



EMPLOYMENT TRIBUNALS

Claimant: Mr D Kuzera

First Respondent: Knight Square Limited

Second Respondent: First Property Services Ltd

Heard at: Sheffield **On:** 16 November 2017

Before: Employment Judge Brain

Representation

Claimant: Ms K Ephraim, FRU Volunteer

Respondent: Mr A Weiss of counsel

RESERVED JUDGMENT

The Judgment of the Employment Tribunal is that:-

1. The First Respondent is dismissed from the proceedings as having no interest in the matter.
2. The Claimant's claim for unpaid holiday pay is dismissed upon withdrawal.
3. The Claimant was constructively unfairly dismissed by the Second Respondent. His unfair dismissal complaint succeeds.
4. There shall be no reduction to any basic and compensatory award made in the Claimant's favour by reason of the Claimant's conduct.

REASONS

1. The Tribunal heard this case on 16 November 2017. After hearing the evidence and receiving helpful submissions from each party judgment was reserved.
2. The Claimant brings a complaint of constructive unfair dismissal against the Respondents. By consent, it was agreed that the Second Respondent was Claimant's employer. The First Respondent was dismissed from the proceedings. The Second Respondent shall be referred to as 'the Respondent' hereafter.

3. The Tribunal heard evidence from the Claimant. A signed and dated witness statement from the Claimant's wife Carol Kuzera was also submitted. She did not appear before the Tribunal to give evidence.
4. On behalf of the Respondent, the Tribunal heard evidence from Stephen Cooper. Mr Cooper holds the position of regional manager for the northern region.
5. The Claimant was employed by the Respondent as a development manager. According to Mr Cooper, the Respondent manages 1400 retirement developments in the UK. A retirement development will typically consist of 25 to 50 apartments or properties. These are in the main owner occupied but may be rented. A service charge is payable by the occupiers to the Respondent for their services in managing the development. The service charge covers the provision of the development manager assigned to the particular development.
6. Mr Cooper goes on to say that the role of the development manager is to inspect the building and communal areas, liaise with contractors, answer residents' queries, facilitate arrangements for social events and "to create a community and a great place to live". In many of the developments which are managed by the Respondent the development manager will live on site.
7. The Claimant was employed to work for the Respondent as a development manager between 29 November 2010 and 3 April 2017. He was the development manager assigned to the development at St Chad's Court, Headingley. The Claimant reported to Kevin Rice, area manager.
8. The Claimant resigned from his position by way of written notice in his letter of 28 March 2017 (pages 118 and 119 of the bundle). In this letter the Claimant gave notice to the Respondent of his resignation with effect from 3 April 2017.
9. The resignation arose out of the Respondent's handling of a disciplinary investigation into the Claimant's conduct concerning one of the residents at St Chad's Court. The resident's name is referred to in the papers within the hearing bundle and was referred to during the course of the proceedings. However, being conscious that judgments are now uploaded onto a publicly available website, the Tribunal will refer to her simply as 'X'.
10. The Claimant was suspended from his duties by the Respondent on 13 February 2017 pending an investigation into his conduct. The Claimant's evidence was that he took the decision to resign from his position by reason of the lack of communication from the Respondent about the progress of the investigation and the length of time that the investigation was taking. These features were aggravated by the fact of the Claimant and his wife living at St Chad's Court.
11. The Claimant and his wife resided at St Chad's Court pursuant to a service occupancy license. This is at pages 45 to 47.
12. The Claimant's contract of employment is at pages 62 to 74. Reference is made within the contract of employment to the Respondent's disciplinary and grievance procedures. The procedures are at pages 36 to 44. The Tribunal's attention was drawn to the non-exhaustive list of issues regarded by the Respondent as serious enough to warrant summary dismissal. The list is at clause 2.10 of the disciplinary procedure (pages 40 and 41). The list extends to borrowing money from residents and handling residents' financial affairs.

13. Also within the bundle are extracts of the development managers' manual. A list of the routines to be carried out at various intervals by the development manager is at pages 48 to 52. The Tribunal need not list those here.
14. Section 2.13 of the manual concerns the development manager role. (The Tribunal observes that the manual refers to this as 'house manager' but the terms are interchangeable. There was no dispute that the manual was applicable to the Claimant).
15. Section 2.13 opens with the observation that "*there is no easy definition of [the development manager] role.*" It goes on to say that most residents who have moved into the development will expect to maintain their independence and health. The Claimant confirmed in evidence under cross-examination that the development was for independent living. However, he accepted that there was a risk of some residents developing conditions which may render them dependant and thus at the risk of exploitation.
16. The Claimant fairly accepted that it formed no part of his role to act as a medical carer and that his role was confined to the management of the development. This is reinforced in section 2.13 of the manual which says that, "*The working relationship between you and the residents must be effective. Whilst we expect you to behave as a "good neighbour", you should be mindful not to step over the professional boundaries. We know that there may be close relationships between individual House Managers and residents whom you may have known for many years. It is very important however that relationships do not appear to come so close as to bring into question the House Manager's ability to deal impartially with other residents.*"
17. There is then set out "*the following areas of responsibility and duty.*" This is said to be a non exhaustive list to be used as a guideline. It concerns three principle areas: 'general welfare of residents'; 'administration, care and maintenance of the development'; and 'dealing with emergencies'. The 'general welfare of residents' responsibility extends to looking out for signs of need, contacting the appropriate people for assistance with the resident's agreement and liaison with doctors, social workers, health visitors and district nurses. It also extends to "shopping or collecting prescriptions on behalf of very frail residents **in emergencies** (see chapter 3.14)". (The emphasis by way of bold lettering is in the manual). The Tribunal was not furnished with a copy of 'chapter 3.14'.
18. Section 3.07 concerns emergency care. There it is provided that the development manager is not required to provide nursing care or undertake domestic work for residents. This section goes on to provide that following a medical emergency a resident may require help with cooking, cleaning and shopping until he or she recovers. The development manager's role in such situations is to speak to the resident and discover what he or she wants after which the manager may then contact friends, relatives, a doctor or social services. Managers are permitted to find neighbours willing to assist. At the end of the relevant passage, it is provided that, "*If the resident is completely without food, then you may, as a last resort, do basic shopping for them.*"
19. Although the Tribunal was not taken to this, section 13.03 refers to a 'development diary'. This is to be used to record the daily business of the development. The Tribunal infers that it was pursuant to this requirement that the Claimant maintained the diary extracts of which may be seen at pages 103 to 110.

