



EMPLOYMENT TRIBUNALS

Claimant: Mrs N North

Respondent: Incentive FM Ltd

Heard at: Hull **On:** 20 December 2017

Before: Employment Judge Maidment (sitting alone)

Representation

Claimant: Mr A Gloag, Counsel

Respondent: Mr M Bloom, Solicitor

RESERVED JUDGMENT

The Claimant's complaints of unfair dismissal and breach of contract fail and are dismissed

REASONS

The issues

1. The Claimant's primary complaint in these proceedings is of unfair dismissal which in turn is dependent upon her having been constructively dismissed. The Claimant maintains that the Respondent acted in breach of the mutual obligation of trust and confidence. She relies on a number of aspects of her treatment as singularly and, more particularly, cumulatively amounting to a fundamental breach of contract. These are, namely: being given an excessive workload, not being offered the correct support, being undermined by her account director, Mr Alderson. She maintains that, when she submitted a grievance on 5 May 2017, there was no adequate investigation by Mr Wilson, the outcome was delayed (although in his submissions Mr Gloag no longer relied upon the issue of any delay), he failed to speak to key witness and gave an unsatisfactory resolution of mediation. Finally, the Claimant relies upon the Respondent's refusal to pay her excess mileage charged on her private leased vehicle, even though such mileage was incurred as a result of business travel.

2. The Respondent denies that the treatment of her took place and/or is such as to amount to a fundamental breach of contract. Further, it will be said that the Claimant did not resign in response to a fundamental breach but instead to commence more lucrative employment elsewhere and that she delayed in so doing, so as to be taken to have affirmed the contract of employment. If, however, the Claimant was constructively dismissed, the Respondent does not put forward in the alternative any potentially fair reason for dismissal.
3. The Claimant has a further complaint seeking damages for breach of contract which relates to the excess mileage charges she incurred on her leased vehicle and the Respondent's failure, she says in breach of her contract of employment, to repay her in respect of those charges.

The evidence

4. The Tribunal had before at an agreed bundle of documents numbering some 235 pages.
5. Having clarified the issues with the parties the Tribunal took time to complete its private reading into the witness statements exchanged between the parties so that when each witness came to give evidence, he/she could confirm their statement and then, subject to brief supplementary questions, be open to be cross examined on it. The Tribunal heard firstly from the Claimant and then on behalf of the Respondent from Mr Glenn Wilson, operations director, and Mr Steve Alderson, account director.
6. Having considered all relevant evidence, the Tribunal made the findings of fact as follows.

The facts

7. The Respondent is a facilities management business responsible for the health and safety, security and maintenance of its clients' buildings across the United Kingdom. The Claimant was employed by the Respondent from 1 May 2010 and had previously worked as its facilities manager for the St Mark's Retail Park in Lincoln. From 2013 she reported to Mr Glenn Wilson, operations director. The Claimant's evidence before the Tribunal was that for the most part she had a good relationship with Mr Wilson, who she described as friendly towards her and indeed supportive, she said, up until around the middle of 2016.
8. In Summer 2015 it became evident that the Respondent was about to lose the contract to manage the Lincoln retail park. The Claimant asked to be retained in an alternative position with the Respondent rather than transferred to the incoming contractor which would be responsible for that site. At this time, the Respondent was in negotiations with Empiric,

providers of student accommodation, to manage buildings for it. The Claimant was told that this could provide an alternative opportunity for her within the Respondent.

