EMPLOYMENT TRIBUNALS

Claimant: **Mrs S Parker**

Respondents: **David Wood Baking Ltd**
David Wood Food Ltd

Heard at: **Llandudno** **On:** 5th March & 27thJuly 2019 (in chambers)

Before: **Employment Judge R F Powell**

Members: **Ms Atkinson**
Mr Charles

Representation

Claimant: **In person**
Respondent: **Ms Francis, of counsel**

JUDGMENT

The unanimous Judgment of the Employment Tribunal is:

1. The claim of indirect discrimination is not well founded and is dismissed.
2. The claim of less favourable treatment on the grounds of the claimant's status as a part-time worker is not well founded and is dismissed.
3. The claim that the claimant was subject to a detriment on the ground of her Application for Flexible working is not well founded and is dismissed.
4. The claimant was constructively unfairly dismissed.
5. The claim for breach of contract is well founded.

Introduction

1. On the 8th August 2018 Mrs Parker has presented a claim to this tribunal alleging that her former employer, David Wood Baking Limited, had on the 20th July 2018 constructively unfairly dismissed her contrary to section 95(1)(c) of the Employment Rights Act 1996. She alleged that the majority of the conduct which led to her resignation also amounted to a breach of the following statutory provisions;

a) Indirect sex discrimination contrary to sections 11 and 19 of the Equality Act 2010.

b) Less favourable treatment contrary to Part II of the Part-time workers (prevention of Less favourable Treatment) Regulations 2000.

c) Detrimental treatment because the claimant had exercised her right to make a flexible working request in accordance with section 47E of the Employment Rights Act 1996.

2. The factual matrix on which these three claims are is made is singular and the three claims are alternative interpretations of the claimant's factual allegations.

3. There is one further claim; a breach of contract claim arising from the claimant's resignation.

4. We record that a claim for holiday pay was not pursued.

The Evidence

5. The Tribunal heard evidence, submissions 2019 and commenced its deliberations on the 5th March 2019. It was not possible to conclude the deliberations and the tribunal met in chambers on the 27th July 2019 to conclude its decision making.

6. The tribunal considered the content of a single bundle of documents of 133 pages to which some additional pages were added in the course of the hearing.

7. The tribunal heard evidence from the claimant on her own behalf and from Mr Adam Astley, the respondent's site manager at its premises in Flint and Ms Parker's line manager during the period between February 2017 and July 2018. The tribunal received a witness statement from Mr David Wood but he did not attend to confirm his statement nor to be cross examined.

The Agreed Facts

8. The claimant's continuous employment with the respondent commenced on the 27th July 2009 when she started work with Brake Bros Ltd. Her employment subsequently transferred to the respondent on the 30th June 2014 under the 2006 Transfer of Undertakings (Protection of Employment) Regulations.

9. At all material times the claimant was an employee for the purposes of section 230 of the ERA 1996 and a worker for the purposes of regulation 1(2) of the PTW Regulations 2000.

10. The claimant's contract of employment [45] contained a term which stated:
"you are normally required to work 37.5 hours a week" and identified her normal working hours as 08.30 to 17.00 five days a week (including a one hour unpaid lunch break)".

11. The claimant's Job title was described thus:

"Your current job title is Admin Team member, Brake Manufacturing. Periodically, you will receive an updated job description.

It is important that we operate an efficient service to our customers…. For these reasons it is necessary that all staff undertake promptly and efficiently any duties reasonably required of them. Equally, it is vital that all staff display a high standard of team work and flexibility. You will be expected, for example, to co-operate in handling the work of absent colleagues. Your employment is based on your acceptance of these terms."

12. The claimant's administrative duties had been quite varied for a number of years; dealing with the administration work of processing sales and purchase orders for the Flint site, reporting those orders by email, using Sage software, ordering stationery and communicating with suppliers and providing company weekly reporting and transport figures for the Flint site. More recently, she worked in an office with two colleagues Lisa and Deborah.

13. On 1st August 2012, following the claimant's return to work following maternity leave, she reduced her working hours to 30 hours a week [50/51A].

14. Following her return to work following her second period of maternity leave, the claimant returned to work on the 9th October 2017. She returned to her contracted role and continued to work in administration albeit her tasks had changed and she was focused on processing packaging orders.

15. Although she was still contracted to work 30 hours and five days a week, she used her accrued annual leave entitlement to reduce her attendance at work to three days and a total of 18 hours a week. This was accepted by the respondent. The claimant's pattern of work became Monday, Wednesday and Friday of each week.

16. This was intended to be a short-term measure but in December 2017 her planned child care provision was disrupted and could not be resolved until the following September and so she requested that the pattern of a three day week be extended until September 2018.

17. An initial verbal request to her manager Gareth Davies in December 2017 led to an agreed extension until the end of January 2018.

18. On the 3rd January 2018, the same date on which the claimant submitted a written request for a variation of her hours of work, Mr Davies agreed the claimant's request; that she could continue to work three days a week until September 2018. This agreement was documented in a letter from the respondent to the claimant dated the 9th February 2018 [55/56].