20. Section 3.13 of the manual deals with circumstances where a resident is unable to cope. It is contemplated that physical or mental health may start to deteriorate. The development manager is encouraged to be observant and suggest help from neighbours or relatives with shopping. This provision in the manual corroborates the Respondent's case that although the development is for independent living it is contemplated that there may be deterioration in mental or physical health such that dependency arises. This possibility was fairly acknowledged by the Claimant.
21. In the course of his duties, the Claimant became concerned about X. According to the development diary at page 103, on 12 August 2016 (at 16.00 hours) he telephoned social services concerning her dementia issues.
22. That X became known to and was known by social services is evident from the email trail at pages 97 to 102. X's social worker was Katie Fowler of the Woodsley Neighbourhood Care Management Team in Leeds. These email exchanges took place between 24 November 2016 and 8 December 2016. They need not be recited in full but relate to a proposed visit of X by Katie Fowler.
23. The Claimant gave unchallenged evidence that X could not cook for herself and was dependent upon a friend named Paul Collins for food. Mr Collins would supply her with pre-packaged meals and provide other care. The Claimant said that, "when Paul was unavailable [X] would ask me to buy her food. Between July and December 2016 this would usually be around a couple of times a week. When Paul went away in the summer he did not make provision for X, and so on a few occasions then she asked me for food more frequently. I was aware she was not able to go out and buy food herself, and so I provided her with sandwiches I bought for her. She paid for these by cheque for £100. I did this in the belief that I was authorised to do so by the development manager's manual. I was aware that the manual only allowed shopping on behalf of very frail residents in emergencies (at 2.13) and this is why I raised the issue with my line manager and the local social services department, as I felt her needs ought to be assessed by them, as my contract did not cover care plans." The Claimant's unchallenged account was that he had raised concerns about X with Mr Rice in July 2016 (before contacting social services in August of that year).
24. It was suggested by Mr Weiss that the Claimant had fallen into a pattern of shopping for X and was therefore in breach of section 3.07 of the manual (referred to at paragraph 18 above) as that permitted shopping for food only in circumstances where the resident was completely without food and as a last resort. The Claimant said that he did this as no arrangements had been made for X notwithstanding the contact that he had made with his area manager and social services and thus X continued to be reliant upon Mr Collins. It was in his absence that the Claimant stepped in to buy food for her.
25. In paragraph 5 of his witness statement the Claimant says, "I found out at the beginning of December 2016 that Paul was due to go away again (on a cruise) so I spoke to Katie Fowler at the beginning of December, and she agreed that a plan needed to be put in place to make sure that X was provided with the care she needed. I also made my line manager aware of the situation and my concerns but nothing happened."
26. In these circumstances, the Claimant and his wife again purchased food for X. The Claimant says that she reimbursed him his outlay by giving him another cheque for £100.

27. On 28 December 2016 the Claimant was approached by X. She told him that she had no food. The Claimant then telephoned Mr Collins. By this date he had returned from his cruise. Mr Collins said that he was unwell. He asked the Claimant to buy provisions for X as he (Mr Collins) could not do it. The Claimant did so.
28. The Claimant explained in evidence that X mainly ate ready made sandwiches. That is why the food bills were high.
29. Between December 2016 and January 2017 X provided four cheques of £200 each to cover the cost of the food bought in for her by the Claimant and his wife in Mr Collins' absence by reason of illness. Three of those cheques were paid to the Claimant. One was paid to his wife. The Claimant said that all of the outlay was documented and vouched for by receipts although unfortunately he did not keep copies. The receipts were given to the social worker by the Claimant (as we shall see).
30. At the beginning of February 2017 Mr Collins came back on the scene. It appears that he was concerned about the amount of money that had been paid by X to the Claimant. Mr Collins therefore reported the matter to the police. The Claimant was arrested on 3 February 2017.
31. The arrest coincided with the Claimant being about to go on holiday. He therefore did not tell the Respondent about his arrest until he returned from his holiday.
32. The Claimant's holiday was taken between 6 and 10 February 2017. He went away for a few days and returned home on 9 February 2017 to find a note from Mr Rice asking the Claimant contact him upon the Claimant's return.
33. The Tribunal did not have the benefit of hearing evidence from Mr Rice. No explanation (other than the fact that he was no longer an employee of the Respondent) was given for this to the Tribunal. This was unfortunate as Mr Cooper, from whom we did hear evidence, had no involvement in the matter in February 2017.
34. It appears from Mr Rice's subsequent report into matters (at pages 93 to 96) that he found out about the Claimant's arrest on 7 February 2017. He was informed of this by Leeds City Council Adult Social Care Team that day. The report confirms (at page 93) the fact that Mr Rice visited the site on 7 February 2017 and then left a handwritten note requesting the Claimant to contact him.
35. The Claimant's explanation for not informing Mr Rice of his arrest of 3 February 2017 was that he was informed that the police would contact Leeds City Council who in turn would contact Mr Rice. This is, indeed, what actually happened according to Mr Rice's report.
36. The Claimant met with Mr Rice on Monday 13 February 2017 to discuss the matter. Mr Rice suspended the Claimant on full pay pending the outcome of an investigation into the issues surrounding his arrest. Mr Rice confirmed the Claimant's suspension in a letter dated 16 February 2016 (at pages 79 and 80).
37. I shall not set out the suspension letter in full as its contents are familiar to the parties. However of note is that:-
 - 37.1 The Claimant's suspension was around an allegation that he had accepted money from X on more than one occasion and that he had failed to notify the Claimant of the fact of his arrest.

