EMPLOYMENT TRIBUNALS

Claimant: Ms Samantha Kirwan

Respondent: Cleantec Services Limited

Heard at: Watford Employment Tribunal **On:** 20-21 June 2024

Before: Employment Judge Young

Representation
Claimant: Ms Nankya (FRU representative)
Respondent: Ms Ernestina Afriyie (Consultant)

JUDGMENT by Employment Judge Young dated 21 June 2024 and written reasons having been requested on 26 June 2024 in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Introduction

1. The Claimant was employed by the Respondent, a cleaning company, as a supervisor, from 1 September 2021 until her termination of employment 9 May 2023. Early conciliation started on 24 July 2023 and ended on 23 August 2023. The claim form was presented on 18 September 2023.

The Claims and Issues

2. The Claimant makes a claim for constructive unfair dismissal. The issues as agreed at the start of the hearing are:

    1. Did the Respondent breach the Claimant's contract by unilaterally telling the Claimant that her supervisor duties would be removed at a meeting held on 16 February 2023?

    2. Did the Respondent breach the implied term of mutual trust and confidence by:

a. removing the Claimant's supervisor duties at the February 2023 Meeting unilaterally after her 10 years of service at St Albans High School.
b. failing to consult the Claimant before making the decision to remove her supervisor duties.
c. failing to discuss alternative arrangements that would utilise the Claimant's skills and experience.
d. creating an environment where the Respondent carried out the alleged acts in issues 2(a)-(c) that caused the Claimant to feel undervalued and undermined in her professional capacity?

3. Was the breach so fundamental so as to constitute a repudiatory breach?

4. Did the Claimant leave her employment on 9 May 2023 in response to the breach of contract, and not for some other, unconnected reason?

5. Did the Claimant affirm the new contract and lose the right to claim constructive dismissal?

6. If the Claimant was dismissed, what was the reason or principal reason for dismissal - i.e. what was the reason for the breach of contract?

7. Was it a potentially fair reason?

8. Did the Respondent act reasonably in all the circumstances in treating it as a sufficient reason to dismiss the Claimant?

9. **Remedy**

9.1 If there is a compensatory award, how much should it be? The Tribunal will decide:

9.1.1 What financial losses has the dismissal caused the Claimant?

9.1.2 Has the Claimant taken reasonable steps to replace their lost earnings, for example by looking for another job?

9.1.3 If not, for what period of loss should the Claimant be compensated?

9.1.4 Is there a chance that the Claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason?

9.1.5 If so, should the Claimant's compensation be reduced? By how much?

9.1.6 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?

9.1.7 Did the Respondent or the Claimant unreasonably fail to comply with it the ACAS Code of Practice on Disciplinary and Grievance Procedures?

9.1.8 If so, is it just and equitable to increase or decrease any award payable to the Claimant? By what proportion, up to

25%?

9.1.9 If the Claimant was unfairly dismissed, did she cause or contribute to dismissal by blameworthy conduct?

9.1.10 If so, would it be just and equitable to reduce the Claimant's compensatory award? By what proportion?

9.1.11 Does the statutory cap of fifty-two weeks' pay or £105,707 apply?

9.2 What basic award is payable to the Claimant, if any?

9.3 Would it be just and equitable to reduce the basic award because of any conduct of the Claimant before the dismissal? If so, to what extent?

The Hearing and Evidence

3. The hearing was in person over a period of 2 days. I received a bundle of 116 pages. The Claimant provided an updated schedule of loss dated 20 June 2024. However, on the final day of the hearing (21 June 2024), the Claimant provided a number of iterations of schedules of loss. All iterations were added to the bundle. During the Claimant's evidence, additional documents of the Claimant's qualification certificates were relied upon. The Respondent made no objection to the late disclosure of relevant documentation and the documents were added to the bundle as pages 121-123. I received two written witness statements. First from the Claimant who gave oral evidence and the second statement from Mr Antonia Tavares, Area Manager who gave oral evidence on behalf of the Respondent. After evidence was heard from the parties, the Claimant submitted a new schedule of loss that referred to universal credit not previously mentioned. The Claimant was recalled to the witness stand to give additional evidence on this point and the Respondent was permitted to ask questions about this point.

Findings of fact

4. The following findings are made on a balance of probabilities. All references in square brackets are a reference to the bundle page numbers. Only findings of fact relevant to the issues, and those necessary for the Tribunal to determine, have been referred to in this judgment. It has not been necessary, and neither would it be proportionate, to determine each and every fact in dispute. The Tribunal has not referred to every document it read and/or was taken to in the findings below but that does not mean it was not considered if it was referenced to in the witness statements/evidence and considered relevant. The parties agreed as a fact that the Claimant's continuous employment dated from 12 August 2013.

