



EMPLOYMENT TRIBUNALS

Claimant: Mrs T Davison

Respondent: Niche Housekeeping Services Ltd

Heard at: Hull (BY CVP) **On:** 1 and 2 November 2021

Before: Employment Judge Miller

Representation

Claimant: Mr P Davison (the claimant's husband)

Respondent: Mrs V Barley (owner)

JUDGMENT having been sent to the parties on **15 November 2021** and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Introduction

1. The claimant was employed by the respondent as a cleaning assistant from 12 December 2018 until 30 April 2021.
2. The claimant tendered her resignation on 15 April 2021 giving notice for her employment to end on 30 April 2021. The claimant started a period of early conciliation on 15 April 2021 and that finished on 16 April 2021. On 18 April 2021 the claimant brought a claim that she was constructively and unfairly dismissed by the respondent.
3. The respondent denies that it acted in breach of contract entitling the claimant to resign and, in any event, they say that the claimant affirmed her contract by reason of the fact that she gave two weeks' notice. Further, the respondent says that the claimant did not resign in a timely manner in response to the alleged breaches.
4. The claimant says that the respondent has breached the implied term of mutual trust and confidence by its actions. The particular alleged acts that the claimant relies on as amounting to breaches of the implied term are as follows

- a. A failure by the respondent to provide a duty of care to the claimant due to stress and bullying in the workplace, especially when being off sick
 - b. a failure by the respondent to follow the disciplinary procedure outlined in the claimant's contract by giving the claimant a final written warning without any previous disciplinary sanctions
 - c. failing to follow up the claimant's grievance
 - d. failing to follow up on the allegation that the claimant was racist
5. This list of alleged breaches is taken from the claimant's resignation letter as summarised in the respondent's response. I checked with the claimant at the beginning of the hearing and she confirmed that these were the alleged acts amounting to a breach of the implied term of mutual trust and confidence on which she wished to rely.
6. The claimant produced a witness statement and attended and gave evidence. She was represented by her husband.
7. The respondent produced witness statements from the proprietor, Mrs Vanessa Barely and the respondent's general manager Mrs Annette Barley. Both of those witnesses also attended and gave evidence and the respondent was represented by Mrs Vanessa Barley.
8. I am grateful to both Mr Davison and Mrs Barley for the helpful and concise way in which they presented the respective cases and I'm grateful to all the witnesses for the clear and helpful way they gave evidence.

Findings of fact

9. I make the following findings of fact. I have sought to only make such findings as are necessary to deal with the particular allegations and where facts are in dispute I have made a decision on the balance of probabilities.
10. The respondent is a domestic and commercial cleaning company although it primarily provides domestic cleaning. From late 2019 the respondent entered into a contract with a company called ABI to provide office cleaning, and from early in 2020 it took on the role of covid cleaning to provide additional cleaning required because of the pandemic.
11. There are some matters that predate the main events but I will deal with those when considering the disciplinary process as necessary. The issues really began on Monday 8 March 2021. The claimant attended work with her colleague Sandra Babb. She says that another colleague, Amanda Willet, was already at work. She and Ms Babb both said good morning to Ms Willet but Ms Willet only acknowledged Ms Babb. The claimant says that she ignored her and turned her back on her and the claimant did not know

why. The claimant says that she asked Ms Babb why Ms Willet was ignoring her and Ms Babb said she did not know.

