



# THE EMPLOYMENT TRIBUNAL

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**SITTING AT:** LONDON SOUTH  
**BEFORE:** EMPLOYMENT JUDGE ELLIOTT (sitting alone)  
**BETWEEN:**

Ms V Raynor

Claimant

AND

Plumpton College

Respondent

**ON:** 22, 23 and 24 August 2017

**Appearances:**

**For the Claimant:** Ms C Urquhart, counsel

**For the Respondent:** Ms P Leonard, counsel

## **JUDGMENT**

The Judgment of the Tribunal is that the claim fails and is dismissed.

## **REASONS**

1. By a claim form presented on 5 December 2016 the claimant Ms Valerie Raynor claims constructive unfair dismissal and breach of contract for wrongful dismissal and for breach of an implied term in relation to sick pay.

### **The issues**

2. The issues for the tribunal were clarified with the parties at the outset of the hearing with reference to the list of issues prepared by the parties and were confirmed as follows:
3. Did the claimant resign as a result of a fundamental breach of her contract of employment? The term of the contract relied upon by the claimant is implied term of trust and confidence and an implied term that the respondent would exercise a discretion in her favour in relation to sick pay.
4. The breaches of contract relied upon by the claimant are:
  - A lack of administrative support for the claimant despite various requests for this continuing until she went off sick.
  - Unjustified criticism of the claimant's performance and work particularly around a meeting on 3 December 2015 and making a comment in relation to the claimant opened in November 2015 and

thereafter restricting access by the claimant to his emails.

- A conversation with Mr Kerswell on 3 December 2015 when he suggested that the claimant was not performing well.
- On 3 December Mr Kerswell stating that the claimant could not be on annual leave during term-time.
- Failure to refer the claimant to occupational health.
- Failure to implement the policy on mental health and stress in the workplace (page 231) which the claimant contends is contractual. The respondent does not accept that the policy is contractual.
- A delay in dealing with her grievance of 27 January 2016 including the appeal as there was no outcome until 23 June 2016.
- The grievance did not properly conclude the annual leave issue which obliged her to bring the appeal. The appeal outcome did not deviate from what should have been the contractual situation in relation to annual leave.
- The reduction to half pay and SSP.
- The refusal to exercise a discretion to extend her sick pay.
- Restrictions on when she could take annual leave. She accepts she had to abide by a chart which shows dates which are blocked off for everyone (page 59) but was being invited to agree to a change to her contract to limit her annual leave to certain times.
- The last straw was on 3 August 2016 in an email (page 179) with a refusal to authorise annual leave in November 2016 and the refusal of an extension of sick pay.

5. Was there a fundamental breach of the claimant's contract of employment?
6. Did the claimant affirm the breach?
7. If not, did the claimant resign in response to the breach?
8. If there was a dismissal, what was the reason for dismissal? Was it for a potentially fair reason under the Employment Rights Act 1996.
9. The claimant brings a separate breach of contract claim in respect of the refusal to exercise a discretion to extend her sick pay. The claimant says there was a custom and practice that those on long term sick leave would have that discretion exercised and because her case is that her illness was due to the respondent's treatment of her, they should have extended it.
10. There is a breach of contract claim for notice pay. It is not in dispute that the respondent did not pay notice pay to the claimant.

### **Witnesses and documents**

11. The tribunal heard from the claimant. For the respondent the tribunal heard from four witnesses: Mr Jeremy Kerswell, Principal, Mr Robert "Stan" Stanier, Chair of Governors and grievance officer, Mr David Stokes, Vice-Principal and Mr Howard Wood, the grievance appeal officer.

12. There was a bundle of documents of about 300 pages.
13. There was a list of issues, a chronology prepared by the respondent and an opening note from the claimant which consisted of a cast list and a chronology.
14. I had detailed written closing submissions from both sides to which they spoke. The submissions are not replicated here. They were fully considered along with the authorities referred to, even if not expressly referred to below.

### **Findings of fact**

15. The claimant worked for the respondent from 22 January 1999 until her resignation on 1 September 2016. She was employed as personal assistant to the Principal. The respondent is a specialist independent college based in Sussex offering higher education courses. It employs about 350 employees.
16. From 1 January 2012 the claimant's duties were widened by agreement to include HR administration. A letter dated 20 December 2011 confirming this change was at page 50 of the bundle. The claimant was given two increments on her salary to reflect the widened scope of her role. Administrative assistance was originally provided by Ms Cynthia Bianchi for an average of 12 hours per week which was to be flexible. In 2012 the Principal of the college was Mr Des Lambert. The claimant's signature appears on the letter of 20 December 2011 indicating her agreement to the terms set out.

### **Mr Kerswell's appointment as Principal**

17. From 5 October 2015 Mr Jeremy Kerswell was appointed as Principal. The claimant had been the PA to the Principal since January 1999. Prior to Mr Kerswell joining, the claimant had worked for two other Principals, Mr John Brookham and Mr Des Lambert. During the first month of his employment Mr Kerswell did not pass a great deal of work to the claimant as he was getting to know the college and the staff.
18. On 28 October 2015 the claimant sent an email to the Vice-Principal Mr Stokes stating that she was really struggling with her work. She sent a separate email to Mr Lambert, despite the fact that he had left having retired, saying that her work situation had not eased (page 64). She started her email by saying "*Des, for info, got to moan to someone!!*" She complained that Ms Blake, the finance assistant who was designated to support the claimant with the HR work, was being "*pulled by Accounts*".
19. In her email to Mr Stokes she said she could not maintain her current hours. She said she was working 6 to 7 days squeezed into an average week.

