. This right to being accompanied only applies at a disciplinary or grievance hearing (**s10 Employee Relations Act 1999**).
75. The claimant then states that it took her manager less than three hours following the fact finding/investigation meeting to conclude that the matter should be taken to a disciplinary investigation. Of the four allegations, three were taken forward. Mrs Suttie's evidence was that while the allegations were capable of constituting disciplinary action, this matter should not have reached the disciplinary stage because there was 'no paper trail' to support disciplinary action. I accept this to be both a reasonable and reliable assessment of the investigation conducted by Ms Brooker. In my finding, Ms Brooker, guided by her line manager, Mrs Roethenbaugh, did not conduct a fair investigation before making the decision to take the allegations to a disciplinary hearing.
76. Immediately following the decision to take three allegations to disciplinary stage, Mrs Roethenbaugh and Ms Brooker discussed the appointment of the disciplinary hearing manager via lync. Ms Brooker's input is enquiring 'she [the claimant] asked who the hearing manager would be and would expect it not someone who has managed her before, did Vicky (Ms Hughs) manage her before?' Mrs Roethenbaugh's replies 'she managed NB, but you don't get to dictate who holds the meeting. Despite Mrs Roethenbaugh's apparent preference for Ms Hughs to be appointed, HR confirm that an independent manager (from another site) would be appointed. In my finding, the respondent, following the claimant's request and led by HR, made a fair decision in the appointment of Mrs Suttie as hearing manager.
77. The claimant then goes on to state she didn't know what she was being disciplined for. I agree that the invite letter should have stated the specific allegations and the disciplinary pack would have been confusing because it included the allegation about Mr Gray. The claimant was asked why she did not make enquiries with Mrs Suttie about exactly what the allegations were and I accept her response, that she was dealing with the death of her brother between the investigation and the disciplinary hearings. However, the claimant was told at the end of the investigation outcome follow up meeting what matters were being taken forward to the disciplinary, she prepared a detailed statement that covered the three allegations and she also confirmed she was clear by the end of the disciplinary hearing with Mrs Suttie what the three allegations were. I find that while the correspondence could have been clearer, the claimant, nonetheless did understand what the allegations were and was able to represent herself in relation to the same during the disciplinary investigation.
78. There was a disciplinary outcome meeting on 5 August 2021. The outcome was no formal disciplinary sanction. Mrs Suttie did have concerns about the claimant's handling of the call with the IFA and recommended training, a 121

with the claimant's team leader and a PIP. The claimant told the tribunal she thought this was a fair outcome, she said that she (Mrs Suttie) seemed very fair and thought she handled it (the disciplinary investigation) very well. The claimant also stated she had already agreed that the way she handled the matter with the IFA was a training issue and that she could have handled the call better.

79. Mrs Suttie's evidence to the tribunal was that the claimant's 'behaviours' were not always in keeping with LV values though she thought this was better managed through 121 support, training and a PIP. She referenced the IFA call and the comment about the Zoom bomb, as examples of behaviour that was not appropriate. I found her evidence to the tribunal to be balanced and considered and find that the respondent's concerns about some of the claimant's 'behaviours', as confirmed by Mrs Suttie's evidence, to have been reasonable.
80. Turning to a review of the investigation and disciplinary procedure as a whole. My finding is that the investigation process was inadequate as conceded by both Mrs Suttie and Mr Brown whereas the disciplinary investigation conducted by Mrs Suttie was, by the claimant's own acknowledgement, fair.
81. Turning to whether the respondent conducted itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee (**Malik**), I am reminded that this is an objective test (**Malik**) and it is not for the tribunal to establish intention (**Leeds Dental Team Ltd v Rose**) and that tribunals should be mindful of setting the bar too low (**Frenkel Topping Limited v King**). It follows that a fundamental breach of the implied term of trust and confidence will only arise when there is a serious breach of an internal policy (**Blackburn v Aldi Stores Ltd**). The procedure was poorly applied initially though handled fairly once the matter was passed to HR, who appointed an independent hearing manager and subsequently, Mrs Suttie, as confirmed by the claimant, was fair. Further, while there was no formal disciplinary sanction, training and a PIP were recommended based on the way the claimant conducted a call with an IFA, which was inappropriate. In my judgment, neither the disciplinary itself or the way the respondent applied the disciplinary policy were acts (singularly or taken together) calculated or likely to destroy or seriously damage the trust and confidence between the claimant and the respondent. I do not find this act (singularly or cumulatively) to have breached the implied term of trust and confidence?