5. The Claimant started working as a janitor on 12 August 2013 at St Albans High School (the 'School'). The Claimant was TUPE'd transferred a number of times before being TUPE transferred to the Respondent on 24 August 2020 as a janitor. The Claimant's role as a janitor on transfer was initially during the hours of Monday to Thursday 7:00 am to 3:30 pm, Friday 7:00 am to 3:00 pm. The Claimant was paid at a rate of £9.43 at that time. The Claimant's janitor duties included spot cleaning, spillages, refilling

consumables in toilets and ensuring the School was kept as clean as possible during the day.

6. In 2021, the Respondent advertised a supervisor role with the working hours of 5am to 8am and 4pm to 8pm as the Respondent's previous supervisor Mr Healy he had left around May 2021. Mr Haley's hours were the same as the hours advertised for a supervisor.

7. The Claimant had already begun to undertake a business and administrative course in order to increase her career prospects. In June 2021 the Estate Manager of the School, Mr Owen informed the Claimant of the role supervisor and suggested that the Claimant apply for the role. The Claimant was invited to attend an interview, and during the Claimant's interview, she made it clear that she could not work before 7am or after 6:30pm due to transportation issues. Mr Tavares spoke with Mr Owen who approved the Claimant's proposed hours and agreed for her to be offered the supervisor role. In August 2021, the Claimant was informed that she was successful in obtaining the role.

8. On 1 September 2021, the Claimant signed particulars of employment with her new job title set out as "cleaning supervisor" [35]. The Claimant received a new rate of pay of £11.00 and her agreed working hours as a supervisor were from 7-8am and 3pm- 6:30pm. The Claimant's duties as a supervisor included overseeing and coordinating a team of cleaners, ensuring high cleaning standards, handling inventory, and completing timesheets for the cleaning staff to ensure accurate recording of working hours and attendance. However, the Claimant still undertook janitor duties in the hours of 8am-3pm.

9. However, in May 2022, by email dated 16 May 2022 [71] the Claimant explained that she was undertaking supervisory duties throughout all her hours including the janitor hours. By email dated 16 May 2022, the Respondent agreed to pay the Claimant the supervisor rate for the entirety of her hours of work she undertook save 1.5 hours because "*the position of supervisor is mainly to supervise the cleaning team whilst they are carrying out their tasks but understand you are unable to work all these hours so hopefully you will accept this as a compromise*" [72].

10. In early 2023, the School had a meeting with the Respondent. Mr Tavares' evidence was that he was not at the meeting with the School, but he was told by his Regional Manager who was at the Meeting with the School that the School had requested a supervisor who could be present from 5am to 8pm. Mr Tavares explained that there had been complaints about unsupervised cleaners not attending work at all or not on time or not doing the work. Mr Tavares accepted that when he said what happened at the School meeting, he was only conveying what he was told by his Regional Manager. Mr Tavares then spoke to his Regional Manager who told him to meet with the Claimant and inform her of the changes.

11. I do not accept Mr Tavares' evidence that the School insisted at that meeting that they must have a supervisor on site. Mr Tavares provided no evidence of any communications between the Respondent and the School. I heard no evidence from the Regional Manager of the Respondent. In the note of the Meeting that Mr Tavares had with the Claimant later on 16 February 2023, Mr Tavares wrote that the changes to the Claimant's duties was to take place

after the easter break, there was no specific date provided in the note or told by the Regional Manager. Mr Tavares accepted in cross examination that there was no specific date when the change was to take effect.

12. I find that if it was the case that the School insisted on the change to the supervisor's hours, then they would have indicated a time that they wanted the change to be implemented. I did not find Mr Tavares evidence credible on this point. I find that the School did not insist on having a supervisor on site during the cleaner's shift. I find the Respondent wanted a supervisor on site during the cleaner's shift because they were having problems with the cleaners and this in turn led to complaints from the School.

13. The Respondent had no problems with the Claimant's performance or conduct nor did the School. The School did not at any time request that the Claimant be removed from site or the Claimant's supervisory duties be removed from her. On 15 February 2023, Mr Tavares messaged the Claimant on WhatsApp about having a catch up meeting to discuss changes to her schedule/structure the next day [74]. The WhatsApp message did not state that the catch up meeting was a consultation meeting.