12. That evening the claimant messaged Katie Ross, another of her colleagues, to make arrangements for picking her up and taking her to work on Thursday 11 March. I understand that Ms Ross had been on furlough and was due to return to work. There was a customary and private arrangement between the claimant and Ms Ross that the claimant would give her a lift to work even though it was significantly out of her way. Ms Ross's reply was "yes that's great thanks Tanya" and the claimant drew attention to the fact that Ms Ross ends the message with "see you Thursday X".
13. The next day, Tuesday, 9 March 2021, the claimant again attended at work. She says that Ms Willet was again there and in response to the claimant saying good morning it is alleged that Ms Willet grunted at her. The claimant's account is that Ms Willet asked if she was working in the factory (at ABI) all day and asked about Elaine (another colleague) and the claimant said she didn't know if Elaine was working in the factory that day but that she would ring her and ask. The claimant said that she passed Elaine's response onto Ms Willet who then asked about Louise, another colleague, and the claimant said she already knew that Louise would be in at 1:15 PM. The claimant then said that she asked Ms Willet if the trolley was ready (being, I think, the trolley with the cleaning products on). The claimant says that Ms Willet said yes. The claimant said in her witness statement that then "I grabbed the trolley and began to pull it out of the unit when Amanda said would you like help pulling the trolley". The claimant replied no thanks, she could manage.
14. The claimant says that after a while for no apparent reason Ms Willet threw down her spray cloth and said "that's it, I've had enough of this not putting up with your shit, you obviously don't want to work with me so I'll ask Elaine if she wants to work with you". This was witnessed by an ABI worker called Damien. Shortly after the claimant was joined by her other colleague Elaine. The claimant says that Damien told Elaine later what he'd seen happen. The story was then spread to other of the claimant's colleagues including Kirsty and Louise. The claimant says the rest the day progressed without incident.
15. Later that day, Ms Willett sent an email to Mrs Annette Barley. This email is a complaint about the claimant and sets out slightly different version of what the claimant says happened. Mrs Annette Barley says that she received a phone call from Ms Willet on 9 March 2021 saying that she wanted to raise a formal grievance about the claimant's conduct towards her that day and her attitude in general. The email was sent in response to Mrs Barley's request for Ms Willet put her complaints in writing.
16. Ms Willett says that in fact on Monday 8 March it was the claimant who ignored *her* after saying good morning. She also says that on 9 March it was the claimant who asked Ms Willett whether they were working together

and it was the claimant who phoned Elaine to confirm the arrangement. Ms Willet says that the claimant “snapped” at her when she asked if she wanted a hand with the trolley and then closed the door on her. Ms Willett agrees that she then said, although as the claimant was walking off with the trolley, “I told her I wasn’t going to put up with her shit and that I’d ask Elaine to do the factory”.

17. Ms Willett also make some general complaints about what she describes as the claimant’s attitude, that she keeps storming off and that she keeps telling people how awful Ms Willet and Sue (another colleague) are.
18. I do not need to make finding about what actually happened on 9 March 2021 at ABI – about who was to blame for the argument. I do not know. What is clear, and what I find, is that there was an argument between Ms Willet and the claimant. In the course of that argument Ms Willett swore at the claimant and walked off.
19. The next day, Mrs Annette Barley said she received another phone call, this time from Katie Ross, saying that she was worried about returning from furlough on 11 March and working with the claimant again. Mrs Barley says that Ms Ross said she had been worried about this before the lockdown and hoped it would be okay on her return but in fact she was still worried about it.
20. Mrs Barley advised Ms Ross to put her complaint in writing, which she did and then sent on 10 March. In that email she says that she originally drafted it in the November the previous year in the hope that she would not have to send it. Her complaints about the claimant centred on the following things. She says that

“Tanya keeps trying to set me up with anyone who has a pulse at ABI. I asked her to please stop because I am not interested. Then 26 October 2020 she started asking me about what I thought about one particular lad. I again told her that I was seriously not interested”.
21. Ms Ross then goes on to describe the claimant sending her a number of messages in a way that she found uncomfortable. Ms Ross says that she did raise this with the claimant in the October and the claimant said it would stop but then, she said, the claimant ignored her. Ms Ross said this has resulted in a number of men at ABI shouting and chanting at her and she also refers to the claimant describing covid as “a load of shit” which she says she found hurtful.
22. Ms Ross then makes a number of other allegations about the claimant’s behaviour including specifically she says that “I found her quite rude and at times racist. I can’t really give examples because I walk away when she says things that make me feel uncomfortable”. She does give one particular example which the claimant agreed happened (in response to a question from the Tribunal) which was she says that “she once showed me something she had on a phone. It was a picture of a coloured woman with

an amputated leg headlined with “black Friday... 25% off”. Tanya knew immediately that I wasn’t impressed and said “yeah, I might have to be careful who I send that to””.

23. The only part of this allegation that was addressed in evidence by the parties was whether the claimant had tried to set Ms Ross up with anyone at ABI. The claimant had suggested to Ms Ross that she might be interested in one particular person and this included sending a photograph of him to her.
24. It is clear from the email from Katie Ross that she was certainly expressing as at 10 March 2021 that she found the claimant’s actions unacceptable.
25. It is also clear that both Ms Ross and Ms Willet expressed clear views that they disliked working with the claimant in their respective emails.
26. The claimant was then on Wednesday 10 March called by Mrs Vanessa Barley and told that she was not to go into work the next day but instead go to a meeting with her at 10 o’clock. Mrs Barley did not tell the claimant what the meeting was to be about. The meeting was confirmed in a text exchange between the claimant and Mrs Barley who said this was not a disciplinary meeting but the claimant could bring another member of staff with her if she wanted to.