37.2 The Claimant was not permitted to contact any of the Respondent's employees, residents, relatives or friends of residents except for any employee identified by the Claimant as his companion to accompany him at subsequent meetings.

38. The Respondent recognised the practical difficulty presented by the fact that the Claimant lived at the development. Mr Rice therefore said:-

"I appreciate St Chad's Court is your home and also your place of work and by stating "you must not attend" is conflicting and therefore I would like to take this opportunity to explain precisely what is meant by this request:-

Do not reside in, or frequent in the communal areas such as the lounge, laundry, entrance hall or communal corridors, pathways and gardens.

If you utilise the laundry, for personal use only, please be mindful of when residents are in the area and use the facilities in the early morning or late evening to minimise your exposure to them."

39. Mr Rice went on to say that, *"in addition, whilst I understand and appreciate your position and relationship with our residents on site please could I ask that you refrain from discussing this situation with them as this will not be professional nor will it benefit our residents' perception of what is occurring in this instance. Our request is one in which you do not need to ignore the residents when you see them in and around the development where you live, but we would ask that you acknowledge them with a hello and goodbye but do not enter into discussions about the development or yourself until further notice from us"*.

40. On 22 February 2017 the Claimant emailed Mr Rice to say that he had received an email from the police officer in charge of the investigation to say that the police were taking no further action. An appointment to answer bail at Elland Road police station on 23 February 2017 had therefore been cancelled.

41. The Claimant accepted in cross-examination that it was reasonable for the Respondent to suspend the Claimant pending the undertaking of investigations. The Claimant also fairly accepted that it was reasonable for the Respondent not to have undertaken any investigations pending the outcome of the police enquiries. Accordingly, the Claimant has no complaint about the Respondent's handling of matters for the first 10 days of the suspension between 13 and 22 February 2017.

42. Mr Rice notified Abbie Boyle of the Respondent's human resources department of the fact that the police were not pursuing matters. This notification was sent on 27 February 2017 (page 83). Mr Rice sought guidance as to how to proceed. A little later the same day Mr Rice emailed Ms Boyle (page 84) to say that Katie Fowler was awaiting confirmation from the police that the matter was not to be pursued. Mr Rice told Katie Fowler that the Respondent would be proceeding with its investigations. Ms Fowler confirmed that the issue involved the four cheques in the sum of £200 each, three of which were made payable to the Claimant and one to the Claimant's wife. Mr Rice requested "further details of the allegation and if possible the receipts evidencing what was purchased in each of the cheques".

43. An issue arose about payment of the Claimant's salary at the end of February 2017. The Claimant said that he had been paid too little. It formed no part of the Claimant's case that the underpayment of his salary (which was rectified within two days by the Respondent) formed a reason for his resignation. The Tribunal therefore need not go into detail around this. Suffice it to say however that the

Claimant had texted Mr Rice about this on 28 February 2017 (page 113). When raising his enquiry about his salary he asked if there was “any further news on my suspension?” On 2 March 2017 the Claimant in fact told Mr Rice that his salary had been paid in full (pages 113 and 114).

44. Also on 28 February 2017 the Claimant had written to the Respondent’s human resources department about his salary (page 85). The letter was headed ‘*Letter dated 16 February 2017 from Kevin Rice Area Manager regarding suspension from duty 13 Feb. 2017.*’ This was marked as having been received on 2 March 2017, the same day upon which the Claimant told Mr Rice that his salary had been paid in full. It appears therefore that the position regarding salary was rectified immediately upon receipt by human resources of the Claimant’s complaint. The Claimant mentioned in the letter at page 85 that he had texted Mr Rice with his concerns about the suspension issue and had received no satisfactory answer. He said in his letter that he had contacted ACAS who had led him to believe ‘that the correct procedures are not being followed.’
45. On 2 March 2017 Mr Rice again emailed Abbie Boyle (page 86). He said that he had left a couple of telephone messages with Katie Fowler but had had no response to date. He said that he was on leave on Friday 3 March and intended conducting a “further final interview with Dean on Monday [6 March].” He mentioned that the residents were wanting to know the reason for the Claimant’s absence from work.
46. The Claimant prepared a statement which is dated 6 March 2017 (page 87). This was handed to Mr Rice that day. The Claimant said that it was handed to Mr Rice when he (Mr Rice) called into the development to see residents. The Claimant said that no appointment had been made by Mr Rice to see the Claimant contrary to what he had said to Abbie Boyle the previous Thursday. There was nothing in the bundle to indicate that Mr Rice had made an appointment to interview the Claimant. The Tribunal therefore accepts the Claimant’s account as to the circumstances in which the statement at page 87 was handed to Mr Rice. Essentially, this had been prepared by the Claimant who said that he thought that Mr Rice had asked him to prepare a written statement at the suspension meeting of 13 February 2017. The statement was handed to Mr Rice in circumstances where the Claimant happened to see him on 6 March and not by prior appointment.
47. The Claimant said in the statement that:-

“After returning to work from Christmas leave on 28 December 2016 X was awaiting me at St Chad’s office. She said her friend Paul Collins had not left her any money or food. She asked me to contact Paul Collins and ask him to visit her. I telephoned Paul Collins and was told he was off sick due to illness. He asked me to buy food for X which I did over the next few weeks. I advised him that I had not heard from Katie [Fowler], X’s social worker who visited X on or around 8 December 2016. He said he would contact Katie as he had a telephone number to ring her.