9. The Respondent was successful in being awarded a contract in late August by Empiric which was in fact to deliver facilities management to their nationwide portfolio of buildings. The Claimant was offered the role of key account manager and accepted this position which was a significant promotion involving an increase in her salary from around £28,000 per annum to £40,000 per annum together with a car allowance of £6000. The Claimant's mileage expenses could be reclaimed at the rate of 32p per business mile. By the time the Claimant's employment with the Respondent her salary had increased further to around £44,300.
10. The Empiric contract started with the Respondent taking responsibility for 1 building located in Portsmouth but it was anticipated by the Respondent, as was the Claimant aware, that the Empiric portfolio which they would be responsible for would grow as it did to around 58 buildings covering a very wide geographical area.
11. The Claimant was successful in her new role and credit is due to her for the number of Empiric buildings which were brought into the contract portfolio. Due to the rapid expansion, there was a growth in the team supporting the Claimant, in particular portfolio managers with direct responsibility for a number of Empiric buildings in their geographical areas. Nevertheless, the Claimant had a significant workload, not assisted by the amount of travelling, predominantly by car, which she undertook to visit various client sites and attend meetings. The Claimant's case is that she was working 18 – 20 hours a day, Monday – Friday, with additional work undertaken at weekends and on call. It was put to the Claimant that this was an exaggeration and whilst the Tribunal cannot accept that the Claimant habitually had only four hours of non-working time in each 24-hour period, the Claimant's schedule does illustrate again a substantial workload with little time for proper rest. The Claimant's contract of employment dated back from her days as a facilities manager and provided for a standard working day of 8 hours but with the expectation that the Claimant would work reasonable hours in excess of those mentioned as might be necessary for the proper performance of duties.
12. The Claimant was home based and planned her own diary subject to client needs.
13. On 21 October 2016, the Claimant emailed Mr Wilson headed "*rant time*" stating: "*I genuinely don't think the Empiric contract can sustain our service levels unless we get some extra support soon. Everyone is just pushed to the absolute hilt and I am mega fearful we are going to miss something that is either going to leave us with egg on our face or worse*"

lose the contract... We also need some urgent admin support... Empiric are buying fucking shit buildings and we are picking up the pieces, however we can only do what is feasible with the small team we have. We are passed buildings which we are told need little work and when we get in there we uncover how shit they really are.... Even the recruitment of staff is an issue, having the time to dedicate to good recruitment process. None of us seem to have enough hours in the day to be able to induct, train and support our own staff on site which again makes us look shit!!!"

14. The Claimant listed a number of additional staff she felt were required, including a new portfolio manager promising she would “*work my guts off to make sure this contract works as it should*” and apologising if the communication sounded negative. The Claimant accepted that in her communications she did not pull any punches and was not a shy and retiring individual.
15. Mr Wilson spoke to the Claimant over the telephone on 24 October and said that he would try to make life easier for the Claimant. The Claimant and Mr Wilson then met with Empiric on 10 November where the need for more support on the contract was raised. They then awaited Empiric’s response. The Claimant re-raised her request for further assistance to Mr Wilson by email of 26 January 2017. On that day Mr Wilson met with the Respondent’s managing director and secured agreement for the recruitment of a further portfolio manager, a helpdesk operator and most significantly an account director. Mr Steve Alderson was recruited to the account director position which sat between the Claimant and Mr Wilson such that Mr Alderson would be the Claimant’s immediate line manager. The Claimant’s evidence before the Tribunal was that she was told that Mr Alderson would provide her with greater support and that she was over the moon that someone had been brought in.
16. Mr Alderson commenced employment with the Respondent on 13 February. His role including account directorship of Empiric and another significant client. The Empiric team received by email a formal announcement and a follow-up email shortly afterwards on 14 February specific to the Empiric contract. This referred to the approval to recruit a fifth portfolio manager to start as soon as possible and described Mr Alderson’s new role as one where he could give invaluable support to the Claimant and others to ensure the delivery of service levels beyond Empiric’s expectations. Mr Wilson in such email thanked everyone for their continued support which he said had been noted within the business.
17. The Claimant first met Mr Alderson at a client meeting she had invited him to in Sheffield on 16 February. She said that she did not consider him to have been helpful and whilst at that meeting he had not been rude or aggressive she felt he did not seem to ask questions or take a real interest in matters. Spending time, she maintained, looking out his mobile phone. She could not agree with Mr Alderson’s own impression of the meeting as

having been productive and part of him learning the nature of the business. Whilst Mr Alderson had substantial management experience this was more in logistics than facilities management. Subsequently the Claimant said that whilst he appeared to be positive in his emails he could be derogatory when spoken to face-to-face and that she did not like his style of management. The Claimant raised her concerns with Mr Wilson who advised the Claimant to give Mr Alderson a chance

