EMPLOYMENT TRIBUNALS

Claimant:	**Ms I Registe**
Respondent:	**Kingsborough Centre**
Heard at:	**Watford Employment Tribunal**
On:	**4,5 February 2025**
Before:	**Employment Judge M Magee**
Representation:	
Claimant:	**Ms Williams (Claimant's sister)**
Respondent:	**Ms McKenzie (Litigation Consultant)**

JUDGMENT having been sent to the parties on 8 April 2025 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunal Rules of Procedure 2013, the following reasons are provided:

REASONS

Introduction

1. Ms Registe brings a claim for constructive unfair dismissal, alleging breach of the term of mutual trust and confidence by The Kingsborough Centre ("The Respondent"). The Respondent denies the breaches and states that Ms Registe resigned.

The Hearing

2. At the beginning of the hearing, Ms Registe confirmed that her only claim was one for constructive unfair dismissal.

3. The tribunal had an agreed bundle, consisting of 204 pdf pages. The Tribunal heard live evidence from Ms Bologun, Ms Registe and Ms Williams. The statements of Ms Holliday and Ms Rehak were read, with the Tribunal attaching such weight as appropriate given that they had not attended to give live evidence.

Issues

4. The issues were identified at a preliminary hearing on 8 August 2024.

5. Was Ms Registe dismissed within the meaning of S95(1)(c) of ERA 1996?

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

    a. Giving Ms Registe a Final Written Warning on 3 January 2024;
    b. Saying to Ms Registe on 6 Feb 2024 that forgetting to put away her mobile telephone was a serious case;
    c. Telling Ms Registe that she had to resign on 6 February;
    d. Helping Ms Registe to resign that day.

7. The Respondent does not assert that there was a potentially fair reason if there was a dismissal.

8. Did Ms Registe cause or contribute to her dismissal?

9. Did Ms Registe take reasonable steps to mitigate her loss?

Findings of Fact

10. Ms Registe commenced employment on 13 May 2019 with the Respondent, employed as a nursery nurse. She had previously been employed in the NHS for 20 years working with children. She was a nursery lead.

11. Ms Registe's Manager was Ms Bologun.

12. On 2 August 2022, Ms Registe received informal management advice (80). The circumstances were that she called to a child who she perceived to be in danger due to a risk posed by a section of wall in the garden area (77). She accepted using a firm tone of voice. Ofsted (82) confirmed that there was a risk posed to children in the garden area, providing confirmation of Ms Registe's account. I found Ms Registe to be a credible and truthful witness and I preferred her evidence to that of Ms Bologun, whose answers evaded relevant questions.

13. On 8 December 2023, Ms Registe and another nursery worker were looking after a group of 5 children, one of whom was asleep. One of the 4 children awake (Child B) had bitten another child a week previously when Ms Registe had not been on duty. Ms Bologun had asked Ms Registe to keep an eye on Child B. Ms Registe had just been asked to conduct observations on 2 children, which involved her using an ipad to input information. The ipad was not working and Ms Registe briefly left the room to ask for help fixing it. During this brief interlude, Child B bit another child. Ms Registe was investigated for this incident.

14. Ms Registe raised concerns about her treatment by email dated 15 December 2023 (90), complaining of unequal treatment. This was never replied to substantively by the Respondent, who requested that she complete a grievance which she did not.

15. I accept Ms Registe's evidence that there was regularly short staffing and it was a regular occurrence having to leave the room without cover. The instructions given to her about child B were to "keep an eye on them". There were not specific instructions as to precisely what she should do in respect of Child B. No one else was disciplined for either of the biting incidents. Ms Registe was investigated and received a Final written warning (96) dated 3 January 2024. She did not appeal the decision.

16. The Respondent's mobile phone policy (167) states inter alia that:

    a. Mobile phones are to be turned off or silent and not used during working hours;
    b. Mobile phones can only be used during a designated break;
    c. Mobile phones should be safely stored in lockers during the working day.

17. The copy of the phone policy is incomplete as provided by the Respondent. The instructions are inconsistent and contradictory. As disclosed, the policy is silent as to sanctions for breach of the policy. There is nothing to state that a breach is treated as serious or subject to any particular sanction. The last line on the page states "If you are found to be using your phone inside the nursery premises you will be asked to finish your call or….".