Meeting on 11 March

27. The claimant attended the meeting on 11 March with Mrs Vanessa Barley. It is not entirely clear what this meeting was – part of an investigation, an initial fact finding meeting, an opportunity to consider whether matters should go any further or something else.
28. The claimant says she was told at the meeting about the complaint by Ms Willet but not about the complaint by Ms Ross. Mrs Barley says that she said there were some complaints but she did not say who they were from. There is certainly no mention in the notes of those meetings of the claimant being given any detail about what the meeting was about. It is recorded that Mrs Barley said “explained to Tanya that we have now received allegations from other members of staff claiming Tanya is difficult to work with and they do not like her attitude and conduct whilst at work”. I conclude from the notes of the meeting that the claimant was aware that the complaint came from Ms Willet because she refers to asking the respondent to speak to Damien (the ABI worker who had witnessed the incidents on 9 March). I note that the claimant also spoke to Elaine prior to this meeting who suggested that the claimant obtain a statement from Damien. On balance, I prefer the evidence of Mrs Barley that she did not tell the claimant who the complaints were from. This is supported by the contemporaneous documentary evidence and it seems more likely that the claimant just worked out that it was about the incident with Ms Willett.

29. In that meeting, the claimant was given the opportunity to respond to the allegation that she was difficult to work with, but no specific details were given. No specific allegations were explained and the claimant was not shown the emails from Ms Willett or Ms Ross.
30. The claimant said that she was happy with everyone she worked with but that Ms Willett would not speak to her on the Monday. The claimant said that the respondent should try to speak to Damien (even though Mrs Barley had not by this point even told the claimant what the allegations were actually about) and then the claimant said that she had been to a counsellor and her counsellor told her she was being bullied at work.
31. Mrs Barley did not make any enquiries about the claimant's wellbeing – she said this was because she wasn't sure where the boundaries were in the employer/employee relationship. She asked the claimant to confirm that she had not raised the issue of being bullied before and the claimant agreed she had not. The claimant was told at the end of the meeting that she was not able to come into work and she was paid holiday pay but it was agreed in the course of the hearing that the claimant was eventually kept away from work on full pay.
32. The respondent said the claimant was not suspended. To all intents and purposes she was. The claimant was told not to come in to work while still receiving full pay. This is almost always referred to as suspension and I do not understand why the respondent so vigorously challenged this. In the event, however, nothing really turns on it as there is no claim for unpaid holidays before the tribunal.

Investigation

33. The matter was then referred to Mrs Annette Barley to investigate.
34. Having heard the evidence of Mrs Annette Barley, I think it likely that she sought to undertake a fair investigation. She said she had no experience and very little training and was following advice at every step. Mrs Annette Barley interviewed everyone who worked, or had worked, for the respondent at ABI except the claimant, Ms Ross and Ms Willett. She said it never crossed her mind to do so. She was unable to interview Damien as, she said, ABI would not let her and I accept her evidence of that. It is wholly plausible in the circumstances.
35. I set out who she interviews and a summary of what they said:
36. Louise Irwin – described the claimant as intense and overbearing and motherly. She describes the claimant as trying to avoid confrontation with Sue. She said the claimant started texting her non-stop asking where she was working and who with. She confirmed she had not witnessed the incident between the claimant and Ms Willett. She referred to an argument with "Sue".