20. Also on 28 October 2015 the claimant also sent an email to the four members of the Senior Management Team (SMT) Mr Kerswell, Mr Stokes, Mr James Hibbert, Deputy Principal and Mr Mike Groves, the Finance Director (page 65) making a formal request for assistance for one day per week that she had originally been promised for the HR tasks. She said she could not continue under her current conditions. On 29 October 2015 Mr Lambert sent an email to Mr Kerswell (page 67) stating that he thought the claimant was struggling with her workload and noting that Ms Blake was supposed to be assisting. He said his concern, apart from the claimant's workload, was that when she had time off Mr Kerswell would have no one to be his PA. He was acknowledging that the HR duties were proving to be a lot of work for the claimant, no doubt as the College had grown since she commenced those duties almost 5 years previously. Mr Lambert also commented in his handover note to Mr Kerswell (page 200a) "*I have suggested to her that especially initially you may need more support in terms of extra people in her office but I don't think she likes the thought of this. If you are not careful though you end up doing more admin that you should*".
21. In response to the request for assistance, Mr Kerswell replied to the claimant on 5 November 2015 stating that he and Mr Stokes had been in discussion about obtaining some additional help for the HR work (page 71) to help with the backlog and to keep them going until they decided what to do with HR under the proposed new structure. He said it would be good to talk to the claimant about this and suggested that they go out for coffee the following morning. I find that this was a timely and positive response to her request for additional help.
22. In addition to assistance provided by Ms Blake, the claimant also received assistance from Ms Carol Turner who helped with arranging interviews for prospective employees. Ms Turner also kept the staff sickness records.
23. Six days after Mr Kerswell's 5 November email, in order to address the claimant's concerns about the HR workload, the respondent employed Ms Sarah Jeffers, an experienced HR Manager. She commenced work with the respondent on 11 November 2015, initially on a six-month fixed term contract and subsequently as a permanent member of staff. In evidence the claimant said that Ms Jeffers was a qualified HR professional whilst she (the claimant) was not. Despite this, the claimant's position was that Ms Jeffers had not been taken on to do day-to-day HR work but had only been employed to do project work. The claimant said that she did not mention in her witness statement, the employment of Ms Jeffers because it was of "no help to her".
24. On 5 November 2015 the claimant sent an email to Mr Kerswell, copied to Mr Stokes and Mr Hibbert (page 69) stating that she was grateful for the one day per week assistance that she was now receiving from Ms Blake but confirming that this was still insufficient to address the backlog and assist with the increasing workload. She said "*can this please be revisited. The HR workload is increasing markedly. This is not a "capability" issue, I simply*

*cannot keep up with the increasing and unreasonable demands that are being made of me. I'm willing but not able!"*

25. There was a concession from the respondent on day 2 to the effect that the respondent accepted that the claimant needed more assistance and she was right to raise this. I also find that the HR work had become too great for the claimant. I find that once it had been raised with Mr Kerswell and the SMT, steps were taken swiftly to begin to address the matter.

#### The birthday card issue

26. On 13 November 2015 Mr Kerswell sent an email to his former PA Ms Kirstie Slocombe thanking her for a birthday card for his 40<sup>th</sup> birthday. Mr Kerswell said "*....and my PA opened it so now everyone here will know!*" (page 74). The claimant was upset by this comment and sent an email to Mr Kerr is well stating "*bit miffed that you think I'd broadcast your birthday just because I opened the card*" (page 75). Mr Kerswell intended this as no more than a light hearted reference to the fact that people would know his age, rather than as a criticism of the claimant.
27. Mr Kerswell's evidence was that he was disappointed that the claimant felt that way about this personal email. He said it was an entirely innocuous joke which was about him turning 40 rather than anything else. He did not intend it as a slight on her. Mr Kerswell saw the claimant the next morning and said that this was not what he intended. As he could not see the business need for the claimant to be reading his sent emails, he questioned the extent to which it was useful it was for her to continue to read them. His position was that if he wanted her to know about a sent message he would copy her in or forward it to her. Mr Kerswell did not agree that he denied the claimant access to his emails.
28. There was no evidence that the claimant's access to Mr Kerwell's emails was barred. I find that he did not deny her access to his emails but that he quite reasonably queried the necessity of her accessing his sent messages. He was in a position to make sure that she saw any message that he sent and wanted her to be aware of. There was no discussion or restriction with regard to his incoming emails.
29. The claimant denied that she simply did not like Mr Kerswell. She said he was her "chosen candidate" although she was not on the interview panel that recruited him. She dealt with the administration of the recruitment paperwork.

#### Annual leave

30. The claimant's contract of employment started at page 42 of the bundle with provisions as to holiday on page 43. The claimant was entitled to all bank holidays and 25 days per annum in the leave year from 1 September to 31 August. The contract stated that the college may close for a number of working days in the interest of efficiency and in that case the employee

was allowed to add up to a maximum of five working days to the 25 working days. If the closures exceeded five days then the excess had to be taken as part of the basic 25 day allowance. The timing of those closure days was at the discretion of the respondent.

31. Clause 5.2 said *"The timing of all holiday is subject to the agreement of your line manager. Outline holiday schedules for individual staff are required by 30 November in any holiday year"*.
32. The claimant accepted that this formed part of her contract of employment and that her leave requests required approval of the line manager. The claimant said that when she was employed she was not told of any restrictions on taking annual leave other than those on the annual leave sheet (page 59). I find that the claimant knew or ought reasonably to have known the position by reading clause 5.2 of her contract of employment which she signed.
33. The respondent's Leave Policy was at page 201 of the bundle. It dealt with annual leave at page 221. It provides that staff are required to agree the timing of their holidays with their HoD/line manager. It said:

*In the event of a request not being granted, the manger will discuss the matter with the member of staff concerned and seek suitable alternative dates. Staff are therefore advised not to make firm holiday commitments without the agreement of their manager.*
34. On 18 November 2015 the claimant went on holiday to visit her son in South Africa. She was due back on Tuesday, 1 December 2015. On 23 November 2015 just over a week before her due return date, the claimant sent an email to Mr Kerswell (page 76) asking if she could extend her holiday and return on Monday, 7 December 2015. Mr Kerswell denied the request stating (page 77) *"given the pressure that everyone is working under"* he knew the claimant would understand why. One of the reasons was because he as Principal was new in post.
35. He also said *"It's also not necessarily the best way of letting you know but I'm afraid I will struggle to authorise your leave in future during term time and/or when I am still in work, as it does cause some disruption"*. The claimant was disappointed that her leave could not be extended. She was not sure whether Mr Kerswell was imposing a requirement that her annual leave should coincide with his and suggested they clarify this on her return (page 78).
36. The claimant accepted an oral evidence that Mr Kerswell was entitled to refuse this request for extended annual leave made at very short notice. She said *"I thought if I don't ask, I don't get"*. However, she was upset at his suggestion that he might struggle to authorise annual leave in the future during term time.
37. The claimant accepted in evidence that she could not take annual leave whenever she wanted. She accepts that it was subject to managerial approval. She accepts that there were times when either she or the college

would be busier than usual and often those times coincided.