18. The Claimant emailed Mr Wilson on 23 March headed again *“rant time”* asking if there might be an opportunity for her to move roles. She went on: *“I just cannot work with Steve, so preferably something which takes me away from him being my line manager. I don’t do micromanagement and I certainly can’t carry on like this! It is driving me do lally tap!! I have enough to do without him planning my diary, telling me how to run my days etc etc. As I said to you before I know you needed some pressure relieving from you and I hope having him there has done that... However he is too corporate and his communication skills are poor! I thought it was great to have someone in to help support us... We are not children and don’t need babysitting.... He doesn’t even understand our culture... I have emailed as he doesn’t like me talking to you!!!”*
19. The Claimant agreed that Mr Wilson had called her the following day and again sought to persuade her to give him more time. He said that moving the Claimant off the contract was not an answer and it was better for the Claimant to work through the issues with Mr Alderson.
20. The Claimant complained that Mr Alderson had attended to interview alongside her candidates for a new portfolio manager in the South East. The decision on who to appoint was, however, an agreed one. The Claimant reiterated to the Tribunal her complaint that Mr Alderson told her how to run her diary, was constantly on the phone to her, was rude or went silent during conversations. She recalled an instance where he described the planning of the portfolio team as *“shit”*.
21. The Claimant was on holiday from 6 – 21 April and received an email from Mr Alderson on her last working day stating: *“This is a great handover for the team – giving them clear direction while you are away!”* At the same time he asked the Claimant regarding available dates at the end of May and in June to arrange some meetings with the client. The Claimant complained that while she responded with some available dates, including 22 May, a number of weeks passed without her hearing anything and when she did hear that that was the date proposed by him for a meeting with the client in London, she had already made arrangements to be in Falmouth that day insisting that the Claimant prioritise that meeting. The Claimant ultimately managed to attend the meeting and go to Falmouth, but not without some difficulty and inconvenience.

22. We Claimant complained about Mr Alderson's attendance at a team meeting in Manchester on 27 April which she said was a low-level meeting to review budgets and whilst he was entitled to be there, there was no need for him to be and she had told him so in advance. The Claimant said that she behaved professionally, but felt that Mr Alderson had been rude in trying to lead the meeting telling the Empiric team staff that they ought to put narratives in budgets whereas the Claimant had already discussed this with them.
23. The Claimant had already emailed Mr Wilson on 24 April asking if she could have a chat with him and an agreed call took place between them on 28 April. The Claimant accepted there was no unreasonable delay in arranging this call. She agreed that the call lasted for a lengthy period and that Mr Wilson listened to everything she had to say. It was in fact the last day before Mr Wilson departed on holiday until a return to work on 9 May. She agreed that he had sought to be helpful and had addressed her in a friendly manner. Mr Wilson's expressed view was that if the Claimant had any concerns she ought to speak directly to Mr Alderson, which the Claimant felt she had already attempted to.
24. On 3 May the Claimant made a Facebook post stating: *"I cannot formulate an expression using tangible language that would even begin to express just how much you piss me off."* She believes that Mr Wilson as a Facebook friend of hers would have seen this posting. Her recollection was that the posting followed a team meeting to review the Empiric contract in Birmingham and referred to Mr Alderson.
25. That meeting appears to have taken place on that day or 4 May. The Claimant said that on arrival Mr Alderson said he wasn't going to stick to the agenda and caught everyone by surprise asking what they wanted from the day. He said to the Tribunal that that was his style and approach to such meetings. She said that he was then extremely negative saying that they were a poor performing team without recognising the strain there had been on resources. She described there being significant tension between those at the meeting, which needed to be adjourned, and that during the break one of the Claimant's portfolio managers had been in tears and others had expressed confusion about Mr Alderson's intentions causing her to try to calm the situation down before the meeting continued. She said that Mr Alderson had pulled her to one side in fact before the meeting recommenced saying that on reflection he shouldn't have said what he had and needed to apologise to the team. Mr Alderson told the Tribunal that he had wanted to promote a discussion about how those serving the Empiric contract became a high performing team, but this had been taken as a criticism that they were not already a high performing team. We Claimant's view was that any criticism of the management of the contract was a criticism of her.