According to the house managers manual (section not quoted) I was aware I could get food for a resident until such measures are put in place to enable the resident to have food. X has no cooking facilities and would only eat sandwiches, cakes and fish and chips. A number of residents witnessed X attending the office asking for food.

The last response from the social worker on or around 8 December was that she was going to arrange a meeting to discuss X's shopping needs as her friend was buying all the wrong type of food. She was stocking up and not eating or cooking what was brought for her by her friend.

X's GP had carried out an assessment on her in November 2016 and had difficulty contacting social services. I emailed social services with the GP's advice and contacted Paul Collins by telephone.

If I had not bought for X I feel she would have suffered without immediate help when she has no relatives or contactable friends”.

48. On 10 March 2017 Mr Rice sent two emails to Abbie Boyle (pages 89 and 90). He said in one of them that he had managed to speak to Leeds Social Services Safeguarding Team. They were satisfied that the Respondent was pursuing an internal disciplinary investigation. Mr Rice said, “To this end my final report, plus Dean’s personal statement will be with you this weekend”. 10 March 2017 was a Friday and therefore the inference to be drawn from Mr Rice’s email is that the report would be with human resources on 11 or 12 March 2017. It appears from the email at page 90 that Paul Collins was not co-operating with Leeds City Council by providing information around the circumstances. This was required by reason of X’s cognitive state as she was “unable to recall much if anything of the circumstances”.
49. Mr Cooper was asked by Ms Ephraim whether there was any reply from Abbie Boyle to the emails to which reference has been made at pages 83, 84, 86, 89 and 90. Mr Cooper did not know whether there had been and the Tribunal was not furnished with any replies that had been sent to Mr Rice. The proper inference to draw is that there was no reply.
50. On 21 March 2017 Mr Rice emailed Samantha Gibson (regional manager) and Abbie Boyle (page 92). He attached a ‘draft final report’ (pages 93 to 96). He said in his email that “to date I have been unable to verify elements of the report – principally the involvement and confirmation by Paul, X’s carer/friend of his actions and involvement. LCC Safeguarding Team have as yet had no updates from Paul concerning his involvement and contact between Paul and Dean”. Mr Rice mentioned a ground- swell of support for the Claimant from the residents. Mr Rice said also that, “it has been expressed to me openly that residents have had concerns about X and the role of Paul”.
51. The Claimant was unaware of the existence of the report at the material time. He only became aware of it following disclosure during the course of these proceedings.
52. After setting out the background to matters and the fact of the Claimant’s suspension, the salient parts of the report are as follows:
- Mr Rice was aware that the Claimant had raised concerns about X’s welfare in July 2016 and that he (Mr Rice) had been told by the Claimant that Leeds City Council had been engaged in early December 2016 to support X. Further, concern about X’s welfare had been raised by residents. This culminated in an attendance by the ambulance service on 28 January 2017. In addition, over a period of years concern had been expressed about X’s ability to look after herself. The previous incumbent of the Claimant’s position had prepared a note to this effect which Mr Rice discovered upon X’s file.

- The Claimant had kept receipts for the items which he had purchased but unfortunately had not kept a copy for his records. That said, Leeds City Council confirmed that the funds paid out of the three cheques written in the Claimant's favour were all accounted for. It seems there was an issue about the fourth cheque made payable to the Claimant's wife which was said to be "an advance for the payment of milkman and other cash payments".
- Mr Rice had been unable to contact Paul Collins. Further, Leeds City Council had been unsuccessful in their endeavours to speak to him. X was unable to assist by reason of her mental health.
- Mr Rice reported that "the safeguarding of X is still under investigation by LCC social services and no information has been made available".

53. Mr Rice then made the following recommendation:-

"The sum of £800 was received by [the Claimant and/or the Claimant's wife] to support X for a period of time between mid December and mid January with the apparent knowledge and possible confirmation of Paul. The sums of money are beyond what may be reasonably expected to include emergency support, especially with LCC involvement. There is no evidence of any attempts by either [the Claimant] nor Paul to contact social services over this period. A gross misconduct hearing is recommended concerning the acceptance of funds and Financial Regulations from a resident/leaseholder is recommended. Recommendation – dismissal would be the recommended action. However as a result of the extenuating circumstances surrounding the need to provide "emergency support" to X, training or re-training concerning [the Claimant's] conduct may be more appropriate".

54. On 17 March 2017 the Claimant sent a text to Mr Rice. He said:-

"Hi Kevin, I must say this suspension is going on too long. I have written two letters to HR with no response regarding payslips and employee assistance telephone number. The stress and feeling of being trapped is dreadful. Why am I being treated as the criminal? Your going in a fortnight and no further forward. I'm going to seek further advice from ACAS. Regards Dean."