19. In 2018 the respondent undertook a restructure of its business and two pertinent matters affected the Flint site. Its production became continuous "24/7" which considerably increased its production and sales. That change was consequent to a contract to supply a national retailer. The terms of the contract with the national retailer entailed certain standards of record keeping. Secondly, a decision was made to centralise and/or streamline the work of ordering materials and ingredients for its sites. The ordering tasks and administration standards were derived from the practices of the respondent's Bolton, office.

20. It is in this context that a dispute arose between the claimant and the respondent concerning her duties, the way in which she was treated by her superiors and the resolution

of her grievance all of which culminated in her sickness absence between the 11th June 2018 and, on the 20th July 2018, her resignation with one week's notice.

Findings of Fact on matters which were not agreed

21. In the winter of 2017, the respondent had been seeking new contracts and considering restructuring its business to improve its efficiency. The claimant confirmed (in cross examination and in her letter of the 7th May 2018) that she had been involved in some meetings to this effect before her 3rd January 2018 application for flexible working. One of the decisions made by the respondent, which was managed by Ms Darling, was the centralisation of ordering of materials for the respondent's eight factories across England and Wales. A number of these factories operated on a 24-hour basis every day and the decision was made to operate the centralised ordering of supplies from Bolton. A further decision was made to recruit two additional full-time staff to work on the centralised ordering function; again, based in Bolton.

22. In the same time frame the Flint site was required to increase its production to "24/7" to fulfil a contract with a national retailer and thus aspects of work at the Flint site increased; on Mr Astley's evidence turn over there was projected to increase from £12 to £25 million a year.

23. In the same period the claimant's immediate line manager Mr Gareth Davies moved to a new role in the respondent's business and Ms Jennifer Darlington came to work at the Flint site on the 18th February 2018. The claimant's evidence stated that Ms Darlington had a plan; "to restructure the admin office to how Bolton ran".

24. It was around this time that the claimant began to experience a shift in her duties. She gave evidence that her work was gradually moving away from the ordering towards new aspects of administration which would include the need to learn how to use new spreadsheet software. That training took place on the 16th March 2018 when Ms Jessica Hough came to Flint to train the claimant to work in line with the Bolton office methods. However, a week later a decision had been made to ask Ms Hough to take responsibility for all of the Flint site sales orders. In cross examination the claimant confirmed that she had been told that the sales order task was expected to come back to her in September 2018; the date when she planned to return to working 30 a week

25. There is a difference of evidence between the claimant and Mr Astley about the date of a meeting. The claimant states it took place on the 25th April 2018n whereas Mr Astley states the meeting took place on the 4th May.

26. A record of a meeting between the claimant, Mr Astley and Ms Jenny Darlington (summerised in Mr Astley's email of the 4th May 2018 was before us [57-58] as was the claimant's summary of the meeting on the second page of her letter dated the 7th May 2018 [59-60].

27. On balance it seems more likely that that Mr Astley met with the claimant on the 25th April 2018 and provided her with a job description which outlined new administrative tasks [80a-b] she was to undertake. These included;

a) Maintaining all employee work files; obtaining necessary documents for those files and updating existing records.

b) Maintaining the records of staff training and ensuring that training was arranged promptly and certificates obtained.

28. These were tasks which the respondent considered to be of importance particularly as the new client was one which undertook audits of its suppliers' health & safety and employee records to be confident it was working with ethical and responsible providers. An initial audit had found deficits in the respondent's record keeping at the Flint site and thus, corrective action was a priority. From the claimant's point of view, she was not happy because the task was menial and weighty; there was a four- year backlog of work to be done. She had no previous experience of Health and Safety work and whilst she was promised training, she was not clearly informed of the character of the training the respondent intended to provide.

29. The claimant expressed her dissatisfaction with working in the area where files were stored, being away from her computer, telephone and colleagues albeit it transpired that the respondent did not require her to work away from her colleagues. The tribunal was taken to photographs of Technical Administration Room [77-79], which was partly shelves laden with lever arch files and partly document storage boxes all of which gave the impression that no orderly mind had been applied to its organisation for some time. That however would not detract from the respondent's evidence that the records were in need of prompt organisation and thereafter proper administration.

30. The claimant was ill at ease about the proposed changes and felt that the removal of her preferred task to Bolton amounted to the redundancy of her role and there had been no consultation with her about that decision. This and other matters were discussed with Mr Astley and Ms Darlington on the 4th May 2018.

31. The discussion on the 4th May covered the reason why the sales ordering role had been subsumed into the central function; the proportionate increase in the sales ordering with the implementation of "24/7" production at the Flint site, the respondent's lack of personnel to cover the sales ordering task on the two days a week when the claimant was not at work, the centralising of the respondent's systems and that the role would be returned to the claimant upon her return to her full 30 hours a week in September 2018; a little over three and a half months from the date of the 4th May meeting.