Issue (g), sub-issue a – h – express breach of contract

82. Turning to the express breach alleged as part of (g) sub-issue a. The respondent's disciplinary policy is stated to be non-contractual. Therefore, any breaches of policy are not breaches of contract. There are circumstances where a disciplinary sanction that is out of all proportion to the offence may constitute a contractual breach, an example of this would be a demotion or pay cut (**BBC v Becket**). However, no disciplinary sanctions were imposed on the claimant following the disciplinary investigation. I find that there was no express breach of the claimant's contract of employment.
83. For the avoidance of doubt and to avoid repetition, my findings, with reference to the alleged breaches of the respondent's disciplinary policy as set out in

issue (g) – subsections b - h are the same as stated above. There has been no disciplinary sanction capable of being an express breach of the claimant's contract of employment. The remainder of my findings will deal with whether the respondent, without reasonable and proper cause, conducted itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between it and the claimant.

Issue (b) - The cleaner incident – decision to investigate

84. The claimant accepted that the respondent had to investigate a complaint from a third party. With reference to the requirement to investigate, she said 'Absolutely, 100%' and then stated 'I do not object to the investigation, I object to the way it was handled'. The claimant accepted this as a reasonable step and she was correct to do so. I find that the decision to investigate the 'cleaner incident' is not a fundamental breach of the implied term of trust and confidence.

Issues (c), (d) and (g), sub-issues c and d - The cleaner incident – the conduct of the investigation and the decision for Mrs Roethenbaugh to appoint herself as the investigation manager and the decision not to appoint the claimant's line manager, Ms Hardwick

85. Issues (c), (d) and (g), sub-issues c and d are dealt with together due to the considerable overlap.

86. In evidence Mrs Roethenbaugh's reasoning for managing the investigation was a combination of the fact that she had taken the complaint, was one of the more senior managers at the Hitchen site and she did not want to damage the relationship between the claimant and Ms Hardwick. Mrs Roethenbaugh told the tribunal she did think she was impartial because the 2021 disciplinary was finished, there was a PIP in place (this had actually been removed by this time), she was working in a different department from the claimant, it was only a fact finding meeting at this stage and she was acting within policy. The claimant's position was that she was conflicted due to allegations she made about the claimant's behaviour towards a number of managers in 2019 (see paragraph 20) and her 'substantial involvement' in the 2021 disciplinary.

87. The policy states your line manager will usually be best placed to conduct the investigation and disciplinary. However, in my finding, a decision to derogate from this would not, in or of itself, constitute a fundamental breach of trust and confidence.

88. I have already found that Mrs Roethenbaugh did imply that the claimant was lying and did say that the claimant's behaviour bordered on bullying. While it is not unreasonable to have a preliminary view of a matter, Mrs Roethenbaugh's manner and conduct of the investigation hearing were not, in my judgement, impartial or fair and both the claimant's objections and concerns were reasonable.

89. The claimant has made numerous references, in the grievance, the witness statement and to the tribunal about this incident being 'such a minor incident' and blown out of all proportion. I disagree. A complaint from a third party that a member of the respondent's staff has sworn at one of its cleaners is not a minor incident and if well founded, is capable of being an act of gross misconduct in

accordance with the respondent's policy. It is not for the tribunal to make a finding on whether the claimant swore at the cleaner or not. The tribunals' role is to assess whether the respondent's conduct, in the way it handled this investigation, was a fundamental breach of the implied term of trust and confidence. Therefore, the potential gravity of the complaint has to be considered in my finding. Mrs Roethenbaugh would have rightly been concerned about the impact on the respondent's reputation and I accept that she may have genuinely considered herself to be the most appropriate person to conduct the investigation in the circumstances.