The meeting of 3 December 2015

38. The claimant returned to work on 1 December 2015. On Thursday 3 December she had a meeting with Mr Kerswell. The claimant's case is that this meeting turned into a "heated argument" during which Mr Kerswell suggested that she had not been performing her role satisfactorily and that this shocked and upset her. The respondent's case is that this was not a heated argument and Mr Kerswell did not raise his voice. The respondent accepts that during the meeting Mr Kerswell, as line manager, raised concerns about the claimant's role and performance.
39. Mr Kerswell prepared in advance a handwritten note of the points he wanted to discuss with the claimant at that meeting (page 82). The claimant was asked in evidence if she accepted that they were Mr Kerswell's notes. She said she could not accept this and although she had referred to them as his notes in paragraph 17 of her witness statement.
40. The claimant also prepared notes in advance of the 3 December 2015 meeting. She did not disclose these notes to the respondent, despite referring to them in paragraph 15 of her witness statement. It was only during the course of her oral evidence that she said she thought they might be in her handbag. The notes were in the claimant's handbag and I asked that counsel for the claimant (who had no prior knowledge of the notes) to consider them during the lunch break on day one and if appropriate disclose them to counsel for the respondent.
41. The document was introduced to the bundle at pages 81a-81d. It became apparent upon seeing the document that it was not the original notes but a different set of typed notes made after the meeting. The claimant said she probably had the original notes at home and would bring them on day 2. The claimant brought her handwritten notes which she had read from at the 3 December 2015 meeting. They were introduced to the bundle at pages 81e to 81j. The error of non-disclosure was on the part of the claimant's solicitors and not the claimant herself and was described by counsel as an "oversight" on their part.
42. The meeting of 3 December 2015 lasted no more than 7 to 8 minutes during which Mr Kerswell spoke for no more than 1 to 2 minutes. The claimant was not sure how long the meeting lasted but she did not dispute the suggestion that this was the duration. I therefore find that it was a 7 to 8 minute meeting.
43. In his one to two minutes of speaking in that meeting Mr Kerswell referred to the annual leave situation. Due to the brevity of the time during which he spoke and the fact that the claimant walked out of the meeting, there was insufficient time for a concluded discussion on the topic. The claimant's case was that Mr Kerwell said he "would not be swayed" on the matter. He denied saying this. Mr Kerswell admits to using the word "unrelenting". He

- was referring to the business case for granting annual leave as being unrelenting. It is recorded in his contemporaneous handwritten notes at page 82 of the bundle.
44. The claimant's typed note of that meeting as to the discussion on annual leave was at page 81b. This refers to an exchange with the claimant raising a number of points about annual leave and her record of Mr Kerswell's replies and on two occasions, lack of reply. I prefer Mr Kerswell's account to the claimant's for the following reasons. It is not in dispute that the meeting lasted no more than 7-8 minutes. Mr Kerswell spoke for the first one to two minutes, part of which dealt with work performance issues. The remaining 5-6 minutes consisted of the claimant reading out her notes before she walked out. I find on a balance of probabilities and in those circumstances there was insufficient time for the dialogue recorded by the claimant at page 81b to have taken place.
  45. Mr Kerswell did not dispute that he raised with the claimant the fact that she appeared to have difficulty in prioritising tasks. He acknowledged that she was struggling with her role. This was her own position as she had quite reasonably been seeking further assistance. Mr Kerswell did not pick the claimant up on matters that he could have done, such as an email from the Chief Executive of East Sussex County Council in his first week of employment (page 80) suggesting a meeting, which he had asked the claimant to arrange. About 2 months later on 1 December 2015, he asked the claimant if she had put this in the diary and she said "*No, not yet. Too many other urgent things to do*". She accepted it would have taken no more than a matter of minutes. I find that Mr Kerswell took a measured approach to this meeting and it was not a heated argument.
  46. The claimant went to the meeting with a prejudged negative view as to how it would go. She said in paragraph 15 of her witness statement "*I knew that this meeting was going to be stressful for me*". During this brief meeting she read from her handwritten notes prepared in advance of the meeting. She said she held her notes in front of her face so that Mr Kerswell could not see how upset she was. After reading her notes, the claimant walked out without giving Mr Kerswell the opportunity to respond and deal with the matters for discussion. The claimant does not dispute that she walked out of that meeting.
  47. After the meeting on 3 December 2015 the claimant went to see the Vice Principal Mr David Stokes in his office and she also spoke to his PA Ms Sheena Sutton, to complain about the meeting.
  48. At 11:45am on 3 December the claimant sent an email to Mr Stokes thanking him for taking the time to have a chat with her. She said "*I feel that the working relationship between he and I has unfortunately broken down for the time being through no fault of my own*" (page 83). She sent a further email to Mr Stokes and included Ms Sutton at 8:02am on 4 December stating: "*Dave, the working relationship between Mr Kerswell and myself appears to have ruptured unexpectedly and through no fault of my own*".



*She went on to say “as he has now said I am unable to do my work satisfactorily, I feel pressurised to attend work despite that stress existed before and which continues, but could I ask if you could let him know before I arrive today that I will be in work. This does not imply acceptance of the change of working conditions that he is trying to impose....”*

49. On 4 December 2015 at 8:53am, Mr Kerswell sent an email to the claimant (page 86) stating that he would rather Ms Jeffers help with the current backlog in generic HR and therefore support the issues she and Sarah Blake had in relation to HR priorities. I find that this is an example of Mr Kerswell taking a positive approach and that it was his intention that Ms Jeffers help the claimant with the HR backlog and that she was not purely confined to HR project work.
50. On 5 December 2015 the claimant continued her correspondence with Mr Lambert despite the fact that he had retired and was no longer the Principal. She wanted his view on whether her annual leave had at any time caused disruption. She was critical of Mr Kerswell's email of 23 November 2015 on the issue of annual leave.
51. On 7 December 2015 the claimant was signed off work by her GP who gave the reason as “situational work related stress” (page 89). This sick note was sent to the respondent. The claimant remained off sick and did not return to work prior to her resignation on 1 September 2016.
52. On 7 December 2015 the claimant contacted Ms Laura Holt, the Clerk to the Corporation setting out her intention to commence an informal grievance process against the Principal Mr Kerswell. This was acknowledged and a meeting proposed for 16 December 2015. The claimant declined the meeting stating that she wished to deal with matters after her return to work.
53. By the time the claimant went off sick on 7 December 2015 she had only worked with Mr Kerswell for a total of eight weeks taking account of her period of annual leave in November 2015.
54. On 1 January 2016 the claimant received an email from the Chair of Governors Mr Stan Stanier who said he had been made aware that the claimant was off work and considering a grievance. He invited her to contact him if she wished to chat. I find that he was exploring whether there could be a resolution without the need for the claimant to go down the grievance route.