32. The claimant left that meeting with no sense of reassurance; she believed her role had been made redundant without any consultation and that she should have been given the opportunity to go back to working five days a week, further she believed she was being picked on because she was a part time worker. She ended her letter dated the 7th September thus:

" This position I have been put in can easily be resolved to the satisfaction of all parties, if I was asked to consider increasing my hours back to my original contract earlier than September."

33. On the 14th May (erroneously referred to as the 16th May in the claimant's witness statement) the claimant spoke to Ms Darlington and was informed that Ms Darlington was no longer the claimant's manager and that she now to report to the Technical & Quality Managers. Ms Darlington could not tell the claimant what her role would be. When the claimant voiced disquiet, Ms Darlington cautioned her that a failure to follow a reasonable order to commence new tasks on the 16th May, could lead to disciplinary action. This led the claimant to submit a further letter dated the 15th May [64-65] which was, taken with the letter of the 7th May, clearly a formal grievance.

34. The Respondent's grievance procedure is notable for its brevity:

a) The first paragraph informs employees that it is essential that they follow the "correct procedure".

b) The second directs them to raise problems with their supervisor. If that does not resolve matters the employee must "record their grievance in writing to the shift manager (or above if applicable) who will reply within 7 working days."

c) The last paragraph states: "If the matter is not resolved you may contact the managing director whose decision will be final."

35. There is no mention of investigation, the right to representation, a hearing or a period of prior notice of any of these steps.

36. On the 16th May Mr Wood, the respondent's most senior manager and co-director, was working at the Flint site and, without warning to the claimant, decided to hear her grievance.

37. Mr Wood's statement has been read by the tribunal. In his absence we prefer the evidence of the claimant.

38. The claimant was not forewarned of the meeting. When she met Mr Wood the claimant stated that, if the meeting was a grievance, she wanted time to prepare. Mr Wood ignored the claimant and talked over her.

39. Mr Wood then directed a manager to call Debbie Johnson to come to the meeting to sit with the claimant. The claimant had no choice in the matter and no chance to speak to Ms Johnson in private.

40. After three requests to Mr Wood about the character of the meeting, none of which were answered, the claimant was noticeably upset and crying.

41. It is apparent from the respondent's notes that Mr Wood was unaware of the claimant's letter of the 15th May.

42. Nor based on our reading of the minutes does he try address the claimant's essential allegation that she was being "picked on" because she was a part time worker or her wish,

expressed in writing and orally in the meeting, to return to her 30 hours a week earlier than September 2018.

43. The tribunal has reached the conclusion, based on the claimant's evidence, which includes her dispute with the reliability of the respondent's notes, that Mr Wood somewhat ambushed the claimant and pressed her to accept his view rather than investigate her concerns or try to address them.

44. This view is corroborated by Mr Wood's subsequent letter which does not mention the claimant's concern that her role had been changed because she was a part-time worker.

45. The letter does not advise the claimant that she has the right to appeal and, on reading the grievance procedure It would appear that Mr Wood's decision was final.

46. The tribunal notes that the bundle contains no documentary evidence of events between the 9th February and. There after the pertinent events are recorded in the claimant's grievance letter of the 15th May 2018 [64-65 and the respondent's minute of a meeting between the claimant and Mr Wood (with several additional attendees) on the 16th May 2018 [66 -73] a and Mr Wood's outcome letter of the same date [74].

47. On the 16th May the claimant commenced two weeks annual leave. Immediately thereafter she was absent with ill health until the 20th July. During her sickness absence, as she accepted in cross examination, the claimant had applied for and had accepted new employment which she intended to commence on Monday 30th July 2018.

48. The claimant resigned by a letter dated the 20th July she gave one week's notice. Her new employment was a fixed term contract with a considerably higher pro rata remuneration than that which she enjoyed working for the respondent.

The relevant legal matrices, discussion and conclusions

Flexible working

49. Section 47E of the Employment Rights act 1996 states as follows:

(1) *An employee has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the employee—*

(a)made (or proposed to make) an application under section 80F…

50. It is not disputed in the case that the claimant had made, and the respondent had granted, the claimant's flexible working request.

51. The parties do dispute whether the respondent's conduct was detrimental and whether the conduct was "on the ground of" the claimant's application under section 80F.

52. As the statutory language of "detriment" and "on the ground that" have been addressed repeatedly with respect to claims brought under section 47B and the tribunal has directed itself based on those authorities:

53. A detriment will be established if a reasonable worker would or might take the view that the treatment accorded to them had in all the circumstances been to their detriment. In order to establish a detriment it is not necessary for the worker to show that there was some physical or economic consequence flowing from the matters complained of (see *Shamoon v Chief Constable of the Royal Ulster Constabulary (Northern Ireland) [2003] UKHL 11*, 285.

54. In *Feccitt & others v NHS Manchester* 2012 ICR 372, CA, Elias L.J. stated that section 47B would be infringed if the protected act of the employee "materially influences the employer's treatment of the employee".

55. The claimant's case, which we may articulate in a slightly more structured manner, was this; she requested to reduce her working days to three, that in turn led to the employer choosing not to allow her to continue with a task she had previously undertaken because it was judged to necessitate a full time occupant. The employer's decision therefore related to her application under section 80F; but for her application, she would not have been working three days a week and therefore her original task would have been retained.