37. Donn O'Connell – described everyone she worked with, including the claimant and Ms Willett, in positive terms.
38. Sandra Babb – describes Ms Willett as not mincing her words, says what's on her mind. Describes the claimant as “generally all right. She is crazy mixed up right now. Quite withdrawn and snappy”. She was not asked about the 8 or 9 March even though she was there on 8 March.
39. Elaine Riby – Says the claimant is fine, not rude. Says she was not aware of any falling out between the claimant and Ms Willett until Damien told her that “Amanda picked up some stuff and left the factory floor and Tanya was shook by it”.
40. It is clear, and I find, that no questions were asked about the claimant's relationship with Ms Ross or the allegations she made about the claimant. There was no investigation at all into the allegation that the claimant was racist. Mrs Barley said that she did not want to lead the witnesses by asking direct questions about what happened and she agrees that a lot of the questions were not really relevant to what had happened on and around 9 March 2021.
41. I note that the claimant is described as snappy and withdrawn which resonates, or ought to have resonated, with the claimant having counselling. Mrs Anette Barley did not consider discussing this with the claimant – she said she thought that would be for Mrs Vanessa Barley to do as part of the disciplinary.
42. After conducting these interviews, Mrs Annette Barley referred the matter to Mrs Vanessa Barley. There is no written record of the referral – there was a conversation. Mrs Barley said in evidence that her recommendation was that it needed to go to a disciplinary meeting to find out more. She said that she had had reference to the respondent's disciplinary policy when making that recommendation and that in her view the allegations potentially fell into unseemly or disorderly behaviour, amounting to a serious offence, or gross misconduct in that the claimant had failed to adopt a polite and courteous manner to her fellow work colleagues.
43. Following this recommendation, Mrs Vanessa Barley wrote to the claimant on 17 March requiring her to attend a disciplinary meeting. This was rearranged from 22 March 2021 to 25 March 2021. The claimant was sent with this letter copies of the emails from Ms Willett and Ms Ross. She was not at this stage given any of the interview notes from Mrs Annette Barley's investigation. She was informed that she could bring a colleague or Trade Union representative. It was agreed that there was no recognised union at the employer but Mrs Barley said, and I accept, that the claimant could have arranged an external union representative if she had so wished.
44. In the interim, Mrs Vanessa Barley re-interviewed Louise Irwin and Elaine Riby on 24 March 2021. She said this was to find out more detail of what Damien had seen, as they could not speak to him directly. Ms Irwin said

that he had approached her and asked if the claimant was ok and that he had seen Ms Willet walk off. Ms Riby said that he had told her he heard Ms Willett say “I hope Elaine wants to work with you as you obviously do not want to work with me today”.

45. On 23 March 2021, the claimant submitted a grievance to Mrs Barley. That dealt with three things. Firstly it said that she disputed the accounts of Ms Ross and Ms Willett and she provided her own account which reflects the account set out in the claimant’s ET1 and witness statement.
46. Secondly, it said that the process has had an adverse effect on the claimant’s health, resulting in panic attacks and anxiety. Mrs Vanessa Barley’s evidence, which I accept, was that the respondent, in the form of Annette Barley, was already aware of the claimant having panic attacks as of 1 March 2021.
47. Thirdly, she raised a formal grievance against Ms Ross and Ms Willett, saying that their actions and accusations amounted to bullying in the workplace.
48. Mrs Vanessa Barley was very reluctant to accept that this was a grievance. In her witness statement she describes it as correspondence and it was only when pressed in oral evidence to give a clear answer that she accepted it was a grievance. I find that this clearly and obviously was a grievance. She complains about her colleagues bullying her, refers to her poor health and states that she wishes to raise a grievance. Mrs Barley did not, initially at least, treat this as a grievance. She said that the purpose of the correspondence was for the claimant to put her version of events forward at the disciplinary hearing and that this was dealt with there. She then latterly said that in fact she intended to deal with the grievance after the disciplinary hearing.
49. I do not accept this evidence. Mrs Barley said that she only decided to respond to the grievance (later in April after the claimant had given notice) on advice. It is clear that at that time, Mrs Barley had no intention of addressing the claimant’s grievance except to consider her version of events in the disciplinary hearing.
50. The disciplinary meeting was on 25 March 2021. The claimant attended alone. She says it lasted about 20 minutes and this was not disputed.
51. The claimant was not sent any of the evidence for the disciplinary hearing prior to it. She already had the emails from Ms Willett and Ms Ross. She was not given the notes of the interviews with the other workers at any point. Mrs Barley says that copies of those two emails, her proposed interview questions and the claimant’s grievance were made available in the hearing. The claimant disputes this. In any event, Mrs Barley said she told the claimant they were for “her reference”. She did not indicate that they were of any importance. Either way, the claimant did not see these documents before, or at, the hearing and, at the very least, Mrs Barley did

not actively suggest that the claimant should consider them or that she would be referring to them.