#### The claimant's grievance

55. On 27 January 2016 the claimant submitted a grievance to the Governors of the respondent (page 105). There were two main headings to that grievance; lack of support to perform her role and her complaint about her annual leave.

56. On 8 February 2016 the claimant attended a grievance meeting with Mr Stainer and Mr David Evans, the Vice Chair of the Corporation. She was accompanied by a workplace colleague Ms Val Wilkinson, the College's former Finance Director.
57. On 9 February 2016 Mr Stanier met with Mr Kerswell in connection with the grievance.
58. On 9 March 2016 Mr Stanier met with the claimant to discuss the grievance outcome. There were seven points of outcome (page 119) which in summary were:
- That the claimant receive OH assistance to best allow her to return to work
  - The college review its HR function
  - That there be a formal review of the claimant's job
  - That the college conduct an audit of HR policies and procedures
  - That the Principal and the claimant review the whole work year and identify those periods where the claimant being on leave would cause the most inconvenience
  - That outside those periods, reasonable flexibility would be exercised.
  - That the SMT consider what staffing arrangements could be put in place to provide cover for the claimant's role in her absence.
59. Following the grievance meeting the claimant received an email from Mr Kerswell (page 122) dated 11 March 2016 which clarified that when the claimant was able to return to work she would do so as his PA and nothing else. The HR work would be removed from her. The claimant said this came as a relief. It was a good solution to the issue of her overwork.
60. In relation to annual leave Mr Kerswell said he would be willing to let the claimant take up to one week during term time throughout the year except for in the months of September, October, January, May and June. The claimant did not wish to meet with Mr Kerswell to discuss her leave dates. Her evidence was that she did not want to speak to him at all.
61. The outcome of the grievance was therefore that that the HR work was removed from the claimant and there was to be discussion about her annual leave dates. I find that it was difficult for Mr Kerswell to reach a solution with the claimant on her annual leave dates when she was not prepared to discuss it with him.
62. Despite what I find to be the positive content of Mr Kerswell's email of 11 March, the claimant complained to Mr Stanier, by email on 12 March (page 123-124) that she had received contact direct from Mr Kerswell. She said she had specifically asked to have no direct contact with him and she did not consider her grievance to have been resolved. Mr Stanier replied that he must have misunderstood. He said that he struggled to see how matters would proceed and improve without communication between the two of them. He said, and I find that he was correct in stating, that the role

- of PA to the Principal could not be fulfilled without such communication.
63. The claimant asked Mr Stanier to act as a temporary go-between, between the two of them.
64. On 24 March 2016 the claimant received an update on the grievance outcome. It contained six recommendations:
- That she be referred to occupational health to assist with her return to work.
  - That the respondent review its HR staff requirements, roles and duties so that when the claimant returned to work she would not be given any HR duties.
  - There be a review of the claimant's role.
  - That there be an immediate audit of the respondent's HR policies and procedures.
  - That the claimant and Mr Kerswell should review the full work year calendar and identify periods when it would be difficult for the claimant to take annual leave.

#### The grievance appeal

65. The letter of 24 March said that it concluded the stage 2 formal grievance procedure. The claimant was given a right of appeal and she exercised this by letter dated 11 April 2016. She was satisfied with the outcome of her grievance in respect of her workload but she was dissatisfied on the issue of annual leave, although there had been no final resolution on the matter. She said that her contract of employment did not state that any annual leave would be prohibited and that she had worked under that contract since 1999.
66. A grievance appeal hearing was originally arranged for 19 April 2016 but the claimant said she was unable to attend because of annual leave. The claimant asked for the meeting to be scheduled after 6 May 2016 and the respondent agreed.
67. The appeal hearing took place on 16 May 2016. The claimant was again accompanied by Ms Wilkinson.
68. The claimant had surgery in June 2016 and this was the only occasion during her period of sickness absence that the reason for her absence was other than situational work-related stress. The certificate signed by her GP on 30 June 2016 signed her off for five weeks until 5 August 2016 for post-operative recovery.

#### Sick pay

69. The contractual provisions on sick pay were in the contract at page 44 and cross referred to the Sickness Absence Policy at page 236. Employees such as the claimant with over 5 years service are entitled to 6 months full

- pay and 6 months half pay (page 245).
70. Clause 5.3 states *"In the event of sickness absence in excess of the maximum period.....salary payments will cease although the employee concerned will remain in the College's employment for pensionable service purposes"*.
  71. On 15 June 2016 the claimant received a letter from Ms Sarah Jeffers, the HR Manager, stating that her six-month sick pay entitlement ceased on 6 June 2016 and SSP would end on 29 June 2016 (page 165).
  72. In response to this, the claimant sent a lengthy email to Mr Stanier (pages 167-169), placing the responsibility for her absence at the door of the respondent and requesting a discretionary extension of sick pay. She did not assert a contractual entitlement. She said *"I am therefore writing to you as Chair of the Governors to request a discretionary extension to my [SSP] and Sick pay entitlement in full to avoid financial disadvantage to myself, equivalent to the period of time since 7 December 2015 when I was first absent as a result of work related stress"*. She also sought reimbursement of the legal fees she said she had incurred as a result of the respondent's "unfair actions". The claimant did not assert a contractual entitlement in that letter, she referred to the exercise of a discretion.
  73. Mr Stanier replied on 17 June (page 166-167) stating that a discretionary extension of sick pay was not within his gift to authorise and it was a management issue, not one for the Governors.