56. The respondent's case is that it was content for the claimant to work three days or five days; it mattered not because she was a valued employee. In the 16th May meeting when the claimant had indicated she might want to return to five days working, to regain her original task, Mr Wood invited her to make that application if she wished. In short there was no conscious or unconscious ill will towards the claimant.

57. The absence of ill will would not appear, on re-reading the statute, to be a determining factor. However, the employer's action or deliberate inaction must relate to the claimant's request under section 80F. It is open to a respondent to prove on the balance of probabilities that its rational was not the protected act itself but the unforeseen consequences of the act: *Shinwari v Vue Entertainment Ltd* UKEAT 0394/14/BA.

58. In this case we are satisfied that the respondent's decision to remove the sales processing role was based on factors which (a) pre-dated the claimant's application or were a consequence of an accumulation of factors which arose independent of the claimant's section 80F application. Those factors were:

59. The decision to increase production at the Flint site to "24/7" which, on Mr Astley's evidence, reflected a growth in annual sales from £12 to £25 million. That increase caused an associated increase in administrative work. Thus, the claimant's sale processing task could not be completed in 3 days work per week.

60. The absence of any member of staff at the Flint site who had capacity to take on the two days of sale processing for the period between February and September 2018.

61. The streamlining of the respondent's procedures and the centralisation of its sales processing.

62. The pressing need to comply with the requirements of the respondent's contractual agreement with a national retailer, whose products were being manufactured at the respondent's Flint site; the personal, training and health and safety records.

63. In our judgment the respondent has proven that its decision was not on the ground that the claimant had made a section 80F application.

The Part-time Worker (prevention of less favourable treatment) Regulations 2000

64. Regulation 5 states:

"(1) A part-time worker has the right not to be treated by his employer less favourably than the employer treats a comparable full-time worker—

(a) as regards the terms of his contract; or

(b) by being subjected to any other detriment by any act, or deliberate failure to act, of his employer.

(2) The right conferred by paragraph (1) applies only if—

(a) the treatment is on the ground that the worker is a part-time worker, and

(b) the treatment is not justified on objective grounds.

(3) In determining whether a part-time worker has been treated less favourably than a comparable full-time worker the pro rata principle shall be applied unless it is inappropriate."

65. The defence of objective justification in reg 5(2)(*b*) is referred to in the guidance by BEIS and adopts the following approach; that less favourable treatment will only be justified on objective grounds if it can be shown that it:

(a) it to achieve a legitimate objective, for example a genuine business objective;

(b) is necessary to achieve that objective; and

(c) is an appropriate way to achieve that objective.

Indirect discrimination

Section 19 of the Equality Act 2010 states:

(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.

(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—

(a) A applies, or would apply, it to persons with whom B does not share the characteristic,

(b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,

(c) it puts, or would put, B at that disadvantage, and

(d) A cannot show it to be a proportionate means of achieving a legitimate aim."

66. With respect to subsection 2(d) the tribunal has directed itself in accordance with the following guidance:

67. Elias J (as he then was) in *MacCulloch v ICI [2008] IRLR 846, EAT*, set out four legal principles with regard to justification, which have since been approved by the Court of Appeal in *Lockwood v DWP [2013] EWCA Civ 1195*, *[2013] IRLR 941*, *[2014] ICR 1257*:

(1) The burden of proof is on the respondent to establish justification: see *Starmer v British Airways [2005] IRLR 862* at [31].

(2) The classic test was set out in *Bilka-Kaufhaus GmbH v Weber Von Hartz* (case 170/84) *[1984] IRLR 317* in the context of indirect sex discrimination. The ECJ said that the court or tribunal must be satisfied that the measures must "correspond to a real need … are appropriate with a view to achieving the objectives pursued and are {reasonably] necessary to that end" (paragraph 36).

(3) The principle of proportionality requires an objective balance to be struck between the discriminatory effect of the measure and the needs of the undertaking. The more serious the disparate adverse impact, the more cogent must be the justification for it: *Hardys & Hansons plc v Lax [2005] IRLR 726*

(4) It is for the employment tribunal to weigh the reasonable needs of the undertaking against the discriminatory effect of the employer's measure and to make its own assessment of whether the former outweigh the latter.

68. *Magoulas v Queen Mary University of London UKEAT/0244/15* Identified the correct approach to be taken by a tribunal determining the issue of justification In summary:

a) the test is an objective test and not a band of reasonable responses test;

b) the Tribunal must not conflate legitimate aim and proportionality;

c) what amounts to a legitimate aim is not defined in the *2010 Act* and is a question of fact for the Tribunal;

d) the measure must pursue the aim, but it is not necessary for this to have been specified at the time, and an *ex post facto* justification is possible (see *Seldon v Clarkson Wright & Jakes [2012] IRLR 590*);

e) an aim that is inherently discriminatory will not suffice and will not be a legitimate aim;

f) reducing cost can be a legitimate aim in some circumstances, for example in allocating resources between competing demands, but it cannot justify an otherwise discriminatory provision;

g) the principle of proportionality requires the Tribunal to strike an objective balance between the discriminatory effect of the PCP and the reasonable needs of the employer's business;

h) there is no guidance in the *2010 Act* about this, and it is for the Tribunal to assess proportionality;

i) an employer can rely on a justification defence not thought of at the time of the discrimination (see *Cadman v Health & Safety Executive [2004] IRLR 971*); and

j) some evidence is required to establish the defence.