14. The meeting took place on 16 February 2023 (the 'Meeting'). At the Meeting Mr Tavares informed the Claimant that there was a new structure and that included her being a daytime janitor and she was no longer required to carry out the task of cleaning supervisor [36]. Although dated 16 February 2023, Mr Tavares wrote a note of the Meeting on 17 February 2023. Mr Taveres accepted in evidence that the note must have been completed when he received the Claimant's sick note which was not until the following day on 17 February but was mentioned in the note of the Meeting. Mr Tavares did not give the Claimant a copy of the note of the Meeting. Mr Tavares accepted in cross examination that the note of the Meeting was not consistent with his written evidence in recording what happened in the Meeting. The note of the Meeting was not titled consultation meeting and there was no mention of the word consultation in the note of the Meeting. In the note of the Meeting after Mr Tavares stated that after he told the Claimant she was no longer required to carry out the task of cleaning supervisor, Mr Tavares wrote that the Claimant *"immediately abandoned the meeting*". However, I find that after Mr Tavares told the Claimant that there would be a new structure and that included her being a daytime janitor and she was no longer required to carry out the task of cleaning supervisor, the Claimant then asked who would replace her, Mr Tavares said it would be Hazel, who was a cleaner that the Claimant had supervised, but had stepped up to cover supervisory duties of the Claimant when the Claimant was not available. The Claimant then asked Mr Tavares if the change was starting from then, Mr Tavares replied "Yes" to the Claimant. Mr Tavares evidence was that he explained to the Claimant that her role was changing because she could not be at the School from opening to closing hours.

15. Mr Tavares accepted that it was after the Claimant asked him who would be carrying out her responsibilities and that the Claimant left the room and returned with the timesheet folder. Mr Tavares accepted that the timesheet folder was the responsibility of the supervisor. Mr Tavares accepted the folder. I find that Mr Tavares would not have accepted the folder if he did not consider that the Claimant was no longer the supervisor. At no point did Mr Tavares say

to the Claimant that she should keep the time sheet folder as she was still the supervisor.

16. I find that Mr Tavares did not tell the Claimant that this was a request from the School as it is not mentioned in his note of the Meeting, and I accept the Claimant 's evidence that she was not told the reason why there was to be a change to her role. After Mr Tavares told the Claimant in the Meeting that Hazel would be replacing her, the Claimant left the room in tears, the Claimant was extremely upset, but returned to the room to hand Mr Tavares the folder of timesheets and store invoices, which was the responsibility of the cleaning supervisor. The Claimant then told Mr Tavares that she was not feeling well and left the Meeting. The Claimant did not ask in the Meeting the reason why her supervisor role was being removed, but the Claimant assumed it was because that the Respondent wanted her to work the hours of 5-7am and 4:30-8pm which the Respondent believed that she could not do. No alternative to the removal of the cleaning supervisor role was put to the Claimant and the Claimant did not ask about alternatives in the Meeting.

17. However, I accept the Claimant's evidence that given the opportunity she would have accepted the changed hours to the role and would have either taken cabs or purchased an electric bike in order to continue the supervisor role. I find that the Meeting was not a consultation Meeting as there was no reference to consultation in the note of the Meeting or the conversation that Mr Tavares had with the Regional Manager. By the time the Claimant had walked out of the Meeting, I find that the Respondent had made a unilateral decision to demoted to the Claimant to the role of janitor and her supervisor role was removed from her and that created an environment where the Claimant was undervalued and undermined by the Respondent.

18. The Claimant went home immediately after the Meeting. The Claimant was shocked and upset about her demotion. The Claimant got herself in a real state, such that when she spoke to a colleague of hers called Coral to explain what had happened at the Meeting, the Claimant could not make herself understood and does not think that Coral understood what she told her.

19. The Claimant contacted her GP and had a telephone appointment with her GP that same evening at around 18:30. The Claimant's GP signed the Claimant off sick with work related stress. The Claimant's appointment was at the end of the day and the GP closed at around 18:30. The Claimant collected her sick certificate from the GP the next day and sent Mr Tavares a screenshot of her sick notes by WhatsApp on 17 February 2023. The Claimant sick note cover the Claimant's absence from 16 February- 5 March 2023 [38]. When the Claimant's sick note was running out, Mr Tavares contacted the Claimant to enquire if the Claimant would be returning to work or would be obtaining another sick note. The Claimant obtained another sick note covering the period of 7 March 2023-16 April 2023 and another sick note covering the period 14 April 2023-24 April 2023. The Claimant was paid sick pay whilst off on sick leave.