90. Nonetheless, I find that Mrs Roethenbaugh was not impartial and this is clear from her conduct in the investigatory hearing. As an experienced manager who was no doubt familiar with the respondent's policy in this regard, it is clear from her past involvement (in 2019, 2021 and in her repeated references to the tribunal about the claimant's 'behaviours') that she had a negative view of the claimant that in my judgment impacted on her conduct in the investigatory hearing. She would also have been aware that the claimant would object to her conducting the hearing (as the claimant did via the grievance).
91. After the claimant submitted her grievance, HR removed Mrs Roethenbaugh from the investigation.
92. Despite my finding, lack of partiality and unreasonable conduct will not always be at the very serious level required for there to be conduct that is likely to destroy or seriously damage the relationship of confidence and trust (**Malik**). I find Ms Roethenbaugh's conduct was not at this very serious level. This is a high bar (**Buckland v Bournemouth University Higher Education Corporation** and **Frenkel Topping Limited v King**) and the implied term is shown by the fact that it is only breached if the employer demonstrates objectively by its behaviour that it is abandoning and altogether refusing to perform the contract. Further, Ms Roethenbaugh was removed from the investigation following the claimant's objection in her grievance. I find the way the investigation into the 'cleaner incident' was managed both in terms of policy decisions and the conduct of Mrs Roethenbaugh during the investigation was not (singularly or cumulatively) a fundamental breach of the implied term of trust and confidence.

Issues (e) and (g), sub-issues e and f - The meeting on 29 March 2022

93. Following the investigation into the 'cleaner incident', Mrs Roethenbaugh called the claimant to a catch-up meeting with less than one hour's notice. There followed a string of emails because the claimant wanted somebody else present, which was eventually agreed.
94. The claimant told the tribunal that she was invited by Mrs Roethenbaugh to have an 'off the record' chat. The claimant declined to have this conversation.
95. The purpose of this meeting was to establish if the claimant was interested in having a protected conversation under s111A Employment Rights Act 1996, the section is entitled 'confidentiality of negotiations before termination of employment' and is often referred to as a 'without prejudice' meeting. This confirms that such a conversation would have been to discuss termination of the claimant's employment by mutual agreement. This is a procedure that falls outside of a disciplinary policy or procedure and is a 'closed conversation'. By

its nature, an invite to such a meeting will not be advertised as such and an employer would have to explicitly state the purpose of the meeting (termination of employment) as part of the conversation. While the purpose of such a meeting will be to discuss termination of employment, it is not in and of itself, a 'dismissal' as the termination of employment would be by mutual consent. The claimant did not want to engage in this conversation, Mrs Roethenbaugh told her the investigation would move to the next stage. This would have happened but for the grievance.

96. S111A meetings do not form part of a disciplinary process or procedure therefore the respondent did not breach the disciplinary procedure by inviting the claimant to have a protected conversation.
97. In my judgment and for the reasons stated in the proceeding two paragraphs, the issues raised in section (e) and (g) subsections e and f (singularly or taken together) are not calculated or likely to destroy or seriously damage the trust and confidence between the claimant and the respondent. I accept, as the claimant told the tribunal, that she was 'totally flummoxed'. However, the assessment of a fundamental breach of trust and confidence is objective (**Malik**) and an employee's subject belief that the relationship of trust and confidence has been breached, no matter how strongly held, is not relevant (**London Borough of Waltham Forest v Omilaju**). I do not find this act (singularly or cumulatively) to have breached the implied term of trust and confidence.

Issue (f) - The actions of the senior management team (SMT)

98. I have reviewed this allegation within light of the 2021 disciplinary, 2022 investigation into the cleaner incident and the grievance (see my separate findings in these issues).
99. I have already found that the relationship between the parties had broken down. I accept the claimant's evidence that she spoke up and this did not always go down well with the SMT. This is supported by evidence from Mr Batterbee and Ms Munford, ECF representatives, both of whom raised concerns about the impact on customer facing staff in the Hitchin office due to the difficult working environment between 2020 and 2022. The respondent's witnesses confirmed that the period in 2021 was difficult for customer facing staff.
100. Other than the claimant's allegations about misuse of the respondent's disciplinary policy and procedure (which I have dealt with separately), I have not been presented with evidence of bullying and harassment or that there was a direct link between the claimant's willingness to speak up and the purported behaviours of the SMT. In the circumstances, I do not find the actions of the SMT (singularly or cumulatively) to have breached the implied term of trust and confidence.