69. We have concluded that the correct approach in law to justification under section 19 of the Equality Act is materially the same as that to be applied in respect of regulation 5(b) of the PTW(PLFT)R 2000.

The claimant's submissions

70. For the purposes of the Regulation 5 claim the claimant compares her role with her two colleagues employed in administration roles at the Flint Site. She asserts that she was less favourably treated in three respects:

a) Only she was required to carry out "filing work and menial tasks".

b) Told that her job would be ending in September 2018.

c) Failing to deal with her grievances.

71. The respondent's evidence did not dispute that the claimant's two named colleagues in administration were full time staff. It disputed the truth of all of the three alleged acts of less favourable treatment. Taking each in turn:

72. We firstly concluded that the claimant was not told that her job would be ending in September 2018. Mr Astley's evidence, corroborated by the 4th May Note and the statements By Mr Wood on the 16th May all contradict the claimant's assertion which is not corroborated by any document or by a witness.

73. We do find that the claimant was required to undertake work on files; this included filing but also identifying missing or out of date documents and rectifying such deficiencies. We also accept that to undertake such tasks, which had been left undone for up to four years, was likely to be dull and mechanical in substantial parts.

74. We have found a number of deficiencies in the respondent's approach to the claimant's grievance and so we uphold the claimant's assertion that Mr Wood did not deal with her grievance in a fair manner. We then turn to section 5(2)(a).

75. We are satisfied that the claimant has proven that the respondent's decision to alter her work was "on the ground" of her part-time employment. The respondent's case before us and on the contemporary documents was expressly on such grounds; the sales processing had become a full-time role and it was not practical to ask another employee to undertake the task in the claimant's absence.

76. We are not satisfied that the respondent's conduct of the grievance process was in any way related to the claimant's part-time employment status. We of course accept that the subject matter of her complaint related to her part-time work but from the evidence available to us is seems to us far more likely that Mr Wood's brash and somewhat dismissive manner was a consequence of his desire for an immediate solution without the requirement of investigation or delay. We find that is more likely than not that Mr Wood was likely to adopt this approach if a full-time person had complained about a similar change in their tasks.

77. We then must determine whether the respondent has proven that his conduct was justified on objective grounds. As noted above, this question is in all material respects the same question that we must determine for the purposes of section 19 of the Equality Act 2010. We further note that the character of the "PCP" and particular disadvantage pleaded in paragraph 17 of the claimants' grounds of compliant are really the same issue as that we have found proven in paragraph 75 above. We will therefore address the issue of justification, in respect of both the Regulations and the Equality Act, in our findings and conclusions set out below.

PCP

78. We have concluded that the respondent did impose a requirement that the task of sale processing required at least 30 hours work a week and that it could not be done by a part time employee working 18 hours a week, or in the short term circumstances by two part time employees one of whom undertook the work of sales processing on Tuesdays and Thursdays, and by implication, five days a week during the claimant's annual leave (in this case that occurred between the 16th and 30th May 2018).

79. We are satisfied, and take judicial note that the majority of persons who are primary carers for children are women and that those responsibilities can, and do, put women at a disadvantage.

80. As to whether the claimant was at a disadvantage, we directed ourselves in accordance with the guidance in *Shamoon v Chief Constable of the RUC [2003] UKHL 11*,*[2003] IRLR 285*, *[2003] ICR 337*; *De Souza v Automobile Association [1985] IRLR 87, EAT* which indicate that, in cases involving working conditions, a change in job duties which does not involve either loss of status or pay may be enough to constitute a 'detriment', provided the change is reasonably seen as such by the complainant.

81. It is our conclusion that the claimant could comply with the requirement to undertake alternative administrative tasks as directed by the respondent. It was also our conclusion that the claimant had accepted that her tasks could be changed from time to time in

accordance with the needs of the business; that was clearly set out in the clause of her contract of employment cited earlier in this judgment.

82. The particular disadvantage the claimant suffered was perception that the tasks were menial and repetitive. There is no doubt that the claimant genuinely believed that her status had been reduced by the removal of her sales processing task and the imposition of the filing and record keeping tasks.

A legitimate Aim

83. In our judgment the respondent had a legitimate and non-discriminatory aim; to ensure that it was able to meet its contractual obligations and to ensure that its business administration adequately supported its manufacturing function.

Proportionality

84. We have concluded as follows: the disadvantage the claimant suffered was of limited duration; it was not going to extend beyond early September 2018 and was not imposed until the 16th May 2018; a total of three and a half months. The tasks she was directed to undertake were within her abilities and, on the evidence before us, were ones which the claimant should have understood were important to the respondent – it was work which the respondent valued.