18. The disciplinary policy (61) makes no mention of phone use as a specific matter listed as gross misconduct.

19. Ms Registe attended an investigatory meeting with Miss Bologun on 5 February 2024 (149). Ms Registe explained that she had forgotten to put her phone back in her locker after lunch. This is in agreement with the email note of the other member of staff present (155) confirming that the phone was never taken out of Ms Registe's pocket and was not used. Ms Registe accepted that she should not have had her phone with her and the reason was safeguarding. There was no suggestion that the phone had been taken out of her pocket or used. The evidence was that once she had discovered it, she immediately returned her phone to the locker. Ms Bologun stated that the matter would be escalated to HR.

20. Ms Registe left work following the meeting. An email was sent to her at 15.39 on 5 February. Ms Registe was urged to return to work. It was emphasised that escalation to HR did not equate to immediate termination. It was stressed that this was a serious safeguarding concern.

21. Ms Registe sent a WhatsApp to Ms Bologun at 18.10 on 5 Feb. She apologised for walking out, explaining that the first thing that came to her mind was that she would get the sack. She stated that to go through another disciplinary would be too stressful. She stated that she was willing to come in the next day if B wanted her to, otherwise she had only one choice to tender her resignation.

22. Ms Registe attended the next day earlier than usual at 7.30. Ms Bologun asked to have a conversation with her. Ms Registe was unable to provide detail as to what Ms Bologun had said to persuade her to resign. She stated that she was not thinking about the potential disciplinary hearing at all when she returned. Ms Bologun stated that Ms Registe had assumed that the matter regarding the phone was resolved and that there would be no disciplinary hearing. Ms Registe resigned when it became apparent that the disciplinary process was proceeding. Ms Registe genuinely believed that Ms Bologun had duped her into returning. I do not find that Ms Registe was told to resign on 6th Feb, however she genuinely believed that Ms Bologun had done so.

23. Ms Registe tendered her resignation by email at 11.17 am on 6 February, stating that Ms Bologun had told her to resign.

24. The Respondent responded on 8 Feb that Ms Bologun had not asked Ms Registe to resign.

Law

25. Ms Registe relies on the implied term as to trust and confidence most authoritatively formulated by the House of Lords in **Malik and Mahmud v BCCI [1997] ICR 606** as being an obligation 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."**

26. The **Malik** case makes clear that the test is an objective one. All the circumstances must be considered. An employer with good intentions can still commit a repudiatory breach of this implied contractual term. Indeed, in effect any breach of the term as to trust and confidence will necessarily be repudiatory.

27. Not every action by an employer which can properly give rise to complaint by an employee amounts to a breach of trust and confidence. The formulation approved in **Malik** recognises that the conduct must be likely to destroy or seriously damage the relationship of confidence and trust. A useful warning from the EAT about the dangers of Employment Tribunals setting the bar too low can be found in **Frenkel Topping Limited v King UKEAT/0106/15/LA**. That decision makes it clear that acting in an unreasonable manner is not sufficient. The strength of 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.

28. In practice Tribunals are well advised to proceed by considering the following:

    (a) What is the conduct or failure to act on the part of the employer which is said to breach the implied term?

    (b) Was there reasonable and proper cause for that conduct or inaction?

    (c) If not, when viewed objectively was that conduct which was calculated or likely to destroy or seriously damage trust and confidence?

29. Individual actions taken by an employer which do not in themselves constitute fundamental breaches of any contractual term may have the cumulative effect of undermining trust & confidence, thereby entitling the employee to resign and claim Constructive Dismissal. That is usually referred to as, "the last straw", (Lewis v Motorworld Garages Ltd [1985] IRLR 465).

30. In Kaur v Leeds Teaching Hospitals NHS Trust [2018] EWCA 978 the Court of Appeal, (Underhill LJ and Singh LJ) reviewed the law on the doctrine of the last straw and formulated the following approach in such cases

> *In the normal case where an employee claims to have been constructively dismissed it is sufficient for a tribunal to ask itself the following questions:*
>
> *(1) What was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, his or her resignation?*
>
> *(2) Has he or she affirmed the contract since that act?*
>
> *(3) If not, was that act (or omission) by itself a repudiatory breach of contract?*
>
> *(4) If not, was it nevertheless a part (applying the approach explained in Omilaju) of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a (repudiatory) breach of the Malik term? (If it was, there is no need for any separate consideration of a possible previous affirmation)*
>
> *(5) Did the employee resign in response (or partly in response) to that breach?*

31. The last straw itself need not be unreasonable or blameworthy conduct, all it must do is contribute, however slightly, to the breach of the implied term of mutual trust and confidence, see London Borough of Waltham Forrest v Omilaju [2005] IRLR 35. However, an entirely innocuous act cannot be a final straw, even if the employee genuinely but mistakenly interprets the act as hurtful and destructive of mutual trust and confidence.