Issue (g), sub-issue g - The respondent's failure to follow its own disciplinary procedures regarding the SMT

101. The claimant has not provided evidence specific to this issue other than alleging that Ms Nicol and Ms Davies left two months after she departed and this was because the executive committee had finally acted on complaints against the SMT for bullying and harassment. The claimant has raised the issue

of bullying and harassment by the SMT as part of her complaints elsewhere in these issues (a), (c), (d), (e), (f). She has also raised policy breaches (g). These have been dealt with in the context of each of those issues. With reference to the two managers, Ms Nicol confirmed she left the respondent to work closer to home and Ms Michelle Davies was headhunted by a previous employer. The claimant accepted this explanation and apologised for her error. Therefore, my finding is that the respondent did not breach the implied term of trust and confidence with reference to this issue.

Issue (g), sub-issue h - The swear jar challenge

102. (g) sub-issue h – the respondent’s disciplinary policy about swearing as a potential act of misconduct, Ms Nicol’s swear jar challenge and the investigation into the allegation that the claimant swore at the cleaner.

103. I have dealt with the ‘cleaner incident’ above. As to the swear jar challenge, the claimant did not cross examine Ms Nicol on this point. In her witness statement, Ms Nicol explains that this email, sent on 6 May 2022, was a light-hearted challenge and in the absence of cross examination, I except this to the case. While I can understand why the claimant may have found this upsetting, given the stress she was under at the time, her subjective perspective does not form part of the test for a fundamental breach of trust and confidence (**London Borough of Waltham Forest v Omilaju**). There is a difference between an allegation (potentially of gross misconduct) for swearing at an external contractor and a ‘light-hearted challenge’ not to swear either to oneself or out loud in the workplace. I do not find this act (singularly or cumulatively) to have breached the implied term of trust and confidence.

Issue (h) - The grievance process and outcome

104. The claimant submitted a grievance on 2 May 2022. The complaints are set out in paragraphs 45 and 46 above and there is an overlap between the claimant’s issues to the tribunal and the grievance complaints. Mr Brown, a senior manager based in the Bournemouth site, was appointed to investigate the claimant’s grievance. He had no prior involvement with the claimant and she confirmed this in evidence.

105. It is not the tribunal’s role to step into the shoes of the grievance manager and review his findings. I must assess whether Mr Brown’s management of the process and outcome breached the implied term of trust and confidence.

106. Mr Brown investigated the allegations, agreed to go back to 2021 and partially upheld the claimant’s complaint about the fairness of the 2021 disciplinary because ‘the relationship between all parties has broken down. I believe that both parties have shown some behaviours that were not in keeping with the values at LV’ resulting in ‘a small cluster of low level incidences that were combined into a formal investigation, which subsequently found no evidence of wrongdoing’. He dismissed the other allegations. In evidence, he stated that in his view, Mrs Roethenbaugh was capable of being a fair investigator as ‘Caroline had moved onto another team and all was progressing well’. He also stated he was not able to comment on the allegations made by the claimant that she was called a liar and bully because HR advised him not to as this was still a live investigation so he didn’t look at the cleaner incident in

detail. In my finding, Mr Brown's conduct of the grievance and outcome was overall reasonable though his inability to review the cleaner incident in detail may explain why his investigation in this regard was limited and how he was able to reconcile, incorrectly in my finding, the breakdown in relationships with the SMT (which included Mrs Roethenbaugh) and his assessment that she could subsequently manage the cleaner investigation in a fair and impartial way.

107. The claimant was unhappy with the outcome. She chose not to appeal and that was her prerogative. She stated she had lost all trust in the respondent by this time and resigned shortly after receiving the grievance outcome.