20. Mr Tavares did not contact the Claimant at any time to tell her that the Meeting was a consultation Meeting, neither did he tell her that she was wrong to believe that she was no longer the supervisor. Mr Tavares did not follow up after the Meeting with a letter confirming what was discussed at the Meeting,

the next steps, or his note of what happened at the Meeting. Mr Tavares' oral evidence was that because the Claimant had gone off sick that he did not have an opportunity to speak to the Claimant about the fact that a decision in respect of her role had not been made and that there was an alternative option of employing another supervisor on job share with the Claimant. Yet Mr Tavares' written evidence was that *"since the request for a supervisor to be present on site from 5:00 am to 7:00 am and 4:00 pm to 8:00 pm was from the School there was nothing clean tech could have done to change the situation"* [paragraph 19]. This evidence was inconsistent with Mr Tavares' oral evidence. I did not find Mr Tavares evidence credible on this point. Mr Tavares was in a position to write to the Claimant and tell her the alternatives to the removal of her cleaning supervisor role, but he did not. The fact the Claimant was off work sick did not prevent him doing this. Neither did the fact that the Claimant walked out of the Meeting.

21. The Claimant continued to receive WhatsApp messages from other cleaners whilst she was off work. It was only around the end of April 2023 that the Claimant began to calm down and the Claimant started to look for alternative work. The Claimant started looking for other roles she realised that she could not stay at the School as it would bring back what she had gone through and that she could not go back to working in a lower position after having proved that she was capable of more.

22. By email dated 21 April 2023 to Mr Tavares, the Claimant resigned her employment. The Claimant's email of resignation did not state why she resigned [40]. The Claimant did not raise a grievance at any time. However, I find that the Claimant resigned because she had been demoted and because of how she been treated in the Meeting in not being given an opportunity to compromise or try and adjust her hours and being give no notice to effect the change.

23. The Claimant gave 2 weeks notice although her contractual notice period was 1 month. The Claimant returned to work out her notice period over period of eight days on 2 & 5 May 2023 [45]. Mr Tavares went on annual leave on or around 21 April 2023. Mr Tavares responded to the Claimant's resignation by acknowledging the Claimant's resignation email. Mr Tavares returned from annual leave on or around 2 or 3 May 2023. There were potentially 2 days when the Claimant and Mr Tavares were both in the workplace. However, Mr Tavares did not arrange another Meeting to follow up on the Meeting that the Claimant had walked out of because the Claimant had resigned. Mr Tavares did not try to convince the Claimant to retract her resignation.

24. At around the end of April 2023, the Claimant obtained an interview for Techne Solution, the end-of-tenancy cleaning company. This interview went very well, and Claimant was offered a three-month trial. The Claimant passed this trial and got the job. The Claimant received the job offer from Techne Solution on 21 April 2023 and that was why the Claimant decided to put in her resignation then. I find that the job offer was the reason for the timing of the resignation not the reason why the Claimant resigned.

25. From 9 May 2023 the Claimant started in a new role. The Claimant had to start from scratch and had to learn about new cleaning techniques and machinery. The Claimant works from 8:30 am- 5:30 pm Monday - Friday. And since July

2023, the Claimant has supplemented her income by carrying out evening work at a nursery, for two hours in the evening from Monday to Friday and 1 hour every Friday evening at an estate agent down the road, when it became clear that her day time hours were not enough. The Claimant is not in a supervisory position and as she still does not drive. The Claimant needs to pass her driving test before she can apply for a supervisory position. I accept the Claimant's evidence that it will take her 2 years to become a supervisor in her current role.

26. However, the Claimant applied for universal credit in January 2024 when it became clear to her that she could no longer survive on the income she had been receiving in her new roles. The Claimant's universal credit varied in accordance with the overtime that was available to her in her evening job.

Law

Constructive unfair dismissal

27. Section 95, Employment Rights Act 1996 ('ERA') states:

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

(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."

28. Section 95(1)(c) ERA is colloquially referred to as constructive unfair dismissal or constructive dismissal. Lord Denning in the landmark Court of Appeal decision of Western Excavation Limited v Sharp [1978] IRLR 27 best summaries the test for constructive dismissal as *"If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer's conduct. He is constructively dismissed."* Thus, the first question for the Employment Tribunal to determine if there is a constructive dismissal is whether the employer's actions or conduct amounted to a repudiatory breach of the contract of employment.

29. The House of Lords in the case of Malik v Bank of Credit and Commerce International [1998] AC 20 established that it is an implied term of any contract of employment that the employer shall not without reasonable and proper cause conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between employer and employee: (See Malik at paragraphs 34h -35d and 45c-46e).

30. At paragraph 35c of Malik, Lord Nicolls sets out that the test of whether there has been a breach of the implied term of trust and confidence is objective. The conduct relied on as constituting the breach must impinge on the relationship that, looked at objectively, it is likely to destroy or seriously damage the degree of trust and confidence that the employee is reasonably entitled to have in its employer. A breach occurs when the proscribed conduct takes place.