26. By email of 5 May 2017 to Mr Wilson, the Claimant attached a lengthy grievance letter for him to consider on his return from holiday. She said that she didn't feel she could discuss those issues with Mr Alderson directly. The grievance related to her hours of work and her complaints regarding Mr Alderson's management and behaviour.
27. Before Mr Wilson could respond, the Claimant had to attend a meeting in London with Mr Alderson on 10 May. She accepted that at this point he was not aware of her having raised a grievance against him. She said that he said that he didn't like her attitude and that they had to work as one team in front of the portfolio managers. The Claimant said that he criticised her management style stating that his general manager experience was invaluable and far outweighed hers. She said he reduced her to tears, which he denied. Before the Tribunal she added that he described her as a "shit" manager, changing this on challenge, to a statement to the effect that her management skills were "shit". This alleged comment was not in the Claimant's witness statement in circumstances where, if it had been made, the Tribunal is certain it would have been included.
28. The Claimant received on 10 May, an informal grievance raised by Emily Bowater in respect of issues she had with Mr Alderson which the Claimant passed to Mr Wilson. The Tribunal has also heard that in exit interviews a Mark Old complained of being micromanaged and a Brian Brady had been asked questions by Mr Alderson pertaining to the Claimant's own performance. Mr Wilson was unaware of these issues.
29. Mr Wilson acknowledged the Claimant's grievance on 12 May and met with her on 15 May, a delay which the Claimant did not categorise as unreasonable. The meeting lasted from around 9:30 a.m. to 11:15 a.m. during which Mr Wilson asked the Claimant to outline her issues. He made a note of her declared desired outcome to "*get her spring back in her step and enjoy coming back to work*" which the Claimant agreed was an accurate note. She also agreed that she said that she did not want to work with Mr Alderson. She recalled that Mr Wilson gave her the option of proceeding to address the grievance in a formal or informal matter but said that, rather than her opting for an informal approach, he steered matters towards that formal resolution as he said it was quicker. Mr Wilson was clear that the Claimant was happy to proceed to resolve matters informally.
30. Ms Wilson then met with Mr Alderson on 17 May, albeit the Claimant was not aware of that meeting at the time. The Claimant had no complaint regarding this meeting, understanding that it was appropriate for Mr Wilson to speak to Mr Alderson and accepted that she was willing for her grievance to be shared with him. Following this, Mr Wilson asked Mr Alderson to go away and revert with a full statement of his version of the points raised by the Claimant within her grievance, which he did. Having considered these, Mr Wilson arranged to meet with the Claimant on 9

June and notified her of his findings which were detailed in an outcome letter given to her dated 5 June.

31. The Claimant felt that there had been a lengthy period for him to now provide this outcome and felt Mr Wilson had displayed an inappropriate attitude in telling the Claimant it had taken him a day to type up his conclusions. The Tribunal notes that the Claimant had chased Wilson by email of 24 May asking if he was any closer to providing an outcome as *"things aren't getting any better"*.

32. In his outcome letter Mr Wilson recognised that the Claimant's workload had become unmanageable and referred to the appointment of an additional portfolio manager and Mr Alderson to assist her. He then dealt with some specific complaints raised by the Claimant regarding Mr Alderson's management. He said that Mr Alderson had arranged client review meetings on Mr Wilson's own instructions. As regards diary management, he felt that there had not been excessive meeting invites sent to the Claimant. As regards interviewing portfolio managers, it was not thought inappropriate for Mr Alderson to be involved and it was understood that the Claimant was herself involved and that an agreement was reached on the appointments made. He expressed the view that there was no ambiguity on Mr Anderson's behalf that portfolio managers reported directly to the Claimant. He also said that Mr Alderson had been instructed by himself, as part of Mr Alderson's own induction, to attend as many site meetings as possible. As regards the budget review meeting on 27 April in Manchester he said there were two very different accounts of the meeting. Whilst he recognised it might not have been critical for Mr Alderson to attend, it was felt that he should be part of the review of budgets once produced.

33. As regards arrangements for team meetings, Mr Wilson supported the Claimant's comments and going forward it was recommended that Mr Alderson discussed planned dates for meetings which the portfolio managers needed to attend with the Claimant in the first instance.

34. This Wilson did not, however, see it as unreasonable for Mr Alderson to seek to call the Claimant on a daily basis. As regards an exit interview on 28 April 2017 Mr Alderson denied any knowledge of what this related to and Mr Wilson said that he was happy to investigate further if he was provided with additional information. This related to the Claimant's alleging that she had been informed that Mr Alderson had spent time interviewing a staff member for an internal vacancy questioning him on the Claimant's ability to manage people and the Empiric contract. Mr Wilson could see no grounds for criticism however in the content of an email sent by Mr Alderson to the Claimant dated 3 May. As regards the Birmingham meeting on or around 4 May, Mr Alderson had acknowledged that the meeting did not go as well as it could have done and that he could have

“positioned how the newly formed team become a high performing team more effectively.”