Was the PCP justified ?

85. The sale processing, according to the claimant's evidence, had occupied the larger part of her work when she was working 30 hours a week over five days. The respondent's need for sales processing had increased upon acquiring a contract which doubled the respondent's sales at the Flint site. In our judgment, at the material time there was a clear need for sales processing to be undertaken for no less than 30 hours a week. The respondent had, for commercial reasons taken a decision to streamline is administration and apply consistent practice across its eight manufacturing sites. This required some staff to learn new procedures and some staff to be based in Bolton.

86. Further we accept the respondent's case that there was a critical need to demonstrate to its national retailer client that the respondent was complaint with its duties as an employer and its health and safety responsibilities; the proof which the client wanted was discerned from audits of the respondent's files. This was an urgent matter and one of substance at the Flint site.

87. At the Flint site the claimant worked with two other administrators both of whom were on full time hours and were occupied with different tasks to the claimant. It is difficult to see how those staff could step into the claimant's role on the two days a week she was absent and also cover their own duties. The same point arises more starkly for the claimant's annual leave.

88. The claimant's change of tasks was for a period of 14 weeks, two of which she was on annual leave. Thus, the claimant's disadvantage was of a limited duration and she was, in our

judgment, aware that her preferred duties would be returned to her at that end of that period; when she returned to her regular 30 hours a week.

89. Taking all of the above into account we are satisfied that the respondent has proved that the PCP was a proportionate way of achieving its legitimate aim.

90. By reason of the above we do not find the claims under regulation 5 or section 19 to be well founded.

Constructive Unfair dismissal

91. It is for the claimant to prove that her resignation amounted to a dismissal within the meaning of section 95(1)(c) of the Employment Rights Act 1996.

92. The claimant must adduce sufficient evidence to establish her case on the balance of probabilities. She must establish:

    a. conduct by the respondent which amounts to a breach of a term of her contract
    b. that such a breach is repudiatory in nature
    c. that she accepted the repudiation
    d. that the effective cause of her resignation was the said breach

The Terms of the Contract.

93. It is agreed that the term of "trust and confidence" is implied into the contract of employment between the parties.

94. It is averred that the right to have a grievance determined is an express term of the party's contract; [493].

95. It is averred that it is necessary to imply into the contract, as the procedure is silent on this point, that the respondent will conduct an investigation within the band of reasonable responses open to an employer; *Abbey National v Fairbrother*

The Nature of the Breach

96. Regardless of the specific term, the breach must be sufficiently serious*: RDF Media Group Plc v Alan Clements* (decision attached); paragraph 105:

"The test whether there is a breach or not is said to be a 'severe' one. In this regard it should be remembered that for an employee to become entitled to claim that he has been constructively dismissed on this ground, it is not enough to prove that the employer has done something which was in breach of contract or 'out of order' or that it has caused *some* damage to the relationship; there is a need to prove that the conduct of the employer is sufficiently serious and calculated or likely to cause such damage that it can fairly be regarded as repudiatory of the contract of employment, that is to say, so serious that the employee is entitled to regard himself as entitled to leave immediately without notice."

97. *Croft v Consignia plc [2002} IRLR 851 EAT*; the implied term of trust and confidence is only breached by conduct which "seriously damages or destroys" the relationship of trust; lesser blows must be absorbed.

98. The obligation is mutual and the alleged breach must be objectively assessed. It is a convenient comparison to consider the conduct which an employer might reasonably be implied to consider amounts to gross misconduct; a repudiatory breach by the employee which justifies summary dismissal – the acceptance of the repudiation.

99. Or, as another example cumulative conduct; the "last straw"; repeated misconduct or negligence which justifies dismissal with notice; again, an act by the employer accepting the repudiatory conduct of the employee.

100. It is important to note that there is no implied term to simply behave reasonably; *The Post Office v Roberts [1980] IRLR 347 EAT. (A case where an employee had to carry on working alongside the co-employee who was facing trial for sexual assault on the first employee's daughter).*

The Implied term of Trust and Confidence - The House of Lords Guidance

101. In the last paragraph of the judgment of the House of Lords in *Malik v BCCI [1997] IRLR 462 HL*. Their lordships gave guidance to the tribunals on the approach to deciding cases of this sort. That guidance is as significant as that of "Burchell" in misconduct cases. It sets out a preferred order in which the issues are determined:

102. Lord Steyn's speech, under the heading "THE EFFECT OF MY CONCLUSIONS" stated:

"Earlier, I drew attention to the fact that the implied mutual obligation of trust and confidence applies only where there is 'no reasonable and proper cause' for the employer's conduct and then only if the conduct is calculated to destroy or seriously damage the relationship of trust and confidence. That circumscribes the potential reach and scope of the obligation."

103. Accordingly, the questions that require to be asked in a constructive dismissal case appear to us to be:

1. what was the conduct of the employer that is complained of?

2. did the employer have reasonable and proper cause for that conduct?