55. Just over an hour later Mr Rice responded. He said, "No I go in six weeks. I have contacted social services concerning Paul without success at the moment."

56. On 20 March 2017 the Claimant emailed Mr Rice. He said, "Hi Kevin, any response from HR regarding my payslips and employee assistance telephone number, what happened to civil decency and responding to letters?" The Claimant's last two payslips were sent to him presumably by the Respondent's human resources department. An undated compliment slip is at page 88. No mention was made there to the issue of the ongoing suspension.

57. At paragraph 22 of his witness statement the Claimant says, "By 28 March 2017 the situation had become intolerable. My wife and I had spent six weeks more or less confined to our flat and unable to talk freely with our neighbours. We were feeling stressed and anxious about the situation, and the fact that nothing had been resolved. We had no idea when further action was going to be taken as we were not informed. We felt like prisoners in our own home. I had food shopping delivered to avoid going out just in case we bumped into anyone, even having to avoid knocks on the door, when we knew it was a resident, asking how we were.

We also had flowers, little gifts and notes, left outside the door, asking how we were, and letting us know the residents were there if we needed them”.

58. The Claimant decided to resign. As has been said, his resignation letter is at pages 118 and 119. He said in his letter that he was resigning with effect from 3 April 2017. He went on to say:-

“I feel the process has significantly impacted on mine and my wife’s well being since the initial letter of suspension. Following the initial suspension reasons which were quashed by West Yorkshire Police on 22 February I have had no further letters from my area manager Kevin Rice or human resources regarding the original suspension. Obviously on site and being in close proximity to residents I feel the process should have been resolved by now. I feel I have not had the full support from my area manager Kevin Rice who is leaving FirstPort within the next month and also the promotion of the regular regional manager Samantha Gibson has hindered the process. I have kept copies of all correspondence and shall look to pursue the suspension process with ACAS when I have left the accommodation. I would expect a reasonable amount of time to vacate 1 St Chad’s Court and be given one month to vacate.”

59. On 3 April 2017 Mr Cooper telephoned the Claimant to introduce himself. Mr Cooper had taken over the role of interim regional manager of the northern region that very day. Mr Cooper asked the Claimant to reconsider his resignation. Mr Cooper suggested that the Claimant “cool off” (as he put it in paragraph 11 of his witness statement) and instead attend a meeting on 7 April 2017 to continue with the disciplinary process. Mr Cooper said that he encouraged the Claimant to attend the disciplinary hearing and assured him that the outcome was not pre-judged. Mr Cooper said that the Claimant explained his frustration around the lack of communication and momentum regarding his suspension and his case.

60. Mr Cooper’s account is that the Claimant said he wanted to discuss the matter with his wife. Mr Cooper therefore agreed that he could do so and arrangements were made for him to call back an hour later. This Mr Cooper did. The Claimant told Mr Cooper in the second telephone conversation that he had spoken to his solicitor who had advised him not to withdraw the resignation or meet if it was pursuant to the disciplinary process. The Claimant was however prepared to meet with Mr Cooper “to discuss his ‘options’ but not under the guise of our internal disciplinary process”.

61. Mr Cooper followed up the conversation with a letter of 3 April 2017 (at pages 122 and 123). He mentioned that the disciplinary hearing had been scheduled to take place on 7 April 2017. Mr Cooper said that this could take place if the Claimant were to rescind his resignation. Mr Cooper asked the Claimant to contact him to “confirm your current employment position”. He said that if he did not hear from the Claimant by 7 April 2017 then he would process his resignation. Mr Cooper also enclosed a copy of the Respondent’s grievance policy should the Claimant wish to pursue his complaint about his treatment as a grievance.

62. The Claimant did not withdraw his resignation. He also did not raise a grievance.

63. On 5 April 2017 Mr Cooper wrote to the Claimant again (pages 128 and 129). This followed upon the Claimant attending a residents’ meeting on 4 April 2017. Mr Cooper said that this was contrary to the terms of the Claimant’s suspension. Mr Cooper said that he had been informed that the Claimant had told the residents that he had decided to resign. Mr Cooper contended that the Claimant had, in

these discussions, been critical of the Respondent. He inferred that by his actions the Claimant had decided not to rescind his resignation. Mr Cooper therefore confirmed that his employment would terminate with effect from 3 April 2017. The license to occupy the apartment was to terminate on 1 May 2017.

64. The following emerged from the cross-examination of Mr Cooper:

- He was copied in to Mr Rice's email to Abbie Boyle of 2 March 2017 (at page 86). He was therefore aware of the Claimant's suspension. The reason he was copied in was, he said, that he had "probably been appointed to hear the disciplinary hearing".
- No "firm timetable" had been communicated to the Claimant during the course of the disciplinary procedure.
- Mr Cooper did not know whether or not Mr Rice had ever completed a final version of the report (that at pages 93 to 96 being described as a draft).
- The disciplinary hearing on 7 April 2017 was therefore to proceed upon the basis of the draft report that is in the bundle. Mr Cooper did not inform the Claimant of the existence of the draft report (and in particular of Mr Rice's recommendation).
- Mr Cooper was asked at what stage it had been decided to convene the disciplinary hearing for 7 April 2017 and who was party to that decision. Mr Cooper said that the date had been decided upon prior to his conversation with the Claimant and it had been arranged with Abbie Boyle "maybe by telephone".
- Mr Cooper said that it was unlikely that the disciplinary hearing (had it gone ahead) would result in the Claimant's dismissal. However, Mr Cooper felt unable to tell the Claimant that in the telephone conversation of 3 April as that would be to pre-judge matters. Mr Cooper said that he found that conversation to be very difficult.
- Mr Cooper was unable to shed any light as to what (if anything) was happening with regard to this matter between 21 March 2017 (being the date of the draft report) and 28 March.
- Mr Cooper said that he had no line management responsibility for the matter until 3 April.