35. In a summary, Mr Wilson said that Mr Alderson, like the Claimant, had concluded that the current working relationship was not as constructive as it should be or as would be expected. Mr Alderson’s view was that he had not demonstrated any of the characteristics attributed to him and feedback from elsewhere within the business was healthy and dissimilar to the current relationship issues with the Claimant. Mr Wilson continued: *“That said, it is clear we need to reconcile this and establish a new common ground that allows you both to work effectively, together, and towards a common purpose. I would suggest that the three of us meet to discuss how best to achieve this and in order to clear the air.”* He concluded stating that he looked forward to working with the Claimant and Mr Alderson in future to ensure the delivery of an excellent service in an enjoyable working environment.
36. After Mr Wilson delivered the outcome to the Claimant at the meeting on 9 June she said she was going to resign. She felt the outcome was not what she had expected in that there had been no further investigation of her concerns. She agreed that Mr Wilson said he did not wish her to resign and asked her to reconsider and take her time.
37. She agreed that Mr Wilson was kind and helpful texting her shortly after the meeting asking her to let him know that she got home safely. The Claimant responded saying that she didn’t think she could face Mr Alderson at a meeting she had scheduled with him on the following Monday. Mr Wilson responded on Saturday 10 June saying that he thought he may have the solution and asking to meet the Claimant early on Monday morning to which the Claimant agreed on the basis that Mr Alderson wouldn’t be there. They arranged to meet up at an East Midlands service station and it was agreed that the Claimant could miss the meeting which had been arranged later in the day with Mr Alderson.
38. Indeed, Mr Wilson had discussed the situation with Mr Bruce McDonnell, the Respondent’s managing director on the evening of 9 June. He described the Claimant as being a well respected high performing member of the team who they wished to retain and in discussion with Mr McDonnell they had alighted upon an opportunity to realign responsibilities. They had decided therefore to allocate a new account director to the Empiric contract in place of Mr Alderson to start in August 2017 with Mr Wilson re-assuming director responsibilities for Empiric in the meantime. Mr Alderson was to be transferred to a different role within the business.
39. When the Claimant and Mr Wilson met on the morning of 12 June, he explained that decision and that the suggestion was that Mr Alderson be relocated. It was put to the Claimant in cross examination that this was her

dream result, which she said that it might have been if it had been delivered after a further investigation. She knew by this point in time that Mr Alderson had been spoken to in relation to her grievance, but she had not been told that Mr Wilson had interviewed anyone else. She felt still that the issues had been effectively covered up and felt that people had stuck together who had worked together in the past. Mr Alderson, Mr Wilson, Mr McDonnell, Mr Reid, Group MD, and the senior HR person had all previously been employed by a common employer, TNT. Mr Wilson came away from that meeting thinking that they Claimant saw this as a solution which resolved her concerns.

40. He met then with Mr Alderson on the afternoon of 12 June to advise him that he was being reassigned and placed in charge of another portfolio of contracts with immediate effect. Mr Alderson has been taken aback by the decision but reacted professionally and respectfully in accepting it. Indeed, they Claimant accepts that after 12 June she was no longer managed by Mr Alderson who was moved away from the Empiric contract with immediate effect.
41. However, at a meeting on 19 June in Stratford-upon-Avon the Claimant approached Mr Wilson as they were leaving and said that she didn't feel that she wanted to continue with her role within the business as it didn't feel like the company she had joined. The Claimant said that she would like to resign. Mr Wilson said that he did not want to accept her resignation as a valued member of staff and asked her to reconsider. The Claimant agreed before the Tribunal that he had said he wanted her to stay but said that he did not necessarily mean that.
42. In any event, they Claimant submitted her resignation by email on 21 June 2017. Within this, she reiterated concerns regarding Mr Alderson describing his controlling nature. She recognised that Mr Alderson had been removed as her manager and that, although this outcome was her initial expectation, she had felt that her views were not recognised during the grievance and that Mr Alderson had only been removed because the Claimant said she would resign. On reflection she said that she didn't feel a fair investigation had been carried out, predominantly because Mr Wilson had failed to speak to key witnesses who could have confirmed the Claimant's version of events. She said that the investigation took weeks to undertake during which time she was still having to deal with Mr Alderson. Mr Wilson said that he did not speak to the Claimant's portfolio managers as the Claimant wished for the matter to be dealt with informally and he did not need to in any event.
43. The Claimant then raised a complaint regarding a new bonus structure and finally raised the issue of her annual mileage. She stated that when she took on her new role she was advised that her annual mileage would be around 20,000 miles per annum, but since starting her new role she had covered around 79,000 miles in 20 months resulting in her paying

nearly £4200 as an excess mileage charge under her car leasing arrangement. She said that Mr Wilson had acknowledged that the role couldn't be done using public transport so that she had no choice but to incur this mileage and complained that Mr Wilson had refused when she had approached him to reimburse her for this charge.