If he did have such cause, then that is an end of it. The employee cannot claim that he has been constructively dismissed.

If the employer did not have such cause, then a third question arises:

3. was the conduct complained of calculated or likely to destroy or seriously damage the employer/employee relationship of trust and confidence?

104. The claimant's resignation letter of the 20th July 2018 [75-6] set out a number of reasons for her decision to resign:

" A build-up of recent poor management, bullying, lack of following your own company policies, discriminating against a part time worker, a breach of flexible working contract and singling myself out following maternity and with, and complete risk assessment flaws have all built up causing too much stress leading to sick leave and a big impact on my health. She concludes by referencing her grievances and "nothing has been rectified since".

105. It is apparent from our findings that some of the claimant's assertions against the respondent we have not found to be proven for instance; that the claimant would not be allowed to return to her sales processing role in September 2018.

106. Other aspects of the claimant's complaints we have found to be objectively justified. Clearly the claimant has not proven that those actions by the employer were "without reasonable and proper cause".

107. We have accordingly not taken such matters into consideration for the purposes of determining, on an objective basis, whether the conduct of the respondent such that is amounted to a dismissal for the purposes of section 95(1)(c).

108. The elements which we have not addressed fully in our findings of fact set out above are: "bullying", "no clarity of a new job role I was being forced into or face disciplinary" and the respondent's grievance process.

109. Of these elements of the respondent's alleged cumulative conduct we have found the following proven:

The alleged bullying

110. The claimant gave direct evidence of conduct by Mr Astley during a consultation meeting on the 2nd February 2018. She alleged that during the course of consultation, in the presence of Debbie Johnson and Lisa Davies, Mr Astley said; "Stacey, if you are incapable of doing your job, put in your notice so we can re-advertise."

111. Mr Astley did not recall making that statement.

112. According to the notes of the meeting with Mr Wood on the 16th May 2018, Ms D Johnson confirmed that the claimant's complaint; "It is disgusting the way am being treated and the way I am being spoken to." [68]. Which in the context of the claimant's evidence we are satisfied was a reference to Mr Astley's alleged statement?

113. On the balance of probabilities, we find that the claimant has proven that Mr Astley did make such a statement. The respondent did not argue that such a comment was "with reasonable and proper cause" and having accepted the claimant's account we find the comment was without reasonable and proper cause.

114. We note that the conduct was mitigated to some extent by Mr Astley's apology during the 16th May 2018 meeting.

Lack of clarity in the claimant's role/ threat of disciplinary action

115. The claimant gave evidence of the following which was not, and could not reasonably be, contracted by Mr Astley's evidence because he was not party to the discussion:

116. That following Ms Darlington's management of the administration team the claimant's role was slowly changed; without prior warning.

117. That an employee from Bolton trained the claimant how to undertake sales ordering spreadsheet work on Friday 16th March. On Monday 19th found the claimant could not access the spreadsheets because the password no longer worked; she could not undertake sales ordering work.

118. . No explanation was given by the respondent until the 21st March When Ms Darlington informed the claimant that the trainer from Bolton had taken over the claimant's primary task, and one which she wished to retain, and that was why the claimant had not been able to access the spreadsheet on the 19th March.

119. The claimant was left with no clear set of tasks until Mr Astley provided the claimant with a proposed job description around a month later on the 25th April.

120. That proposal was implemented on the morning of the 16th May when Ms Darlington, without warning, informed the claimant that (a) her line management had changed and that she was to report to her new managers, and that a refusal to do so could lead to discipline. The claimant found that her new work environment was, as noted above, in a state of disarray. That same day Mr Woods called the claimant to the meeting noted above.

121. We find that the claimant has proven that Ms Darlington did not inform the claimant of changes to her role prior to implementing those changes or the removal of the sales processing role (by giving that work to a colleague from Bolton). This lack of discussion or warning was distressing for the claimant. Ms Darlington did not resolve, or try to resolve this; it was Mr Astley who proposed a new role a month later. Lastly Ms Darlington gave the claimant no notice of the change of her manager, her change of office and, in that context warned the claimant that she risked disciplinary proceedings if she failed to follow Ms Darlington's instructions.

122. Ms Darlington was not called to give evidence and Mr Astley's evidence could not deal with aspects of the above to which he was not a party.

123. In this context we find that the claimant has persuaded us that she was subject to a period of uncertainty, she was stripped of her long term work without warning and she was, save for Mr Astley's efforts of the 25th April and 4th May 2018, without clarity of her role until the 16th May; when it was effected without warning.

124. We are also persuaded by the claimant's evidence that the conduct of MS Darlington was without reasonable and proper cause.

The 16th May meeting with Mr Wood

125. Mr Wood did not attend to give evidence. Mr Astley's part in the meeting was brief. The claimant, through her own evidence, and by reference to the respondent's written grievance process, has proven Mr Wood's conduct (as noted below) and that such conduct was without reasonable and proper cause. Mr Wood;

a) Did not invite the claimant to a meeting with any notice
b) Did not inform the claimant that the meeting on the 16th was a grievance meeting
c) Did not allow the claimant the opportunity, as she requested, of time to prepare
d) Did not allow the claimant to be accompanied by a person of *her* choice
e) Did not inform the claimant of her right to appeal, and
f) By his own actions, as the most senior employee and director of the respondent, deprived her of the opportunity to appeal to more senior level of management.