#### The grievance appeal outcome

74. On 23 June 2016 the claimant received her grievance appeal outcome. The appeal centred on the annual leave issue. The outcome letter at page 170 said: *"The only leave restrictions that will apply to you will be those that apply to all non-academic staff and are advertised on the staff leave form (which changes each year). The appeal outcome recommended a meeting take place between the claimant and Mr Kerswell with an intermediary or intermediaries (to be agreed by both parties) to address the recommendation that "The Principal and [the claimant] review the whole work year and identify those periods where [the claimant] being on annual leave would cause most inconvenience"*. It also recommended that Mr Kerswell provide sound business reasons why the identified periods would be disruptive and to provide information on cover arrangements for the claimant when she was on leave.
75. Despite the grievance outcome being, on my finding, favourable to the claimant she did not accept it and wrote on 25 June 2016 in strenuous terms to the SMT (page 175). In that letter the claimant raised again, matters which the respondent understood to have been concluded. She again raised her issues with not being provided administrative assistance and her view that she was singled out for unfair treatment. This was despite the fact that all her HR duties had been removed. It was a

complaint that had been resolved in her favour and with no corresponding reduction in pay. I find that the claimant was not letting the matter lie despite the fact that it had gone in her favour.

76. The claimant said that she was “*incredibly shocked and astonished*” that the respondent could treat her as a loyal and dedicated worker in such an intolerable way and referred to her professional integrity being criticised without foundation. This was a reference to the birthday card issue from November 2015, although this was by no means clear from the letter. Having given what, in submissions for the claimant, was described as a “*gentle rebuke*” at the time (her email of 16 November 2015 – page 75 - saying she was “*a bit miffed*”) became characterised 7 months later as a slur on her professional integrity. I find that this re-characterisation was out of proportion to the relatively innocuous incident itself and was an exaggeration of her reaction at the time.
77. The purpose of the letter of 25 June from was to pursue her request for a discretionary extension of sick pay and to seek reimbursement of her legal fees, which were not quantified.
78. On 23 July 2016 the claimant sent an email to Mr Kerswell and Mr Stanier (page 178) saying that having seen her GP and consultant, she would be fit to return to work on Monday, 8 August 2016. She requested annual leave from 8 to 26 August and a further 10 days from 14 to 25 of November 2016.
79. On 3 August 2016 Mr Kerswell replied (page 179) saying that he was happy to approve the August request but declined the November request on the basis that this would be a very busy month for the college. The claimant relies on this email as being “the last straw” leading to her resignation. In that email Mr Kerswell said:

*Dear Valerie*

*Further to your request below, I would be happy to authorise your leave between the 8<sup>th</sup> and 26<sup>th</sup> August, but not for those days requested in November. As you are aware, November is a particularly busy month for the college and I expected to be particularly so for myself and SMT.*

*Furthermore, regarding your letter of 25<sup>th</sup> June, I can confirm that any historical precedent regarding sick pay at the college no longer applies and therefore I am unable to extend yours beyond that stipulated within the college policy, as I am to reimburse any legal fees you may have incurred during that period.*

*Kind regards*

*Jeremy*

### Sick pay comparisons

80. The claimant’s position was that she was aware of others where the discretion to extend sick pay had been exercised in their favour. She did not name any names. Mr Kerswell made enquiries of (i) the Senior Management Team, (ii) the Chair of the Governors, (iii) HR and (iv) Payroll. He arranged for a search to be made of their records over the past 20 years and came up with three examples (page 200). These were:

- A Head of Department who unfortunately had terminal cancer. His pay was continued because he continued to work on and off throughout his illness. The claimant did not carry out any work during her period of sick leave.
  - A female employee who had lymphoma. She received full sick pay for six months until March 2008 and then reduced to half pay in September and October 2008. Her sick pay was not extended.
  - A female employee who had a long-term ill health condition. She did not reduce to half pay because her periods of ill-health were short and intermittent and not continuous. The claimant was not aware of this. The effect of this was that the employee did not exhaust her entitlement.
81. The claimant gave no specific examples of employees of whom she was aware who had their sick pay extended in similar circumstances to herself. She said that she was “aware of people” but agreed that she had given no examples.
82. I find that there was no established custom and practice at the respondent of extending sick pay on a discretionary basis. There was no contractual right to have sick pay extended beyond the terms of the contract itself, as set out in the Sickness Absence Policy at page 245 of the bundle.

The 2016 annual leave request

83. In his email of 3 August 2016, Mr Kerswell approved the leave request for August 2016 despite the short notice, but refused it for November because this was a particularly busy month in 2016. Mr Kerswell set out the full detail of his rationale as to why he considered that the College would be particularly busy in November 2016 in paragraph 24 of his witness statement. That month included a scheduled Ofsted inspection which was of enormous importance to the respondent, planned corporation meetings, the introduction of a new quality review arrangement and a number of sub-committee meetings (page 179). The claimant’s attendance was required to support the Principal and prepare board papers and other documents for these meetings and to attend the meetings and produce the minutes. His evidence was that it was an unprecedented time.
84. Mr Kerswell’s evidence as to the busy status of November 2016 was supported by the evidence of Mr Stanier who said that it was the busiest time at the college of which he had been aware in his 12 years there.
85. The claimant said that the annual leave sheet at page 59 of the bundle showed no restriction on the month of November. This showed November 2015 as it was the leave sheet for the academic year 2015/2016. Neither side had included the 2016/2017 annual leave sheet in the bundle. I find that page 59 is not conclusive in relation to each and every year as it is prepared on an annual basis and changes from year to year (see quotation from grievance appeal outcome letter above).

86. In oral evidence the claimant said that in hindsight she accepted that Mr Kerswell had a valid reason for the refusal of November. The claimant's oral evidence was that she would not know when would be busier times than others. In circumstances where the claimant says she does not know when the busier times would be, I find it reasonable that she should accept the Principal's view on that matter.
87. One of the difficulties was the claimant's refusal to speak direct with Mr Kerswell so that they could seek to explore any suitable alternative leave dates as envisaged by the Leave Policy.
88. The claimant saw her GP on 5 August 2016 (medical certificate page 180). He declined to certify the claimant as fit for work because and certified that her work-related stress was continuing. The claimant was signed off work for a further month to 2 September 2016.
89. On 9 August 2016 the claimant sent an email to Mr Kerswell saying that she believed he may be aware of the grievance outcome recommendations and she was struggling to understand his rationale for refusing her leave in November (page 181). Mr Kerswell replied on 17 August 2016 (page 182) stating that authorisation of leave was at the discretion of the individual's line manager and his reason was "on a business case basis". I find that the refusal of November 2016 was not in contradiction with the grievance outcome. One of the outcomes was that the claimant and Mr Kerswell were to sit down with an intermediary to review the whole leave year and identify periods which would be inconvenient. This had not happened as the claimant had not yet returned to work.
90. The claimant replied on 25 August 2016 (page 183) expressing her disappointment with the refusal of her annual leave in November and thought that he was "*knowingly going back on a promise made to [her] by the college on 23 June (through the governors)*". The claimant said that she considered this to be a repudiation of her contract which she would not waive and she was considering her options.