52. The notes record that the following matters were discussed at the disciplinary hearing:
53. Mrs Barely said that some other members of staff had said the claimant was rude on some occasions. She did not say that some members of staff said she was not rude. The claimant denied it.
54. The second question related to the claimant being a team player. It was put to the claimant that she had grabbed the trolley from Ms Willett. I find this was an unfair and inaccurate allegation. There was no evidence to support it. There is a reference to some quotes suggesting the claimant did not like to work with some people, and a reference to a historic issue with Sue. They then have a conversation about Sue which was not part of any of the allegations or investigation, concluding that they agree that Sue had a different character from Ms Willett and Ms Ross.
55. There was then a discussion about the claimant's account about Ms Ross' allegations. The claimant's view was that she had done nothing wrong – sending messages to Ms Ross about men at ABI, or a man at ABI, was minor and she thought it was a compliment. It was then put to the claimant that three different members of staff had now had altercations with her – the claimant said again that the issue with Mrs Ross had been blown out of proportion.
56. Mrs Barley then said she found the claimant's correspondence to her to be aggressive, although she does not specify which correspondence and I was not taken to any. The only letter I was shown that was dated prior to this meeting was the grievance, and that is certainly not, by any objective standard, aggressive.
57. Mrs Barley then purports to address the claimant's grievance. This focussed solely on why the claimant had not brought it to Mrs Barley's attention before. Mrs Barley does not engage with the substance of the grievance at all. She asks the claimant why she thought Ms Willett and Ms Ross made the allegations and the claimant suggests it might be because Ms Willett was spending time with Sue. She does not know why Ms Ross made the comments.
58. The claimant said that the issues with Ms Ross started when Gavin (an ABI worker) said that Chris (another ABI worker) was interested in her which it seems, resulted in a number of men at ABI shouting and jeering at Ms Ross. The claimant concluded by saying she enjoyed working at ABI and wanted to remain doing so.
59. I find that these notes accurately reflect the substance of the meeting.

60. The outcome was that the claimant received a final written warning. That was confirmed in writing on the grounds that “the information provided does not demonstrate being a team player and general rudeness”. It went on to say “In order to avoid further disciplinary action, you are required to maintain a polite manner and attitude to your fellow colleagues and where any issues between you and another member of staff arise that these are reported to your manager straight away so that matter can be addressed in an appropriate manner”.
61. Later that day, the claimant spoke to her doctor. She describes herself as in a state of panic and anxiety and shaking, and her GP put her on sick. The claimant also says that she exchanged text messages with Ms Babb, telling her that Mrs Barley had put her on a final written warning and accused the claimant of being aggressive, Ms Babb replies that the claimant is nothing but a kitten. The claimant points to this as being inconsistent with Ms Babb’s statement to Annette Barley. In my view, the two statements are not necessarily contradictory. Ms Babb describes the claimant as mixed up, withdrawn and snappy when directly asked about her working relationship with the claimant. The text to the claimant is obviously intended to be a supportive communication to a friend or colleague.
62. What this text exchange does demonstrate, and I find, is that the claimant had a completely different view of her working relationship with her colleagues than it seems her colleagues had. She clearly, and reasonably, perceived that she had a good working relationship with Ms Babb and Ms Ross based on the friendly nature of the messages they exchanged.
63. The same day, Annette Barley contacted the claimant to discuss the claimant coming back to work. Mrs Barley told the claimant that she would not have to work with either Ms Willett or Ms Ross on her return to work. The claimant says that Mrs Barley said she was “expected” back at work, Mrs Barley said in oral evidence that the claimant had agreed to return to work in the disciplinary hearing so she had no reason to think the claimant would not be able to return and she was merely confirming her hours.
64. I prefer the evidence of Mrs Barley. I find that she phoned that claimant to discuss her return to work and the hours she would be working. I do not think she was being aggressive in expecting the claimant to return to work.
65. In respect of working with s Willett or Ms Ross, the claimant said that even if she was not rota’d on with them, she would still come into contact with Ms Willett on breaks or when getting materials. They worked in different parts of the factory, but Ms Willett was there at least 4 days a week. Mrs Vanessa Barley said that they would have made arrangements to ensure that the claimant did not come into contact with Ms Willett on her return to work but I find that even if this was the case, such potential arrangements were never communicated to the claimant.