31. As the test the Malik test is objective, it matters not that the employer does not intend to damage this relationship, provided that the effect of the employer's conduct, judged sensibly and reasonably, is such that the employee cannot be expected to put up with it: Woods v Car Services (Peterborough) Limited [1981] ICR 666.

32. In Gibbs v Leeds United Football Club [2016] IRLR 493, the Court (QBD) decided that a change to the content of a role that resulted in the erosion of an employees duties and showed a clear drop in the employee's status demonstrated an intention by the employer by their conduct, that viewed objectively displayed they no longer intended to be bound by the essential terms of the contract of employment and that was repudiatory, amounting to constructive dismissal.

33. Having determined whether there is a repudiatory breach, the next question, as referred to in Western Excavating v Sharp is has the Claimant shown that it resigned in response to this breach, not for some other reason. However, the breach does not need to be the sole or primary cause of the resignation; only an effective cause. (Nottinghamshire County Council v Meikle [2004] IRLR 703).

34. Langstaff J sitting in the Scottish division of EAT in Wright v North Ayrshire Council [2014] ICR 77 provides further clarity on the Meikle point, where he says *"Where there is more than one reason why an employee leaves a job the correct approach is to examine whether any of them is a response to the breach, not to see which amongst them is the effective cause"* [see paragraph 20]

35. The EAT decision of Nicholson (nee Woodhouse) v Hazel [2016] UKEAT/0241/15/LA, confirms that there is no requirement to mention the reason for resignation in the employee's resignation correspondence. In fact, it is an error of law for an Employment Tribunal to consider it as it is an irrelevant consideration. (See Laing J, paragraph 45).

36. If an employee resigns both in order to commence new employment and in response to a repudiatory breach, then the existence of the concurrent reasons will not prevent a constructive dismissal arising: Jones v F Sirl & Son (Furnishers) Ltd [1997] IRLR 493.

37. In next dealing with the question of whether the Claimant has affirmed any repudiatory breach, Walton & Morse v Dorrington [1997] IRLR 489: demonstrates that having regard to the employee's length of service and an employee may not be taken to have affirmed a repudiatory breach, when they delay resigning until they have another employment. (See President Morison J, paragraph 36).

38. In considering whether the passage of time means that the employee has affirmed the repudiatory breach or breaches, in Chindove v William Morrison Supermarkets Ltd UKEAT/0201/13 (26 June 2014, unreported) Lanstaff P in the EAT suggests that time in of itself is not the only matter to consider. *"The principle is whether the employee has demonstrated that his made the choice"*

that is between accepting the breach e.g. continuing to work or whether he acts to as to demonstrate to the employer he regards himself as being discharged from his obligations under the contract of employment. (See paragraph 25). Lanstaff P goes on to say an employee *"may affirm a continuation of the contract in other ways: by what he says, by what he does, by communications which show that he intends the contract to continue. But the issue is essentially one of conduct and not of time"* (See paragraph 26).

39. The giving notice does not in itself constitute affirmation in an unfair dismissal claim as wording of section 95(1)(c) ERA refers to with or without notice.

40. The ET decision of *Hoch v Thor Atkinson Steel Fabrications Ltd ET Case No.2411086/18* is a helpful example of a case for suggesting that absence after a repudiatory breach leading to a delay in resignation denotes no affirmation of the repudiatory breach. In that case the Claimant was on annual leave before resigning.

Submissions

41. Both parties provided written submissions, which I considered carefully and took into account. Both parties were given approximately 15 minutes each to make oral submissions.

42. In summary the Respondent's submissions were that the Claimant was not credible, the Claimant claimed during the Meeting that she would have considered other options, but she did not mention other options. Neither did the Claimant go back to the Respondent with alternative options. The Claimant was not correct she could come at 5am. The job share was not spoken about because the Claimant did not give Mr Tavares the chance. The Respondent's witness evidence was more credible. When asked by Employment Judge Young why the Respondent said that the third party clause applies, Ms Afriyie's response was the clause referred to being removed from site an example, but the clause was not exclusive to removal from site in order to seek the third party's approval. The clause is what the Respondent used. The Claimant affirmed the alleged breach because of the activities that took place during the delay i.e. she applied for roles and attended interviews. The Claimant's evidence was that she delayed because of emotional stress, however the delay was not because she was under emotional stress because she was able to do the activities mentioned.