#### The claimant's resignation

91. On 1 September 2016 the claimant resigned by letter to Mr Kerswell without giving notice (letter page 187). The letter gives eight bullet pointed reasons for her resignation. They were (in summary form and not directly quoted):
  - *A failure to comply with the outcome of the grievance process and having knowingly gone back on a promise made to her*
  - *having failed to provide sound business reasons to support the restrictions on her annual leave*
  - *failing to explain why her absence other than as highlighted on the staff leave form [page 59] would be considered disruptive*
  - *failure to provide her with consistent administrative assistance as promised*
  - *failing to offer OH assistance*
  - *failing to offer to support her with the college's counselling service*
  - *sending an unjustified derogatory email to a third party regarding her professional integrity [this was the birthday card issue, although not identified as such]*

- *making deductions from salary [a reference to her sick pay situation.*

92. Mr Kerswell responded to the resignation by letter on 12 September 2016, page 189. He did not accept that the refusal of leave in November amounted to repudiatory breach of contract because he said there were legitimate business reasons for refusing and as line manager he considered that he had exercised his discretion appropriately. On the lack of an OH referral he said that the respondent was seeking to do this as part of the claimant's proposal to return to work but it was delayed as a result of her surgical operation and holiday in August. On the point about counselling, he said as an established member of staff with previous HR responsibilities she was aware of the counselling services but she did not seek to avail herself of this. He was not certain what email the claimant referred to (during the hearing we understood it to be the birthday card email but the claimant had given no details in her resignation letter) and he said he had already addressed the sick pay issue in his email of 3 August 2016.

### New employment

93. The claimant commenced in new employment with an estate agency called Strutt & Parker Services Ltd as a PA on 31 October 2016 based in Lewes, East Sussex. The claimant knew the owner of that business and when she applied for the job he contacted her almost straight away and told her she could start "within a week or two". The claimant said that she did not start looking for jobs until after she resigned from her employment with the respondent. Her sick notes show that she was signed unfit for work until 2 September 2016, the day after her resignation.

### The grievance time line

94. The claimant's case is that there was unreasonable delay in dealing with her grievance. The grievance was lodged on 27 January 2016. The grievance procedure was at page 228 of the bundle. It provides that paragraph 3.3 that a grievance hearing should be arranged within 10 working days of receipt. The grievance hearing took place on 8 February 2016 (notes page 115). The grievance panel (Mr Stanier and Mr Evans) met with Mr Kerswell the following day. The grievance hearing took place within the timeframe provided in the grievance procedure.

95. The grievance procedure provides that paragraph 3.5 that the decision will be communicated in writing to the employee within 10 working days of the hearing but if it is not possible to reach a decision within that period the member of the senior management team will write to the employee with an explanation for the delay and when the written decision can be expected (page 229).

96. The claimant was offered a meeting on 22 February 2016 for the grievance outcome (letter page 114 dated 16 February 2016). The claimant could not remember why she could not make the meeting on that date but said that she thought she was on annual leave. At page 120B of the bundle the



tribunal saw her email of 18 February to Ms Holt of who was arranging the meeting stating that she was unable to attend and “*would prefer more time to consider the attachments.*” The meeting date of 22 February 2016 was in line with the grievance procedure and it did not take place on that date because of the claimant’s request for more time.

97. The grievance outcome meeting was rearranged for 9 March 2016 (notes page 129). There was a letter dated 24 March 2016 which was an update on the grievance outcome recommendations stating that it concluded the stage 2 formal grievance procedure. The grievance procedure at paragraph 4.1 provides that an appeal must be submitted in writing within 10 working days of receipt of the decision. The claimant appealed by letter dated 11 April 2016, technically a few days out of time. The respondent nevertheless accepted her appeal. The claimant was surprisingly equivocal in evidence about whether her letter of 11 April 2016 was in fact an appeal, despite the fact that it was headed “Letter of Appeal”. The claimant considered that the initial stage of the grievance procedure had not been concluded. I find that it had concluded because it said as much in the letter of 24 March and the claimant lodged a clearly labelled appeal against the outcome.
98. The grievance procedure provides that the appeal hearing should be held within 10 working days of receipt of the written appeal. On 14 April 2016 Ms Holt wrote to the claimant offering her an appeal hearing on 19 April 2016 which was within the timescale laid down by the grievance procedure. The claimant could not attend on that date because she was on annual leave from 18 April to 6 May 2016 and was out of the country (email page 136). The hearing was therefore rescheduled to 16 May 2016 to allow the claimant time to deal with matters after her return from annual leave.
99. On 26 May 2016 Ms Holt sent the claimant draft notes of the appeal hearing. The claimant responded on 29 May 2016 with her proposed amendments to the notes and on 7 June 2016 Ms Holt sent an updated version with tracked changes (page 155). On 7 June 2016 Mr Stanier requested the claimant’s comments on his proposed recommendations from the grievance appeal. This step is not provided for in the grievance procedure but I find that it was a courteous and helpful approach to seek the claimant’s input on the proposed outcome before a final decision was made.
100. The claimant replied 10 days later on 16 June 2016 (page 167-169) and the appeal outcome was sent to the claimant on 23 June 2016.
101. I can find no unreasonable delay on the part of the respondent in the way in which they conducted this grievance procedure.