Conclusions

32. In respect of the 2 August 2022 incident when Ms Registe received informal management advice (80), Ms Bologun, in evidence struggled to suggest an alternative as to how Ms Registe should have responded in the circumstances other than how she did. There was no clear rationale presented as to why raising your voice to prevent a child from endangering themselves was a blameworthy action. Whilst not a matter relied on in respect of the repudiatory breach, management advice in these circumstances where there was no identified fault on behalf of Ms Registe, appeared to be unnecessary and heavy handed.

33. I find that the disciplinary sanction imposed for the biting incident was far too severe, with Ms Registe being singled out. The instructions given to her were vague as to the steps that she should take to supervise Child B. She was not informed that she was required to continuously monitor Child B. No one else was disciplined or investigated. The sanction was

disproportionately severe in comparison to the allegation. There was not reasonable and proper cause for that conduct. Such treatment goes beyond unreasonable and was objectively calculated to damage the employment relationship. This in my view was a repudiatory breach of the term of mutual trust and confidence.

34. With regard to the mobile phone incident, the Respondent has policies in respect of mobile phones for safe-guarding reasons. It was apparent from the initial report of the incident and Ms Registe's replies to the investigation that she had had the phone in her pocket for a short time after lunch, was unaware of it until checking for a pen, the phone had not been used or removed from the pocket and was immediately placed in a locker. Further the incomplete phone policy does not identify any serious sanction for a breach.

35. The copy of the phone policy is incomplete as provided by the Respondent. The instructions are inconsistent and contradictory. As disclosed, the policy is silent as to sanctions for breach of the policy. There is nothing to state that a breach is treated as serious or subject to any particular sanction. The last line on the page states "If you are found to be using your phone inside the nursery premises you will be asked to finish your call or…." suggestive of breaches not being treated that seriously.

36. The policy is inconsistent as to how phones are to be treated, and it is not necessarily clear that having a turned off phone in a pocket would be in breach of that policy. In any event, the incident was one of the least serious breaches of the phone policy: short period, inadvertent, never brought out, never used, unclear whether it was turned on or not.

37. Whilst referral to HR could be an appropriate response, treating the incident as a serious safeguarding concern was not an appropriate response to the indicated scope of the incident. There was not reasonable and probable cause for so treating the incident in this way.

38. Ms Bologun stated in her evidence that the phone matter was a case of gross misconduct. She wrongly asserted that Ms Registe had had the phone with her all day and had had it with her whilst changing nappies. This is directly contrary to the undisputed facts of the allegation.

39. Given the earlier heavy-handed treatment, both in relation to the level of voice and the biting incident, the description by the Respondent of how the phone incident was to be treated as a "serious safeguarding concern" was objectively not innocuous and trivial. Accordingly, this incident amounts to a last straw entitling Ms Registe to resign in response to the repudiatory breach of contract.

40. In the alternative, the cumulative differential and heavy-handed treatment of Ms Registe cumulatively amount to a breach of the fundamental term of mutual trust and confidence.

41. Given my findings of fact above in relation to the resignation, Ms Registe was not told or encouraged to resign and therefore does not form part of any constructive dismissal analysis.

42. Ms Registe's resignation letter makes it plain that she resigned as a result of the breaches. I find that she did resign for that reason. Her WhatsApp message of 5 February made it clear that the threatened disciplinary process would cause her to have no alternative but to resign. She resigned the day after it was alleged that her conduct amounted to a serious safeguarding concern. Given the timescales involved, I find that she did not affirm the contract. Accordingly, Ms Registe was constructively dismissed.

43. The Respondent did not assert a potentially fair reason for dismissal. Accordingly, the dismissal is unfair.

44. In the circumstances of the severe treatment, Ms Registe did not contribute or cause her dismissal and there is no reduction for contributory fault.

Approved:

Employment Judge M Magee

Date 9 June 2025

SENT TO THE PARTIES ON
10/06/2025

FOR THE TRIBUNAL OFFICE

Notes

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