66. As mentioned, the claimant received the written outcome of the final written warning on 6 April 2021. The respondent said that some documents were included with that letter – the emails from Ms Willett and Ms Ross, the questions to be asked at the disciplinary hearing (but not the answers) and the claimant's grievance and attachment. The claimant said she did not receive them and there is no reference in the letter to them being included. I prefer the claimant's evidence and find that they were not sent to the claimant with that letter.
67. The claimant says that she was, contrary to what the letter says, a team player and she refers to her voluntarily, and for no remuneration, going out of her way to take Ms Ross to work. Mrs Annette Barley agreed that this did in fact demonstrate that the claimant was a team player. Mrs Vanessa Barley agreed that the claimant was a team player up to the end of 2020. It is clear, as set out previously, that from the respondent's perspective something changed in early 2021, but it is also clear that no one from the respondent took any steps to enquire what that might have been.
68. The claimant did not appeal against the final written warning. She said that her appeal had been the grievance letter sent on 23 March. However, in oral evidence the claimant was clear that what she meant was that the grievance should have stopped the disciplinary process while it was investigated and that she did not appeal against the final written warning.
69. The claimant remained off sick and was prescribed medication by her doctor for her mental health. The respondent drew attention to the fact that although the claimant says she was prescribed medication from 8 April she was in fact already on medication from 23 March 2021. I do not place any weight on that apparent inconsistency. It is perfectly clear that the claimant was unwell at the time with mental health problems as there are fit notes from her doctor saying so. It is also clear that the respondent knew about this from early March as already mentioned.
70. The respondent did not contact the claimant while she was off sick, Mrs Barley said that that was because it was their policy not to contact employees when they are off sick. I accept this evidence.
71. On 15 April, the claimant wrote to Mrs Vanessa Barley asking if her grievance would be looked at. She said it should have acted as an appeal but the claimant really just wanted her grievance to be taken seriously. Mrs Vanesa Barley's response was that any aspects raised before the disciplinary were dealt with there.
72. I find that this is not correct. There was no investigation into the claimant's allegations about Ms Ross or Ms Willett because they were not spoken to at all about what the claimant said in her grievance – namely that their accounts were wrong and their allegations amounted to bullying. There was no consideration of the allegation made by Ms Ross that the claimant was a racist. Mrs Barley said that this did not form any part of the disciplinary, and

I accept that, but there was no consideration at all in any context of Ms Ross's serious allegation against the claimant.

73. The next day, the claimant submitted her resignation, effective from 30 April 2021, and set out four reasons. They are the basis of the claimant's claim and I do not need to set them out again.
74. It was not challenged that the claimant genuinely believed that these were the reasons for her resignation and I find that the claimant did resign for the reasons set out in this letter, or more specifically that she resigned as she genuinely believed the matters set out in the letter. No other ulterior reason for her resignation has been suggested.
75. On 30 April 2021, the last day of the claimant's employment, Mrs Barley responded to say that although the claimant has resigned, she had a grievance outstanding that needed resolving. The claimant's response was, effectively that it was too late now. Mrs Barley said the reason for the delay in responding to the resignation was that she was on holiday. I accept that. She also said the reasons she only then decided to address the claimant's grievance was because that was when she got advice that she needed to. I also accept that. However, I find that until she obtained this advice, after the claimant had resigned, Mrs Barley had no intention of considering the claimant's grievance any further. The claimant's response was that "Since I am no longer with Niche, and have lost complete trust and faith in the company due to what I have been put through and the effect on my health, I do not see any benefit in dealing with my grievance now".
76. The purpose of the claimant's grievance was to try to ensure she had a fair disciplinary hearing. Mrs Barley said she was open minded as to the outcome of any potential grievance but she did not volunteer that it might have resulted in the claimant returning to work. I find, therefore, that it is likely that the grievance would not have had the desired effect – namely ensuring a fair consideration of the allegations against the claimant and the counter allegations – had it been dealt with at that point.
77. I note that there was a dispute as to whether the claimant's employment finished at midday on 30 April 2021. I do not need to make a finding about that in light of my finding about the grievance. The fact is that the respondent did not seek to address it until after the claimant had resigned.

Law

Constructive dismissal

78. In respect of the claimant's claim for unfair dismissal, the question is whether the claimant was dismissed within the meaning of s 95(1) Employment rights Act 1996 (ERA) in that she resigned in response to a repudiatory breach of contract.

79. Section 95 ERA sets out the circumstances in which an employee is dismissed, and s 95(1)(c) says that this includes circumstances where “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”.
80. In *Western Excavating (ECC) Ltd v Sharp* [1978] QB 761 the Court of Appeal confirmed that questions of constructive dismissal should be determined according to the terms of the contractual relationship and not in accordance with a test of 'reasonable conduct by the employer'.
81. In *Malik v Bank of Credit and Commerce International SA* [1997] IRLR 462, [1997] ICR 606 it was held that contracts of employment include the following implied term:

"The employer shall not without reasonable and proper cause conduct itself in a manner calculated [or] likely to destroy or seriously damage the relationship of confidence and trust between employer and employee."