#### Occupational Health and the Policy on Mental Health and Stress in the Workplace

102. The respondent’s sickness absence policy contains a section at paragraph 12 on referral to occupational health (page 250). It envisages a prior full

- discussion with the employee and then states that the line manager “can make a referral to the Occupational Health Service”. It indicates the circumstances in which it might be useful. It does not make a referral mandatory.
103. The grievance outcome was that the claimant receive OH assistance to best allow her to return to work and the respondent took the view that the appropriate time at which to involve OH would be the point at which the claimant was fit to return to work when OH could assist with suggestions and adjustments such as a phased return to work and how that might operate.
  104. The purpose of an OH referral is to advise and assist an employer in dealing with long term sickness absence and arrangements to return to work. Although OH may recommend support for an employee, the OHS practitioner is not a treating clinician. The claimant was seeing her GP regularly and also refers to being treated by a consultant (page 178).
  105. Had the respondent been considering termination of employment on grounds of ill-health capability, this may have made an OH referral more important. I find that the respondent was entitled to the view and it was a reasonable grievance recommendation that they seek OH assistance to facilitate the claimants return to work.
  106. It was known by the respondent that the claimant was undergoing surgery in May to June 2016 and that this would require a period of recovery of 6 to 8 weeks. I find that the respondent showed no intention to “disregard the contract of employment” by failing to make an OH referral before the claimant resigned on 1 September 2016. An OH referral is not obligatory.
  107. The respondent also has a Policy on Mental Health and Stress in the Workplace. The claimant contended it was contractual. There is no reference to the policy in her contract of employment and that is not surprising as the policy significantly post-dates her contract. The policy itself makes no reference to it being contractual. It sets out aims and objectives for the management of health in relation to stress at work. It sets out nine aims of the policy but none of these indicate any contractual force. I find that the policy was not contractual.
  108. The policy states at paragraph 4.3 that the college will assess employees who admit to suffering from work-related stress. Such employees are to be considered for any position for which they have the necessary skills and experience and fit to undertake.
  109. I find that the respondent was not in a position to carry out an assessment until the claimant returned to work. This is most likely to have involved a stress risk assessment to ensure that the claimant’s levels of stress remained at a safe level once she resumed her work duties. All HR duties had been removed from the remit of her job and she had not, by the date of her resignation, had an opportunity to ascertain the impact of this on her

levels of stress as she had not returned to work since that decision was made.

### The law

110. The applicable law in relation to constructive dismissal is found in section 95(1)(c) of the Employment Rights Act 1996 which provides that *“for the purpose of this Part an employee is dismissed by his employer if .....the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer’s conduct”*
111. The leading case on constructive dismissal is ***Western Excavating (ECC) Ltd v Sharp 1978 ICR 221***, CA. The employer’s conduct must give rise to a repudiatory breach of contract. In that case Lord Denning said *“If the employer is guilty of conduct which is a significant breach going to the root of the contract, then the employee is entitled to treat himself as discharged from further performance. If he does so, then he terminates the contract by reason of the employer’s conduct. He is constructively dismissed.”*
112. In ***Malik v Bank of Credit and Commerce International SA 1997 IRLR 462*** the House of Lords affirmed the implied term of trust and confidence as follows: *“The employer shall not without reasonable and proper cause conduct itself in a manner calculated and likely to destroy or seriously damage the relationship of confidence and trust between employer and employee”*.
113. In ***Baldwin v Brighton and Hove City Council 2007 IRLR 232*** the EAT had to consider whether for there to be a breach, the actions of the employer had to be calculated and likely to destroy the relationship of confidence and trust, or whether only one or other of these requirements needed to be satisfied. The view of the EAT was that the use of the word “and” by Lord Steyn in the passage quoted above, was an error of transcription and that the relevant test is satisfied if either of the requirements is met, so that it should be “calculated or likely”.
114. In ***Lewis v Motorworld Garages Ltd 1986 ICR 157*** the Court of Appeal held that the test as to whether a repudiatory breach has been committed is an objective one. Glidewell LJ said that the employee can rely on a cumulative course of conduct:
- “The breach of this implied obligation of trust and confidence may consist of a series of actions on the part of the employer which cumulatively amount to a breach of the term, though each individual incident may not do so. In particular in such a case the last action of the employer which leads to the employee leaving need not itself be a breach of contract; the question is, does the cumulative series of acts taken together amount to a breach of the implied term?... This is the ‘last straw’ situation.”*
115. Lord Justice Dyson in ***London Borough of Waltham Forest v Omilaju 2005 IRLR 35*** gave guidance upon the correct approach to cases concerning a series of acts:

*“I see no need to characterise the final straw as 'unreasonable' or 'blameworthy' conduct. It may be true that an act which is the last in a series of acts which, taken together, amounts to a breach of the implied term of trust and confidence will usually be unreasonable and, perhaps, even blameworthy. But, viewed in isolation, the final straw may not always be unreasonable, still less blameworthy. Nor do I see any reason why it should be. The only question is whether the final straw is the last in a series of acts or incidents which cumulatively amount to a repudiation of the contract by the employer. The last straw must contribute, however slightly, to the breach of the implied term of trust and confidence. Some unreasonable behaviour may be so unrelated to the obligation of trust and confidence that it lacks the essential quality to which I have referred.*

*If the final straw is not capable of contributing to a series of earlier acts which cumulatively amount to a breach of the implied term of trust and confidence, there is no need to examine the earlier history to see whether the alleged final straw does in fact have that effect. Suppose that an employer has committed a series of acts which amount to a breach of the implied term of trust and confidence, but the employee does not resign his employment. Instead, he soldiers on and affirms the contract. He cannot subsequently rely on these acts to justify a constructive dismissal unless he can point to a later act which enables him to do so. If the later act on which he seeks to rely is entirely innocuous, it is not necessary to examine the earlier conduct in order to determine that the later act does not permit the employee to invoke the final straw principle.*

*Moreover, an entirely innocuous act on the part of the employer cannot be a final straw, even if the employee genuinely, but mistakenly, interprets the act as hurtful and destructive of his trust and confidence in his employer. The test of whether the employee's trust and confidence has been undermined is objective (paragraphs 20 to 22)”*

116. To reach a finding that the employer has breached the implied term of trust and confidence requires a significant breach of contract, demonstrating that the employer's intention is to abandon or refuse to perform the employment contract, Maurice Kay LJ in ***Tullett Prebon plc v BGC Brokers LP 2011 IRLR 420***.