44. They Claimant gave four weeks' notice of her resignation and continued with her job up until 17 July, albeit she took a period of annual leave before her departure.
45. It put to the Claimant that she could have taken her grievance to the next stage in the procedure, but she said she did not understand that she had the ability to raise a formal grievance or right of appeal, not having read the Respondent's grievance procedure. In any event she felt that as everyone in the company at senior level had all been former colleagues, they would support each other.
46. The Claimant is now and from 7 August 2017 has been an asset manager working directly for her former client Empiric at a salary of £58,000 per annum. She said that there had been no approach from Empiric prior to her resignation. The approach came after she had handed her notice in and she referred to Mr Clint Bartram of Empiric having spoken to Mr Wilson 2 or 3 weeks after she had resigned to say that they were going to offer her a job. She had resigned she said from her employment with the Respondent without any expectations regarding future employment.
47. In support of the Claimant's request for reimbursement regarding excess mileage charges, she referred to a cost proposal relating to the Empiric contract which had referred to a mileage of 20,000 miles in a year. She agreed that this was an internal budgeting document, but said that it was what was discussed when she was offered the role and agreed with her as a maximum mileage. She said that on that basis she had taken out a lease on a vehicle with a limit of 20,000 miles per annum (before excess charges applied) and on the basis that the car would be used by her purely for her business use. She had worked out that she felt she was due the sum of £4200 because she said she understood under the lease that there was a charge of 5p or 8p per mile for miles over 20,000. While she agreed that it was her choice to take out a lease on a vehicle, she said that this was the cheapest way of acquiring a vehicle and she was trying to make her £6000 allowance stretch as far as possible. At the end of the lease term she had the option of paying the excess or buying the car outright at a fixed price determined regardless of mileage. Mr Wilson accepted that the Claimant had been told that she should have a car less than 5 years' old and at least a VW Golf or equivalent from the point of view of company image. Otherwise there were no restrictions he said on the Claimant, no idea in advance as to her mileage and no discussion about the reimbursement for that beyond the rate she claimed as expenses for every business mile.

Applicable law

48. In order to bring a claim of unfair dismissal an employee must have been dismissed. In this regard the Claimant relies on Section 95(1)(c) of the Employment Rights Act 1996 which provides that an employee is dismissed if she terminates the contract under which she is employed (with or without notice) in circumstances in which she is entitled to terminate it without notice by reason of the employer's conduct. The burden is on the Claimant to show that she was dismissed.

49. The classic test for such a constructive dismissal is that proposed in **Western Excavating (ECC) Ltd v Sharp 1978 IRLR 27CA** where it was stated:

“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. The employer is entitled in those circumstances to leave at the instant without giving any notice at all or, alternatively, he may give notice and say he is leaving at the end of the notice. But the conduct must in either case be sufficiently serious to entitle him to leave at once. Moreover he must make up his mind soon after the conduct of which he complains; or, if he continues for any length of time without leaving, he will lose his right to treat himself as discharged. He will be regarded as having elected to affirm the contract”.

50. The Claimant asserts there to have been a breach of the implied duty of trust and confidence.

51. In terms of the implied duty of trust and confidence, the case of **Malik v Bank of Credit and Commerce International 1997 IRLR 462** provides guidance clarifying that there is imposed on an employer a duty that he *“will not without reasonable and proper cause conduct himself in a manner calculated [or] likely to destroy or seriously damage the relationship of trust and confidence between the employer and employee”*. The effect of the employer's conduct must be looked at objectively.

52. The Court of Appeal in the case of **London Borough of Waltham Forest v Omilaju 2004 EWCA Civ 1493** considered the situation where an employee resigns after a series of acts by her employer. The Claimant brings her case (albeit not exclusively) on such basis.