82. The question for the tribunal to determine is therefore whether the respondent without reasonable and proper cause conducted itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee, thereby breaching its contract of employment with the claimant. In *Eiger Securities LLP v Korshunova* [2017] IRLR 115 the EAT held at paragraph 61 that
- If the respondent is in breach of the implied term of trust and confidence set out above, the tribunal must then determine if that breach was repudiatory – if it was sufficiently serious so as to allow the claimant to treat the contract of employment as discharged.*
83. Finally, the tribunal must decide whether, if there was such a breach, the claimant resigned in response to that breach or if they waived the breach or affirmed the contract.
84. If the claimant was dismissed it is for the respondent to show that there was a potentially fair reason for the dismissal and that it was fair in all the circumstances. The respondent denies that the claimant was dismissed – they do not say that if she was dismissed it was for a potentially fair reason. It follows, therefore, that if the claimant was constructively dismissed that was unfair (as the respondent has not sought to show a potentially fair reason) and I do not need to address fairness under s 98 Employment Rights Act 1996 any further.

Conclusions

85. The conduct of the employer on which the claimant relies is
86. A failure by the respondent to provide a duty of care to the claimant due to stress and bullying in the workplace, especially when being off sick

- a. I find that the respondent did fail to demonstrate a proper duty of care to the claimant. There were no enquires of the claimant's wellbeing in circumstances where it was agreed by all that the claimant's behaviour had changed from January 2021. Any reasonable person would have made enquiries why.
- b. Further, there was no investigation into, or consideration of, the claimant's side of the story or her complaints about her colleagues. The claimant's account might have turned out to be false or unfounded, but the respondent did not know that because they did not investigate it. The respondent owed it to the claimant to listen to her side and take it seriously.
- c. There was no contact with the claimant while she was off sick. This might be the respondent's policy but in circumstances where there is a grievance, a disciplinary and allegations and counter allegations of bullying and bad behaviour and these appear to be the reason why the claimant was off, it was absolutely incumbent on the respondent to contact the claimant and find out if they could offer support or at least find out what the issues were. This is obviously a close knit employer and it is hard to understand why these steps were not taken.

87. A failure by the respondent to follow the disciplinary procedure outlined in the claimant's contract by giving the claimant a final written warning without any previous disciplinary sanctions

- a. The respondent said they followed their disciplinary procedure and the allegations fell within serious offences or gross misconduct. They might have done, but the reality is that there was no evidence to support the conclusions to which Mrs Barley came. The investigation was one sided, imprecise and non-specific. The three key actors in the allegations were not interviewed and none of them had an opportunity to comment on what the other said. In ordinary unfair dismissal terms, the investigation was outside the range of reasonable investigations of a reasonable employer.
- b. The respondent's policy must contemplate that any disciplinary sanction would be the result of a fair and reasonable investigation. This was not, so was in breach of the respondent's policy. It was also inherently unreasonable.

88. Failing to follow up the claimant's grievance

- a. It should be clear from my findings of fact that the respondent did not deal with the claimant's grievance. There was no justification for this. To the extent that it was part and parcel of the disciplinary hearing it was dealt with unfairly. In any event, there was absolutely no investigation into the matters the claimant raised.

89. Failing to follow up on the allegation that the claimant was racist
- a. Again, there was no consideration of this. Mrs Barley said it was not part of the disciplinary proceedings, but the fact is there was a serious allegation made by one employee against another. This cannot reasonably be ignored – it is not fair on either employee – and it left the claimant with the allegation that she was a racist hanging over her. The respondent had provided no good reason for failing to consider this.
90. In my judgement, cumulatively, these acts of the respondent amount to conduct likely to damage the relationship of trust and confidence between the claimant and the respondent. The claimant was left with the very clear impression that her side of the story was not listened to and would not be. She was left believing she would have to return to work with the people who had made allegations against her under a final written warning with the very real belief that another allegation, whether true or not, could result in her dismissal. She reasonably had no belief that any subsequent allegations would be considered objectively or fairly because these ones had not been.
91. The respondent had no reasonable reason for acting in this way. They say they relied on the advice of HR advisors but ultimately they are responsible for their own actions.
92. I have found the witnesses to all be reliable and doing their best to give honest evidence. I think that the respondent tried to do things right. However, the test is whether the acts had the purpose or effect of damaging the relationship. The fact that the respondent might not have intended this outcome does not mean that it did not have the effect of damaging the trust and confidence between the parties.
93. Finally, I have found that the claimant resigned in response to this breach. There is nothing to suggest that she affirmed her contact or waived the breach. She tendered her resignation as soon as she realized that her grievance would not get any further consideration. The fact that she gave notice, rather than resigning with immediate effect, does not change that.
94. The respondent did not say that if the claimant was dismissed she was dismissed for a potentially fair reason and for all these reasons, the claimants claim of unfair dismissal is successful.

Remedy

Facts

95. The claimant's average gross earnings for the pay periods in December, 2020, and January and February 2021 were £231.20 per week. This was the only evidence before the tribunal and reflected the claimant's average full pay.