108. A serious breach of the employer's grievance process at both original and appeal stages is capable of constituting a breach of the implied term of trust and confidence (**Blackburn v Aldi Stores Ltd**). There is a significant difference between being unhappy with the process and outcome and that process and outcome constituting a fundamental breach. My finding is that there was not a serious breach of the employer's process. The respondent appointed an independent manager at the claimant's behest, agreed to review complaints going back to 2021 and partially upheld the grievance. Given the ongoing investigation, it was reasonable not to investigate aspects of the 'cleaner incident' so as to prevent a double investigation (with the different agendas of a grievance and then a disciplinary). It follows that I do not find this act (singularly or cumulatively) to have breached the implied term of trust and confidence.

Issue (g), sub-issue b - Decision to halt the disciplinary process during the grievance process

109. On 24 May 2022, the claimant was notified by Ms Hardwick the respondent had received a further third-party complaint. The claimant was not told what this complaint was about and it was put on hold until the grievance investigation had concluded. The complaint was from IFM regarding the claimant's conduct towards reception staff. The claimant was waiting for the grievance outcome at this time, having attended a grievance meeting on 11 May 2022. The policy says 'if you raise a related grievance during a disciplinary process, we'll normally deal with this at the same time, but not halt the disciplinary process'. A disciplinary process, linked to the 'receptionist incident' had not commenced so there was nothing to halt at this stage. Further, the claimant's outcome from the grievance was imminent so it was a reasonable decision to wait for this process to conclude. The second part of this issue relates to the decision not to tell the claimant the nature of the allegation, until after the grievance, having already notified her about its existence. In my finding, this was not reasonable conduct and the respondent should have appreciated this would alarm the claimant. This is further evidence of the breakdown in the relationship of trust and confidence as confirmed by the claimant, Ms Brown and Mrs Roethenbaugh. However, acting in an unreasonable manner is not sufficient (**Buckland v Bournemouth University Higher Education Corporation**). The strength of the implied term is shown by the fact that it is only breached if the respondent demonstrates objectively by its behaviour that it is abandoning and altogether refusing to perform the contract. That did not occur in this instance. I do not find this act (singularly or cumulatively) to have breached the implied term of trust and confidence.

110. Issue (i) - The LV engage meetings

111. Mrs Roethenbaugh's evidence was that only about 1 in 4 employees were invited to these meetings and the claimant was not invited on that occasion. The claimant's evidence had been that she was the only member of her team excluded and the reason she was not invited was because of her grievance and the perception she would soon be leaving. I accept the respondent's position that not all staff were invited and therefore, this was not because of the claimant's grievance or a perception she was leaving. The claimant appears to have accepted this explanation, at least in part, in cross examination by telling the tribunal she should have been invited and even if limited staff were invited, her skills and experience meant she should have been among those invited. In any event, while I accept this would have been upsetting for the claimant, I do not find this act (singularly or cumulatively) to have breached the implied term of trust and confidence.

112. The claimant also referenced this incident as her 'last straw' in her witness statement, though in cross examination, acknowledged her last straw was the cleaner incident through to the grievance outcome and the LV meeting was 'an aside' and not fundamental. Therefore, I find this issue has no bearing on the claimant's decision to resign and is neither a fundamental breach nor a last straw.

Summary of findings

113. The claimant told the tribunal the main issues for her were the 2021 disciplinary investigation, the 2022 cleaner incident and the grievance. I accept that the claimant resigned in response to the latter two issues.

114. I also accept the claimant genuinely considered these issues to have rendered her employment with the respondent untenable and that this impacted on her mental health. I accept the respondent's conduct with reference to the 2021 and 2022 investigations was not always reasonable.

115. However, I find that none of the above acts constitute a fundamental breach of the implied term of trust and confidence, either singularly or cumulatively.

116. I find that the claimant resigned and was not constructively dismissed.

117. Therefore, the claimants claim for constructive unfair dismissal is not well founded and is dismissed.

118. The remedy hearing listed for 10am, by CVP on 19 January 2024 is vacated.

Employment Judge E Davey

Date 16 November 2023

Case Number: 3310074/2022

RESERVED JUDGMENT & REASONS SENT TO THE
PARTIES ON 5 December 2023

FOR EMPLOYMENT TRIBUNALS