53. Essentially, it was held by the Court of Appeal that in an unfair constructive dismissal case, an employee is entitled to rely on a series of acts by the employer as evidence of a repudiatory breach of contract. For an employee to rely on a final act as repudiation of the contract by the employer, it should be an act in a series of acts whose cumulative effect is to amount to a breach of the implied term of trust and confidence. The last straw does not have to be of the same character as the earlier acts, but it has to be capable of contributing something to the series of earlier acts. There is, however, no requirement for the last straw to be unreasonable or blameworthy conduct of the employer, but it will be an unusual case where perfectly reasonable and justifiable conduct gives rise to a constructive dismissal.
54. If it is shown that the employee resigned in response to a fundamental breach of contract in circumstances amounting to dismissal (and did not delay too long so as to be regarded as having affirmed the contract of employment), it is then for the employer to show that such dismissal was for a potentially fair reason. If it does so then it is for the Tribunal to be satisfied whether the dismissal for that reason was fair or unfair pursuant to Section 98(4) of the Employment Rights Act 1996.
55. Having applied the legal principles to the findings of fact the Tribunal reaches the conclusions set out below.

Conclusions

56. The Claimant obviously had a workload which might objectively be viewed as onerous. This arose predominantly as a product of the Respondent's and no doubt the Claimant's success in Empiric trusting them with more and more properties to manage over a short period of time. Whilst growth was anticipated and desired, growth at this speed was not expected. This undoubtedly did increase the pressure on the Claimant, but to an extent she relished the challenge and as a hard-working and very self-motivated individual was determined to make a success of her role. She did have control over her diary and could plan her movements over each working week in a way which made her most efficient and her site visits least disruptive. Nevertheless, there were meetings she had to attend and she had to be reactive to the client's needs. The volume of work gave the Claimant much less flexibility.
57. The Claimant understood the situation and her issue was not that she felt overworked but that to maintain service levels she needed more support from an expanded team beneath her and more effective and dedicated management above her. Mr Wilson was also extremely busy, but on the evidence was available for the Claimant to speak to and she herself recognised that they had a good and constructive relationship at least up to around August 2016.

58. The Claimant, however, then felt that her ability to successfully manage the Empiric contract was at risk without urgent support, hence her email to Mr Wilson which she described as a “rant”. The evidence is that Mr Wilson did not ignore her concerns but indeed quickly sought to address them, which involved having to persuade the client regarding the need for greater management involvement on its contract. Additional staff were recruited and this included the appointment of Mr Alderson as account director above the Claimant.
59. The evidence is that the Claimant welcomed his appointment and the management assistance and expertise it was hoped that he would bring to the party and, had he lived up to her expectations, the Claimant would not, on the evidence, have considered leaving the Respondent’s employment. Unfortunately, he did not and the Claimant has raised a number of complaints about his treatment of her. The Claimant’s complaints are however in the main of a lack of competence on Mr Alderson’s part and his management style which she did not find conducive to a constructive working relationship. The Claimant felt herself to be micromanaged, but the evidence is of little more than a manager who wished to be kept in the loop and to be involved and involve himself in certain client meetings and meetings which the Claimant had ordinarily run on her own with her Empiric contract team. Her complaints have to be seen in the context that, while she welcomed additional support from above, she had no doubt developed her own way of working quite independently, whereas now inevitably an element of that autonomy had disappeared. There may be instances where Mr Alderson’s management of the Claimant and her team could be viewed as “clumsy” or “insensitive”, but the Tribunal’s findings cannot go significantly further and certainly there is no evidence that Mr Alderson was actively and intentionally destructive, abusive or undermining of the Claimant. The Tribunal struggles on its findings to identify behaviour which, certainly on its own, could be viewed as a fundamental breach of contract.
60. It would be wrong to say that Mr Wilson ignored the Claimant’s protestations regarding Mr Alderson’s management of her but, again, in the context of her having worked with him for only a short time and for Mr Alderson and the Claimant needing each to get used to the other, he hoped, not unreasonably, that the Claimant would be able to resolve these difficulties not least by raising them directly with Mr Alderson. The Claimant’s adverse reaction to Mr Alderson does appear to have been almost immediate without giving him much benefit of the doubt.
61. The Claimant raised a written grievance to Mr Wilson and, given firstly his holiday and secondly other commitments, it would be wrong to regard him as having dragged his feet in dealing with it. He saw the Claimant quite soon after she raised her grievance and, whilst it may also have suited him for the grievance to be dealt with in an informal manner, he genuinely

believed that would provide the quickest and easiest solution. You did not force the Claimant down that route, which she herself agreed.