65. The Claimant's complaint is that he was constructively unfairly dismissed. By section 95 of the Employment Rights Act 1996 an employee is dismissed by his employer if (amongst other things) 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.

66. Whether an employee is entitled to terminate his contract of employment without notice by reason of the employer's conduct and claim constructive dismissal must be determined in accordance with the law of contract. The words 'entitled' and 'without notice' in the statute are the language of contract connoting that as a result of the employer's conduct the employee has a right to treat himself as discharged from any further performance of the contract. A test of 'unreasonable conduct' similar to the concept of 'unfairness' and not dependant upon a contract test is incorrect since it would not give effect to the words 'without notice'. Thus, an employee is entitled to treat himself as constructively dismissed 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.

67. The relevant term of the Claimant's contract of employment said to have been breached is the implied term that the parties will not without reasonable and proper cause conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between employer and employee. A breach of this implied term is a fundamental breach amounting to repudiation since it necessarily goes to the root of the contract.
68. The Tribunal's function is to look at the employer's conduct as a whole and determine whether it is such that the employee could not be expected to put up with it. This is an objective test. The question is whether looked at objectively the employer has acted in a manner likely to destroy or seriously damage the relationship of confidence and trust without reasonable and proper cause. The issue in this case is whether the Respondent's actions after 22 February 2017 amounted to a breach of the obligation of trust and confidence.
69. It was acknowledged by Mr Weiss on behalf of the Respondent that this was an unusual situation in that the Claimant was residing at his workplace. It was submitted by him that the restrictions upon the Claimant set out in the letter of suspension at pages 79 and 80 were reasonable in the circumstances by reason of the need for confidentiality and, as Mr Weiss put it, "to avoid awkward encounters".
70. Mr Weiss said that the length of time which the process had taken was objectively not unreasonable. He fairly accepted that there was a need for the Respondent to get on with matters given that the Claimant was living at the workplace and had therefore been placed in a difficult position. He fairly acknowledged the subjective feelings of frustration articulated by the Claimant and by his wife in her witness statement. However, he said that objectively the length of time taken was not such as to constitute a repudiatory breach of the relevant implied term. He said that the Claimant knew matters were ongoing as at 6 March 2017 by virtue of the fact that he had handed his written statement to Mr Rice. He (Mr Rice) then drafted the report, completing it on 21 March. Mr Weiss submitted that the Respondent's conduct in taking the time it did was not so serious as to constitute a repudiatory breach.
71. Mr Weiss submitted that there was nothing in the Respondent's disciplinary policy requiring communication to take place within any given timescale. It was submitted therefore that there was no yardstick by which to objectively measure the Respondent's handling of this case. Further, it was submitted that it was telling that the ACAS Code of Practice: Disciplinary & Grievance Procedures (2015) omitted reference to the need of keep the employee informed of progress (although it was accepted by the Respondent that the ACAS Guide supplementing the Code of Practice does make that recommendation). I note that both of those publications require the suspension period to be as brief as possible.
72. Mr Weiss was asked whether, were I to determine that the Claimant had been constructively dismissed, the Respondent seeks to assert a potentially fair reason for the constructive dismissal for the purposes of section 94 of the Employment Rights Act 1996. This section sets out the permitted reasons for the dismissal of an employee. Mr Weiss said that there was a substantial reason available to the Respondent by reason of the fact that a disciplinary investigation was in train. I note that no potentially fair reason was pleaded on behalf of the Respondent. The

Respondent pleaded at paragraph 27 of its grounds of resistance that the Respondent had not committed any fundamental breach of the contract of employment but did not make a positive assertion of a statutory permitted reason for the Claimant's dismissal were the Tribunal to determine that he had been constructively dismissed.

73. Should a statutory permitted reason be established by the Respondent then the task for the Tribunal (upon which the burden of proof is neutral) is to decide whether it fell within the band of reasonableness by reference to the standard of the reasonable employer to dismiss the employee for that reason in accordance with the equity and substantial merits of the case (taking into account the size and administrative resources of the employer).
74. It is my judgment that there is no repudiatory (or indeed any) breach of the contract of employment on the part of the Respondent between 13 and 22 February 2017. This was the first period of the suspension and which coincided with the police enquiries. Doubtless, the fact of the suspension was likely to destroy or seriously damage the trust and confidence reposed in the Respondent by the Claimant. However, the Respondent was acting with reasonable and proper cause over this period. It was accepted by the Claimant that suspension was a reasonable course of action. The Respondent had no choice but to hold off its own investigations pending the police enquiries. Those enquiries were dealt with quickly, the police taking a decision not to proceed with matters on 22 February.
75. In my judgment, the Respondent did act in repudiatory breach of contract after 22 February 2017. The Respondent's conduct has to be viewed in the context of the unusual feature of the Claimant living at his workplace. Not only that, the Claimant's role was to act as a good neighbour. That was what the Respondent expects of its development managers (page 53). In those circumstances it is inevitable that relationships will grow between the development managers on the one hand and residents on the other. While professional boundaries have to be observed it was expressly recognised by the Respondent upon that page that "*there may be close relationships between individual [development managers] and residents whom [development managers] may have known for many years.*"
76. The Claimant fairly accepted that the restrictions placed upon him in the suspension letter were reasonable, intended as they were to minimise contact between him and the residents and thus preserve the confidentiality and integrity of the process. However, it was in my judgment incumbent upon the Respondent in those circumstances to get on with matters quickly by reason of the difficulties which the restrictions placed upon the every day living activities of the Claimant and his wife.
77. It is in that context that the Tribunal has considered the Claimant's complaint that the Respondent was in repudiatory breach by reason of the lack of communication and the length of time taken in undertaking the investigations. I shall consider each in turn.
78. I agree with the Claimant that there was poor communication on the part of the Respondent. The reality is that after the Claimant had been informed the police were taking matters no further and he told his employer this that all of the communication (such as it was) emanated from the Claimant. From the Respondent, the Claimant appears to have received nothing more than a handwritten compliments slip at some point (at page 88) and Mr Rice's text of 17 March 2017 (at page 115). Neither of these communications told the Claimant