## Conclusions

117. Dealing with the matters relied upon by the claimant as cumulatively amounting to a fundamental breach of contract and based on my findings of fact above, I find the following.
118. In October 2015 when the claimant complained about it, there was a lack of administrative support for her. The respondent accepts that she was right to raise it. She raised this with Mr Kerswell and within a matter of a few days he reinstated the assistance of Ms Sarah Blake for 1 day per week (although this was not the full 12 hours originally allocated) and by 11 November 2015 he had recruited Ms Jeffers as the HR Manager. My finding above is that this was not just for discrete project work.
119. The grievance outcome was that all HR duties were removed from the claimant, with no corresponding reduction in pay. This was the case from 11 March 2016, just under six months prior to her resignation. The lack of administrative support was not a live issue after that. The matter had been resolved in the claimant's favour following her grievance. The claimant had

- not returned to work to experience the reduced duties.
120. Mr Kerswell accepts that he raised in the 3 December 2015 meeting the issue of the claimant's work performance. I find that it was not unjustified criticism because the claimant herself was raising the fact that she was struggling with her work. Mr Kerswell had started to take steps to address this by bringing in Ms Blake for one day per week and recruiting Ms Jeffers.
  121. He did not pick the claimant up on matters that he could have done (such as the failure to arrange the meeting with the Chief Executive of East Sussex County Council). The claimant did not allow the meeting to conclude. Mr Kerswell only spoke for one to two minutes so he could not put across all that he wanted to say and bring matters to a conclusion or resolution in that meeting because the claimant walked out. I have also found above that the claimant went to that meeting with a prejudged negative view of how it would go.
  122. I have found above that Mr Kerswell did not restrict access by the claimant to his emails. He queried the usefulness of her reading his sent emails but applied no physical bar or restriction. He said nothing about his incoming emails.
  123. The claimant relies on Mr Kerswell stating on 3 December that she could not be on annual leave during term-time. One of the purposes of the meeting on 3 December was to follow through on the email correspondence of late November when the claimant was on holiday and Mr Kerswell said that he would struggle to authorise her leave during term time. He had not said categorically that he would not do so; just that he would struggle to do so. The discussion on 3 December could not be brought to a conclusion because the claimant walked out.
  124. It is not in dispute that the respondent did not refer the claimant to occupational health. I have found above that the respondent's intention was to make an OH referral at the point at which the claimant was fit to return to work and have OH input into that return. I have also found above that the respondent was not under an obligation to do so in the meantime. This was their managerial decision.
  125. The claimant relies upon a failure to implement the Policy on Mental Health and Stress in the Workplace (page 231) which she contended was contractual. I have found above that it was not contractual and that the respondent was not in breach of paragraph 4.3 of the policy as the appropriate time to carry out an assessment was when the claimant was due to return to work. The most likely course of action would have been a stress risk assessment in the light of her amended duties to ensure that her levels of stress remained at an appropriate level.
  126. I have found above that there was no unreasonable delay on the part of the respondent in dealing with the claimant's grievance of 27 January 2016 including the appeal.

127. The claimant contends that the grievance did not properly conclude the annual leave issue which obliged her to bring the appeal. The grievance and appeal outcome did not deviate from the contractual situation in relation to annual leave which was that the line manager had a discretion (contract clause 5.2). My finding is that the most important issue in the claimant's mind when she resigned was the annual leave issue. The grievance appeal outcome that there should be a review between the claimant and the Principal, with an intermediary, to look at the whole year had not yet taken place as the claimant had not returned to work. Mr Kerswell had suggested times when it would not be convenient and the claimant had not put forward any counterproposal or engaged in any constructive discussion.
128. Although it would have been helpful if Mr Kerswell had been more expansive in his reasoning for refusing the leave in November 2016, he thought (as he said in the 3 August email quoted above) that the claimant was aware that this month in 2016 was particularly busy and the claimant accepts in hindsight that he had a valid reason for refusing. I find that in no way was Mr Kerswell demonstrating an intention to abandon or refuse to perform the contract of employment. His intention was to apply the managerial discretion for which the contract provided.
129. The reduction to half pay and SSP was entirely in line with the claimant's contract of employment. The refusal to exercise a discretion to extend her sick pay was no more than that, a refusal to exercise a discretion in her favour. The claimant provided no specific examples as to where this had happened in circumstances similar to herself. The respondent had conducted a diligent search of their records going back over twenty years and could find no comparable examples.
130. The claimant's case is that she was entitled to her sick pay because the respondent caused her illness. I make no finding on the causation of her ill health as all I had were a set of GP fit notes which are inadequate for this purpose. It is for the claimant to prove causation if she asserts it. Even if the claimant is right that the respondent caused her ill health (a matter which I do not decide) it does not create a contractual right to sick pay.
131. The claimant relied upon restrictions on when she could take annual leave. She accepted she had to abide by the annual leave sheet which showed dates which were blocked off for all staff (page 59). The annual leave sheet for the relevant leave year 2016/2017 was not put in evidence by either side. Her case was that she was being invited to agree to a change to her contract to limit her annual leave to certain times.
132. The claimant accepts that annual leave was subject to line management approval. She did not have free rein in deciding when she would take her annual leave. I find that the claimant was not being asked to accept a change to her contract. She was subject to managerial discretion which remained open to discussion under the terms of the grievance outcome. I

find that in this, the respondent was not demonstrating an intention to abandon or refuse to perform the contract of employment. Furthermore there was no blanket ban and Mr Kerswell did not say that November in subsequent years was a month in which the claimant could not take annual leave.

133. The primary issue by the date of the claimant's resignation was the question of annual leave. Both sides considered that it was a shame that they had to go through the grievance process just to arrive at the contractual position. Once the claimant had raised a grievance the respondent had no option but to follow the procedure and they did so carefully and thoroughly.
134. The claimant considered that Mr Kerswell was trying to restrict her annual leave in a way that had not happened to her before. Mr Kerswell was applying his contractual managerial discretion. He was not acting in breach of the contract.
135. I have found no breach of contract, whether express or implied term, in relation to sick pay.
136. On the issue of annual leave (and to the extent that it is necessary to say, on the other matters relied upon) I find that the respondent did not demonstrate any intention to abandon or refuse to perform the contract of employment. There was no breach of contract on the matters relied upon, cumulatively or individually. The claimant has not met the test for a breach of the implied term of trust and confidence as laid down in *Malik* and qualified in *Baldwin*. The respondent did not conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence.
137. As such there was no repudiatory breach of contract and the claimant has not proved dismissal under section 95(1)(c) ERA (above).
138. The claims for constructive unfair dismissal and breach of contract therefore fail and are dismissed.

#### **Listing a provisional remedies hearing**

139. Both parties having had an opportunity to check their availability, we listed a date for a provisional remedies hearing for 27 October 2017 at 10am.
140. By consent it was ordered that on or before 6 October 2017 there shall be disclosure by the claimant or any additional documents relevant to remedy including documents related to mitigation of loss.
141. In the light of the findings above the hearing and the above orders are vacated.

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**Employment Judge Elliott  
Date: 29 August 2017**