43. The Claimant's submissions were there was no evidence that the change of hours of the supervisor was at the request of School. No evidence was provided. Mr Tavares admitted that the role of janitor was lower than a supervisor. He admitted that he did not contact the Claimant to say that the Meeting was a consultation. Mr Tavares did contact the Claimant about time sheets when she was off sick, so he did have an opportunity to discuss other options with her. There were inconsistencies in the note of the Meeting, i.e. the date was a problem. In the note of the Meeting, it refers to immediately abandoned the Meeting, but Mr Tavares' statement says other things happened before the Meeting was abandoned. Mr Tavares told the Claimant she was not required and that is a clear demotion. Despite there being a month having transpired before contract with the Claimant, Mr Tavares admitted that he had the opportunity to reassure her. This indicates a lack of effort to support the Claimant. There was no formal confirmation of what

happened in the Meeting and his notes were not sent to the Claimant, there was no communication about the Meeting after it occurred. There was no documentation of the decision making process and a lack of transparency which suggests there was a demotion.

44. The Claimant in providing a new schedule of loss referred to the Claimant's having receipt of universal credit. Both parties were given an opportunity to make submissions on the universal credit issue alone. The Claimant declined to make any further submissions; however, the Respondent did make further submissions. The Respondent's submissions on the universal credit point were that the Claimant had not mitigated her losses as if she had applied earlier for universal credit then the amount would have been significant; and by implications her losses less.

Analysis/ Conclusions

Did the Respondent breach the implied term of trust and confidence?

45. I was satisfied that Mr Tavares did say to the Claimant without any further explanation that the Claimant could not carry out her supervisory duties and that the change would take place immediately. I found as a fact that this was a unilateral decision by the Respondent amounting to a demotion. In my judgment it is plain from the case law (Gibb v Leeds United Football Club) that the unilateral removal of an employee's duties amounting a demotion and loss of status could amount to a breach of the implied term of trust and confidence.

46. It was the case that the Respondent failed to discuss alternative arrangements that would utilise the Claimant's skills and experience regarding her demotion. There was no discussion at all neither did Mr Tavares follow up on proposing any alternatives even though Mr Tavares claimed that there was an alternative of a job share. The removal of the Claimant's supervisor role was put to the Claimant as a fait accompli. This behaviour by the Respondent was likely to destroy or seriously damage the trust and confidence between the Claimant and the Respondent. the Claimant was given no explanation for the change, although she could guess. Such behaviour inevitably created an environment for the Claimant where she felt undervalued and undermined in her professional capacity where there was no issue with the Claimant's performance and she was not told that there were any problems with her performance in any event and the School had not insisted that the Claimant duties be removed from her, there was no justifiable reason for the Respondent to have unilaterally removed the Claimant's supervisor role from her.

47. I therefore draw the conclusion that the fact that on 16 February 2023 the Claimant was demoted without consultation in of itself amounts to a breach of the implied term of trust and confidence. It was a term of the Claimant's contract of employment that she was a cleaning supervisor. This was clearly a role more senior than a janitor role with more responsibilities. The fact that the Claimant was to be paid the same rate of pay as a supervisor did not detract from the fact that it was a demotion and that was a breach of the implied term of trust and confidence.

48. The demotion without consultation coupled with the fact that the demotion was effective immediately so as to create an environment for the Claimant of

undervalue and undermining by the Respondent also leads me to conclude that what the Respondent did accumulatively was sufficient to amount to the breach of the implied term of trust and confidence.

49. The Respondent sought to rely upon a clause 'third party agreement' in the Respondent's handbook which formed part of the Claimant's terms and conditions to say that it was the School who had requested the change to hours. However, I was not convinced that this clause was even applicable to the Claimant. Mr Tavares admitted that the School did not at any time ask for the removal of the Claimant from site and the clause was clearly only applicable to the circumstances where a third party asked for the removal of the contractor's employee. Neither was there any evidence before me that the third party procedure was the process used to in respect of the Meeting with the Claimant. Mr Tavares gave no evidence to this effect.

50. I found that Mr Tavares would not have accepted the folder if he did not consider that the Claimant was no longer the supervisor. The Respondent did breached the implied term of trust and confidence by removing the Claimant's supervisor duties at the 16 February 2023 Meeting unilaterally after her 10 years of service at St Albans High School, by failing to consult the Claimant before making the decision to remove her supervisor duties, failing to discuss alternative arrangements that would utilise the Claimant's skills and experience and by creating an environment where the Respondent carried out the abovementioned matters that caused the Claimant feel undervalued and undermined in her professional capacity. I conclude in addition to the single breach of the implied term of trust and confidence, accumulatively all the aforementioned would her amounted to a fundamental breach of the implied term of trust and confidence.

Did the Claimant resign in response to the breach?