anything of substance about the process of the investigation or the timescales involved.

79. The cursory text from Mr Rice of 17 March 2017 in answer to the Claimant's message earlier the same day about being under stress fell way short of the obligation upon the Respondent pursuant to the relevant implied term not act in a manner seriously damaging of or destructive of mutual trust and confidence. There can be no reasonable and proper cause for effectively ignoring the Claimant and keeping him in the dark for as long as did the Respondent. In coming to this conclusion, the Tribunal has taken account of the ACAS Guide to the Code of Practice around the need to keep an employee informed and the recommendation in both the Code of Practice and the Guide to keep the suspension period as short as possible. This is particularly the case where there is the aggravating feature of the employee living in the workplace and amongst people with whom, as part of his role, he had formed and was encouraged to form good neighbourly relations.
80. It is no answer, in my judgment, for the Respondent to fall back upon the fact that the Claimant knew that the suspension and investigation were ongoing by virtue of Mr Rice collecting the statement from the Claimant on 6 March 2017. It was self-evident to the Claimant that the suspension was ongoing. That much was obvious to him as he was not allowed to fulfil his role. The difficulty for the Claimant was that he had been told nothing after 23 February 2017. The witness statement was handed up by him at a chance meeting which Mr Rice had with the Claimant on 6 March 2017. By that, I mean that Mr Rice had not arranged an appointment with the Claimant and simply called upon the Claimant in the course of his duties to collect a statement from him effectively unannounced. Thereafter, the Claimant was again told nothing notwithstanding the letters that he was sending to human resources. It was only when the Claimant initiated communication on 17 March 2017 that he was given some (albeit inadequate) information.
81. The Claimant was unaware that Mr Rice had prepared a report (in draft). Therefore, he remained in the dark as to what was happening and chose to resign. There was no satisfactory explanation from the Respondent as to why Mr Rice's report took so long to prepare given that on 10 March 2017 he was expressing optimism about completing it that weekend. In the event, he did not, it seems, attend to the matter for a further 11 days and even then the Respondent did nothing with it after Mr Rice submitted it. All the while the Claimant remained suspended and effectively was ignored.
82. There was no evidence that the disciplinary hearing date of 7 April 2017 had been alighted upon prior to the date upon which the Respondent was notified of the Claimant's resignation. Mr Cooper seemed unsure as to how the date had been decided upon. There was nothing before the Tribunal from human resources to Mr Cooper suggesting that that date be allocated for the disciplinary hearing. Plainly, there was no letter or email communication with the Claimant fixing the disciplinary hearing for that date.
83. In the circumstances I am driven to the conclusion that Mr Cooper, in his first day in his new role, found himself facing a difficult situation. He had received the Claimant's letter of resignation. It was left for him to deal with it in Mr Rice's absence (it seems). In my judgment, the reality is that when Mr Cooper spoke to the Claimant on 3 April 2017 the suggestion was made to the Claimant for the first time that the disciplinary hearing take place the following Friday and that that hearing date had been decided upon between Mr Cooper and human resources on

Mr Cooper's first day in role just before Mr Cooper phoned the Claimant. A further difficulty for the Respondent, as Ms Ephraim pointed out, is that that gave the Claimant a very short period of time in which to prepare for the disciplinary hearing as he had not received the report (nor was he even aware of his existence) when he spoke with Mr Cooper on 3 April.

84. The Respondent's Counsel is correct to remind the Tribunal that this is an objective and not a subjective test. There can be little doubt, from what I have heard, that subjectively the Claimant was stressed and frustrated by the process. The task for the Tribunal however is to step back and consider whether objectively the Respondent's handling of the matter was in breach of the relevant implied term such that the Claimant could no longer be expected to put up with the situation.
85. In my judgment, the Claimant has established this to be the case. There was poor communication to him from the Respondent and matters simply took too long in circumstances where the Claimant was living with residents with whom he had been working in his capacity as a development manager. Ms Ephraim put it rather well, I thought, when she described the Respondent's approach as "*slapdash*". In my judgment, looking at matters objectively, the process followed by the Respondent was so deficient as to objectively amount to a breach of the relevant implied term. There were inexplicable and unavoidable delays and the Claimant was not kept informed of such progress as there was or of timescales. The Claimant was entitled to resign in response to his employer's repudiatory breach and therefore he was constructively dismissed.
86. The next question that arises is whether the Respondent has established a potentially fair reason for the constructive dismissal for the Claimant. In constructive dismissal cases the fair reason ordinarily relates to the reason why the employer fundamentally breached the contract of employment. For example, in a case involving a fundamental breach by reason of not paying the employee remuneration due then the potentially fair reason may be a substantial one relating to a need to make redundancies or reduced costs.
87. It is for the Respondent to establish a potentially fair statutory reason. The Respondent starts from the unpromising position of not having pleaded a potentially fair reason for the constructive dismissal of the Claimant (should the Tribunal so find). Mr Weiss submitted that the fundamental breach of contract related to the Respondent's need to carry out an investigation into the Claimant's conduct. It was not a breach of the implied term to suspend the Claimant and to investigate matters *per se*. The breach was in relation to the conduct of the investigation and the period of the suspension. I therefore cannot agree with Mr Weiss that the fundamental breach as established by the Claimant may amount to a substantial reason. There was simply no good reason for breaching the Claimant's contract in this way such as to amount to a substantial reason sufficient to justify dismissal (as there would be, for example, in the instance posited at paragraph 86).
88. A further difficulty for the Respondent, however, is that following the establishment of a potentially fair reason for dismissal, the Tribunal must go on to consider whether it was fair or unfair in the circumstances of the case (taking into account the size and administrative resources of the employer's undertaking) and whether the Respondent acted reasonably or unreasonably in treating the permitted reason as a sufficient reason for dismissing the Claimant. It is difficult to see how it can be said to have been reasonable upon the part of the Respondent to handle the