96. It was agreed (and it accords with my calculations) that the claimant's average net pay for the same period was £220.94
97. At the effective date of termination of her employment, the claimant was aged 53 and she had been employed for just over 2 years and 4 months.
98. The claimant was working 2 full days one week and 2 ½ days the next under the ABI contract. From 18 June 2021, Mrs Barley's undisputed evidence was that the contract at ABI ended so the claimant would have gone back to working 9.5 hours per week. The claimant said that her wages were £9.30 per hour. In submissions Mrs Barley said the claimant's wages would have gone back to minimum wage and in light of Mr Davison's response to those submissions I find that this is correct.
99. From 18 June 2021 therefore, had the claimant's employment not ended, her earnings for the respondent would have been £84.65 per week.
100. The claimant has made numerous applications for work and she has sought work for similar hours she had previously worked to take account of her childcare responsibilities. She appears to have sought work in a number of sectors. She is hopeful of finding work in the next six months.

Relevant law on remedy

101. Section 119 of the Employment Rights Act 1996 provides for the payment of a basic award. This is calculated as the whole number of years' service, multiplied by 1.5 for every year the claimant was above the age of 41 multiplied by a week's pay.
102. Section 123 of the Employment Rights Act 1996 provides for the payment of a compensatory award. This is such amount as the tribunal considers just and equitable having regard to the loss sustained.
103. The compensatory award is capped at the lower of a year's salary (52 weeks' multiplied by average pay) or, at the relevant date, £89,493
104. Pay is calculated as the average over the 12 weeks leading up to the date of dismissal. Rule 2 of the Employment Tribunal Rules of Procedure 2013 procedure rules says that I should ensure that cases are dealt with justly, fairly and proportionately.
105. The loss is that which the claimant would have earned had she not been dismissed. A successful claimant has a duty to attempt to mitigate their losses and losses will be limited to the period by which the claimant could reasonably have expected to get back to the financial position she was in before her employment ended.
106. An award for loss of statutory rights is an award to reflect the time it would take to obtain the rights to not be unfairly dismissed in a new job. It is generally between £250 and £500 and is part of the compensatory award.
107. S 207A of the Trade Union and Labour Relations (Consolidation) Act 1992 says that where there has been an unreasonable failure to comply with the

ACAS code of practice on disciplinary and grievance procedures, the award on an unfair dismissal claim may be increased by up to 25%

Conclusion on remedy

108. I therefore make the following awards

109. Basic award: $2 \times 1.5 \times \text{£}231.2 = \text{£}693.60$

110. Loss of earnings from 1 May – 17 June (the date on which the claimant's hours and wages would have reduced) (being 6.5 weeks) = $\text{£}220.94 \times 6.5 = \text{£}1436.11$

111. Losses from 18 June to the date of the tribunal 19 weeks at $\text{£}84.65$ per week (the amount payable to the claimant once her hours and wages reduced) (on the basis tax and National insurance is unlikely to be payable at that rate) = **£1608.35**

112. In all the circumstances (including the claimant's personal circumstances and the current economic climate) I find that the claimant has not unreasonably failed to seek to mitigate her losses.

113. I therefore award 26 weeks' future losses at $\text{£}84.65$ per week = **£2200.77**

114. To the extent that the calculation of the claimant's wages do not accord precisely with the requirements in Chapter 2 of part 15 of the Employment Rights Act 1996, this is because I have used the evidence available at the hearing on the basis that it would not be proportionate or in the interests of justice (in accordance with rule 2 of the Employment Tribunal Rules of Procedure 2013) to require further more detailed evidence and a further hearing to precisely calculate the claimant's wages. This is particularly the case when net wages are agreed so that it would appear the corresponding gross figure is also agreed.

115. I make an award of **£500** for loss of statutory rights,. This was not challenged by the respondent.

116. This is a total compensatory award of **£5745.23**

117. I apply an uprating of 25%. I found in my reasons that the respondent wholly failed to address, before the claimant's resignation, the grievance the claimant raised. This amounts to a complete and unreasonable failure to comply with the Acas code. In addition, there were some fundamental failings in respect of the disciplinary procedure as set out in my findings of fact.

118. The uplift is therefore 25% of $\text{£}5745.23$ amounting to **£1436.31**

119. This makes a total compensatory award of **£7181.54**

120. And a basic award of **£693.60**

121. **This totals £7875.14**

122. The claimant has not been in receipt of any benefits so that the recoupment provisions do not apply.

Employment Judge **Miller**

19 November 2021