51. The Claimant's resignation at that time was in part motivated by the fact that the Claimant received an offer of alternative employment, however Wright v Ayreshire establishes as long as the repudiatory breach plays a part in the dismissal then it can amount to a constructive unfair dismissal. The principle of the decision Nicholson v Hazel, EAT 0241/15, means it is not fatal that the Claimant did not mention the reason for the resignation in her resignation letter. The Claimant resigned because of the demotion and the environment created by the Respondent, the Claimant was going to be replaced by someone who was her junior, thus, to conclude the fact is that the Claimant could not stay at the Respondent following the demotion and this was a fundamental reason for why the Claimant resigned.

Did the Claimant affirm the contract before resigning?

52. The Claimant was bound to be upset by the Respondent's behaviour and it is no surprise that the Claimant went off work sick with work related stress. The Claimant's sickness meant that she was not in work, there was an approximate 2 month delay before the Claimant resigned. However, the Claimant did not do anything to suggest that she affirmed the contract. The case law confirms that it is not enough that time passed for the Claimant to be considered to have affirmed that contract. The ET decision of *Hoch v Thor Atkinson Steel Fabrications Ltd ET Case No.2411086/18* supports my

conclusion that as the Claimant was absent from work off sick that she did not affirm the contract by being on sick leave. I do not find the Claimant's payment of sick pay as an indication of affirmation either, as the Claimant was not in a position to consider what to do about her employment whilst she was off sick because of her stress until the end of April 2023 and so it was reasonable for the Claimant to have waited until she recovered from sickness before resigning. The Claimant had a sickness certificate until 24 April 2023 and resigned on 21 April 2023, so there was no gap between her recovering from sickness and her resignation in any event.

53. Neither does the fact that the Claimant gave notice suggest to me in these circumstances that the Claimant was affirming the contract. there was nothing about the Claimant's conduct to suggest that the notice given by the Claimant was an intention to accept the repudiation of the contract by the Respondent. In any event the Claimant did not give the proper period of notice of 1 month. I am satisfied that the Claimant did not affirm the contract.

Dismissal?

54. In those circumstances I conclude that the Claimant's date of termination was 5 May 2023 as set out in the Claimant's resignation email. It is my judgment that the Claimant was unfairly dismissed as the reason for her dismissal was a repudiatory breach of the Claimants contract of employment by virtue of the Respondent's conduct. There was no fair reason for the Claimant's dismissal and so no need to consider the reasonableness of the dismissal.

Remedy

Polkey/ contributory conduct

55. Based upon my findings that the Claimant would have purchased an electric bike or used cabs in order to keep her supervisor role, I consider that there is no realistic chance that the Claimant would have been dismissed in any event. Polkey does not apply to the facts of this case. There were no findings of facts upon which I could conclude that the Claimant contributed in any way to her dismissal. There was no contributory conduct by the Claimant.

Mitigation

56. The Respondent submissions were that the Claimant had not mitigated her loss because she did not apply for universal credit before January 2024 when she was suffering a loss. The Respondent relies upon the case of Sos v Stewart [1996] IRLR 334 and I accept that that authority binds me. But Stewart just establishes what is already trite law as far as compensation for unfair dismissal is concerned and that is the duty to mitigate is a duty not to unreasonably fail to take steps to mitigate one's losses. The Claimant tried to obtain extra evening work when it became clear that her day job as it were, was not sufficient to meet her living costs. This is the very definition of mitigation and the fact that the Claimant did not gain enough over time in order of her living cost to be met should not be held against her. It was not unreasonable for the Claimant to have pursued this route rather than claiming universal credit at the earliest opportunity.

57. Notwithstanding, the Respondent did not provide any evidence in the bundle of any jobs they say that the Claimant should have applied for at any time between her resignation and the final hearing before me. The duty to mitigate can only take place after the dismissal takes place so any search of roles before the dismissal are not relevant to the losses suffered by the Claimant. I therefore conclude on the basis of the Claimant's evidence in respect of her new role that she has mitigated her loss. In those circumstances I had to, and did, conclude that she had not failed to make reasonable efforts to mitigate her losses. The Claimant's continuing loss of £92.20 per week in order to reach a supervisor level is reasonable.

Compensation

58. The Respondent accepts that basic figures of the Claimant's schedule of loss. I adopt the Claimant's schedule of loss as setting out the basic award and compensatory award based upon the tribunal findings as correct. The basic award is £5,139.50 and the compensatory award is £5085.01 totalling £10,224.51.

Uplift

59. In respect of the ACAS uplift although the Claimant did not make any grievance in writing, the failure to raise a grievance was reasonable as what was put to the Claimant was a fait accompli. I therefore see no reason to make a reduction in the compensation for the Claimant. However, the Respondent unreasonably failed to follow any procedure in dismissing the Claimant and made no effort whatsoever to communicate to the Claimant anything of what the process was regarding her dismissal. I conclude an uplift of 25% is appropriate this amounts to £ 2556.13 of the totality of the award and is in my view proportionate to the gravity of the breach of the ACAS code.