suspension and investigation into the Claimant's conduct as it did such as to fundamentally breach the Claimant's contract of employment and (constructively) dismiss him. The handling of the matter by the Respondent was such that it was outside the range of reasonable responses of the reasonable employer essentially for the same reasons as gave rise to the Tribunal's judgment upholding the Claimant's claim that the Respondent was in fundamental breach of the relevant implied term. I take into account the fact that the Respondent is a large organisation with a specialist human resources department.

89. In conclusion therefore I hold that the Claimant was constructively unfairly dismissed by the Respondent. It was agreed between the parties that I would go on to consider the remedy issue (pertaining to the basic and compensatory awards upon a successful unfair dismissal complaint) of contributory conduct. This entails me making findings of fact as to whether there was conduct upon the part of the employee which was culpable or blameworthy. This extends to conduct which is perverse, foolish or bloody minded (even if not amounting to a breach of contract). There must also be a finding that it is just and equitable to reduce the assessment of the Claimant's loss and awards by reason of contributory conduct.
90. In relation to the compensatory award, the Tribunal must also make findings that the matters to which the complaint relates (in this case the constructive dismissal of the Claimant) was caused or contributed to by action that was culpable or blameworthy. (For the basic award, there is no need for the conduct to be causative of the loss).
91. In my judgment, there was no contributory fault upon the part of the Claimant. The Claimant had done all that he could, in my judgment, to assist X. Mr Rice's report acknowledges that the Respondent was aware of concerns around her welfare. So too were Leeds City Council. No arrangements had been made by either the Respondent or Leeds City Council to look after X. Her friend and her principal carer Paul was unable to attend to her needs following his return from his cruise at the end of December 2016.
92. In my judgment, the Claimant acted as was contemplated in section 3.07 of the development manager manual. The Claimant was effectively X's last resort. Mr Weiss' suggestion that the Claimant had done what he needed to do by reporting matters to the Respondent and social services and that he should "*let her starve*" (as he put it) is in my judgment simply unrealistic and harsh. True it is that the Claimant was not X's carer. However, the manual makes plain that development managers are in a caring role. They have to look out for the residents. They have a duty to look to their general welfare (pursuant to section 2.13 of the manual). That section of the manual says that it is within the development manager's role to shop on behalf of very frail residents in emergencies only. In my judgment this was an emergency. X had no one else to whom to turn. It is difficult to see how else, other than an emergency, X's predicament may be properly described.
93. In practical terms, it is difficult to conceive of how else the Claimant and his wife could have procured food for X than buying it with their own money and then arranging for X to pay them back. No other method of proceeding was suggested. All of the money paid by way of cheque from X to the Claimant was accounted for according to Leeds City Council. The Claimant thus meticulously kept receipts.
94. In my judgment, the Claimant's actions cannot be characterised as being perverse, foolish or bloody minded let alone in breach of his obligations under his contract of

employment with the Respondent. The Claimant acted compassionately towards X in accordance with his duties as development manager. He helped out this frail resident in circumstances where her principal carer Paul was unable to do so. He did so in circumstances where Leeds City Council's social worker had not made arrangements for her and, as it seems from the email trail at pages 97 to 102, was pressed for time and was finding it difficult to make arrangements to see X.

95. I received no submissions from either party upon any application to this case of the principles in ***Polkey v AE Dayton Services Limited*** [1987] IRLR 503HL. This entails the Tribunal in considering whether an employee would still have been dismissed had a fair procedure been followed. It is plain from Mr Rice's report and from what Mr Cooper said in evidence that the Claimant would not have been dismissed had the Respondent carried out a fair procedure. Mr Rice did not even recommend that the Respondent issue the Claimant with a warning about his conduct. He simply contented himself with a recommendation that the Claimant be given training (presumably around professional boundary issues). Therefore, had the Respondent carried out a fair procedure and had the disciplinary hearing taken place the Claimant would not have been dismissed by the Respondent and his employment thus would have continued.
96. Therefore, the Claimant's complaint of constructive unfair dismissal succeeds. There shall be no reduction to any basic or compensatory award on account of contributory conduct on the Claimant's part and there shall be no reduction to any compensatory award by reason of the chance of the Claimant being dismissed had a fair procedure been followed.
97. The parties shall, within 14 days of date of promulgation of this Judgment, write to the Tribunal with dates to avoid for a remedy hearing accompanied by a time estimate.

Employment Judge Brain

Dated: 29 December 2017