62. Despite the informal process, Mr Wilson did listen to the Claimant's complaints in detail. He then saw Mr Alderson and went through her issues with him giving him an opportunity to comment on them in more detail before then considering what each of them had said and putting together a detailed letter of outcome where it is clear that, whilst the Claimant might not have agreed with the outcome, her issues had been thoroughly considered.
63. Mr Wilson accepts that he did not speak to anyone else and, in particular, to the portfolio managers, who the Claimant suggests all ought to have been interviewed as part of a reasonable investigation. However, again, this was in the context of the Claimant having agreed that the grievance be dealt with as an informal grievance and where the majority of the issues arose out of a direct clash between her and Mr Alderson into which the Claimant's reports could certainly in some respects not have provided a significant amount of corroborating information. Understandably, and again in the context of an informal process, Mr Wilson did not want to open up the issues to the entire Empiric team, but wished to concentrate on a form of resolution/reconciliation between the Claimant and Mr Alderson personally, in circumstances where he knew them both well and respected both of them on a personal and professional level.
64. The solution he ultimately came up with was that there be a form of mediation between Mr Alderson, the Claimant and himself and viewed objectively that was not an inappropriate decision where the predominant thrust of the Claimant's complaints was in relation to management style evidencing a breakdown in relationships which reasonably appeared to Mr Wilson at that time as certainly not irretrievable and where no findings had been made of misconduct on Mr Alderson's part.
65. Had there been a fundamental breach of contract arising out of any issue of lack of support and/or Mr Alderson's treatment of the Claimant, it is recognised that Mr Wilson then moving Mr Alderson away from the Empiric contract and himself taking over account director responsibilities for Empiric before the appointment of a new director, cannot have cured or removed that fundamental breach. Whilst on the Tribunal's findings there was no fundamental breach of contract arising out of this treatment of the Claimant, the Tribunal is clear on the Claimant's evidence in any event that this was not the reason why she resigned from her employment. When she met to discuss her grievance with Mr Wilson, she was clear that she wanted to get back to enjoying her work. Indeed, on her own evidence, the Claimant's decision to leave arose out of her conclusion that her grievance had not been dealt with adequately and that, even if ultimately Mr Wilson had come up with her "*dream outcome*", he had done so only because of her threat to resign from employment and in

circumstances where he had not treated her fairly in both the grievance outcome and the depth in which investigated it.

66. Again, however, the Tribunal's findings do not support a breach of trust and confidence arising out of Mr Wilson's handling of the Claimant's grievance. Whilst he might have taken a different approach to the grievance, objectively viewed, what he did do and his attempts at a resolution are not indicative of an employer acting in a way where there was an intention to disregard the Claimant's contract of employment and the obligations flowing from it.

67. Finally, the Claimant complains of a further breach of her contract of employment in the Respondent's refusal to pay her excess mileage charges on her leased vehicle. The evidence however does not support any finding that there was ever any express agreement between the parties that such sums would be reimbursed. The Claimant was straightforwardly provided with a car allowance in a set monetary sum and it was her choice as to how she funded her vehicle which she would use on company business. The Respondent reimbursed business mileage at a set rate per mile which no doubt reflected her vehicle running costs and an element of depreciation but also provided a further element of compensation. There was never any consideration by either party at the time the Claimant was awarded her car allowance that there might be reclaimable by the Claimant any additional costs arising out of how she chose to provide a vehicle. Certainly, there was no undertaking as to the maximum level of the Claimant's mileage and the costing sheet which was produced was for budgeting purposes in relation to the Empiric contract. It did not reflect any additional agreement as to what the Claimant might be paid. In refusing to pay the Claimant's excess mileage charges, the Respondent did not act in breach of her contract of employment such that this cannot be relied upon as giving her the right to treat herself as dismissed. It does not even possess the characteristics necessary for there to be a last straw, the Tribunal noting that this does not have in itself amount to a breach of contract. Certainly, the lack of any contractual agreement must mean that the Claimant's complaint seeking damages for breach of contract must fail.

68. Fundamentally, on the Tribunal's findings the Claimant's primary complaint of unfair dismissal must also fail in circumstances where the Claimant was not dismissed. Even when viewed cumulatively the treatment of the Claimant was not in breach of the implied duty of trust and confidence.

Employment Judge Maidment

Date: 17 January 2018