60. The Respondent accepted that basic figures of the Claimant's schedule of loss i.e. weekly pay, net pay etc. I adopt the Claimant's schedule of loss as setting out the basic award and compensatory award based upon the tribunal findings as correct. The Claimant is therefore awarded £12, 780.64.

Reconsideration decision

61. At the end of the hearing after judgment was given, the Respondent raised the issue of an email from the Claimant that was sent to the Employment Tribunal in which the Claimant accepted that the calculation for a weeks' pay in relation to the Claimant's new work was incorrect. The weekly amount was not £407 as set out in the last iteration of the Claimant's schedule of loss but £435. As such, the Respondent did not accept the weekly pay as set out in the Claimant's schedule of loss of £047. However, that email had not been provided to the Employment Judge, neither did either party mention the email before judgment was given. This was new evidence that had not been before me when I made my decision on the Claimant's compensation.

62. Rule 73 of the Employment Tribunal rules of procedure state:

"Reconsideration by the Tribunal on its own initiative

73. Where the Tribunal proposes to reconsider a decision on its own initiative, it shall inform the parties of the reasons why the decision is being reconsidered and the decision shall be reconsidered in accordance with rule 72(2) (as if an application had been made and not refused)."

Only a judgment of the tribunal is capable of being reconsidered. A judgment is defined in rule 1 (3) as being:

"(3) An order or other decision of the Tribunal is either—

(a) a "case management order", being an order or decision of any kind in relation to the conduct of proceedings, not including the determination of any issue which would be the subject of a judgment; or

(b) a "judgment", being a decision, made at any stage of the proceedings (but not including a decision under rule 13 or 19), which finally determines—

(i) a claim, or part of a claim, as regards liability, remedy or costs (including preparation time and wasted costs); …

(ii) any issue which is capable of finally disposing of any claim, or part of a claim, even if it does not necessarily do so (for example, an issue whether a claim should be struck out or a jurisdictional issue);

(iii) …"

63. I told the parties that in light of the Claimant's concession before the judgment was given and therefore my misunderstanding of what figures of the Claimant the Respondent accepted, I reconsidered my decision in relation to the compensation awarded.

64. The Claimant's payslips in her new role were used to average out her monthly pay [99]. The Claimant divided by 4.33 the length of April- May 2024 to come to the average of £435 pw. Both parties accepted that the Claimant's weekly salary whilst working for the Respondent was £394.09. Although the Respondent disputed how many hours the Claimant was doing in her new role, the parties accepted that the Claimant's supervisor role was 9.5 hours per day. Ms Nankya said that the Claimant was doing more hours of work in her new role. The Respondent was unable to say how many hours it considered that the Claimant was doing in her new role.

65. I calculated that the Claimant's average hours per week in her supervisor role was 47.5 (9.5 hours per day x 5 days per week). Whilst I calculated that the Claimant's average hours per week in her new job was 44.07 per week (adding all the hours in the Claimant's payslips in a month April-May 2024 was 191 hours. 191 x 12/52 = 44.07 per week).

66. However, I calculated that based upon my findings the Claimant's weekly salary in her supervisor role (8 x £11.55 hours) £92.4 + (1.5 hours x £9.43) £14.14 = £106.54 x 5 days = £532.72 gross pw. However, the parties were willing to accept that using the Claimant's payslips the gross sum was £536.25

(2323.75 x12/52 = £536.25) and so this amount was used as the gross weekly sum.

67. The net amount of the Claimant's supervisor salary per week was £417.29 (1808.27 x12/52 = £417.29 (see payslips [49] both parties accepted that the payslip on page 49 represented a standard monthly salary for the Claimant with the Respondent).

68. I concluded that the Claimant's weekly pay in her new role was greater than her weekly salary in her role with the Respondent. In those circumstances I concluded that the Claimant suffered no losses of wages following the termination of her employment. In those circumstances, the only amount awarded to the Claimant for the compensatory award was £500 for loss of statutory rights. The Claimant was still entitled to the 25% uplift to the compensatory award based upon the Employment Tribunal's findings.

69. In those circumstances the Claimant's compensation is as follows:

    Basic award: (£536 x 1.5 x 2 = 1608) + (1 x 7 x 536) £3752 = £5360
    Compensatory award: Loss of statutory rights £500
    Uplift on compensatory award: (1.25 x 500) = £625

    Final figure: (£5360 + £625) = **£5,985.**

_____

Employment Judge Young

_____

Dated 1 July 2024

REASONS SENT TO THE PARTIES ON
20 August 2024

FOR THE TRIBUNAL OFFICE

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https://www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/