126. Did the proven conduct which was without reasonable or proper cause amount to a breach of the implied term of trust and confidence?

127. The tribunal's task is to conduct an objective assessment of the relevant aspect of the respondent's conduct. We note that the claimant's case asserts an accumulation of conduct by the respondent.

128. We have taken into account Ms Francis submission, which we accept, that an employer has a wide discretion to direct an employee's duties or changes to them and that the exercise of that discretion, unless arbitrary or capricious, is most unlikely to be in breach of its contractual duties.

129. Our conclusions, in this head of claim, distinguish between the respondent's reasonable alteration of the claimant's duties and the manner in which the respondent conducted itself in communicating with the claimant, leaving the claimant in limbo for a period of time and lack of decisions.

130. Taking the conduct of Mr Astley on the 2nd February 2018, the conduct of Ms Darlington between March and 16th May 2018 and the conduct of Mr Wood on the 16th May 2018 we are satisfied that the respondent's conduct, objectively viewed amounted to a repudiatory breach of the implied term of trust and confidence.

Affirmation

131. Following the meeting on the 16th May 2018 the claimant commenced two weeks of annual leave. We do not know when the claimant received the written outcome of the meeting which is dated 16th May [74]. The claimant was then certified unfit to attend work until the 20th July and resigned on the first day she was fit to work. The claimant worked one week of her notice period.

132. *Hadji v St Luke's Plymouth* His Honour Judge Jeffrey Burke QC summarised the position as follows (paragraph 17):

"The essential principles are that:

(i) The employee must make up his [her] mind whether or not to resign soon after the conduct of which he complains. If he does not do so he may be regarded as having elected to affirm the contract or as having lost his right to treat himself as dismissed. *Western Excavating v Sharp* [1978] ICR 221 as modified by *W E Cox Toner (International) Ltd v Crook* [1981] IRLR 443 and *Cantor Fitzgerald International v Bird* [2002] EWHC 2736 (QB) 29 July 2002.
(ii) Mere delay of itself, unaccompanied by express or implied affirmation of the contract, is not enough to constitute affirmation; but it is open to the Employment Tribunal to infer implied affirmation from prolonged delay - see *Cox Toner* para. 13 p446.
(iii) If the employee calls on the employer to perform its obligations under the contract or otherwise indicates an intention to continue the contract, the Employment Tribunal may conclude that there has been affirmation: *Fereday v S Staffs NHS Primary Care Trust* (UKEAT/0513/ZT judgment 12/07/2011) paras. 45/46.
(iv) There is no fixed time limit in which the employee must make up his mind; the issue of affirmation is one which, subject to these principles, the Employment Tribunal must decide on the facts; affirmation cases are fact sensitive: *Fereday*, para. 44."

133. We do not know when the claimant received Mr Wood's outcome of the meeting or when she realised that the respondent was not intending to hold a grievance meeting (albeit she had been asking for clarity on that point even at the end of the 16th May meeting [72]. We do not consider the claimants delay during her annual leave to amount to an affirmation of her contract. Similarly, the claimant's period of ill health, due to stress caused by her work, and during which she sought alternative employment, did not, in our judgment, evidence any willingness to affirm the contract.

134. We direct ourselves in accordance with the guidance in *Bournemouth University Corporation v Buckland* [2011] QB 323 at para. 54 which states as follows:

"..there is naturally enormous pressure put on the employee. If he or she just ups and goes they have no job and the uncomfortable prospect of having to claim damages and unfair dismissal. If he or she stays there is a risk that they will be taken to have affirmed. Ideally a wronged employee who stays on for a bit whilst he or she considered their position would say so expressly. But even that would be difficult and it is not realistic to suppose it will happen very often. For that reason, the law looks carefully at the facts before deciding whether there has really been an affirmation."

135. The fact that the claimant worked part of her contractual notice does not necessarily equate to an affirmation. Section 95(1)(c) provides an express statutory exception to this principle by providing for termination of the contract by the employee *"with or without notice"*. In *Western Excavating v Sharp* at 768E Lord Denning suggested that: "the words *'with or'* were inserted because it was realised that paragraph 95(1)(c) as enacted in 1965 left a gap. A man who was considerate enough to give notice was worse off than one who left without notice."

136. For the above reasons we have concluded that the claimant did not affirm the respondent's breach.

A potentially fair reason for dismissal

137. The respondent did not plead [ET3, paragraph 30, page 31] that the claimant had been dismissed for a potentially fair reason and neither witness for the respondent gave evidence that the respondent had any potentially fair reason for dismissal.

138. The burden of proof rests upon the respondent to establish a potentially fair reason, in the absence of a pleaded case or evidence advanced on this issue the tribunal has concluded that the respondent has not discharged the burden upon it.

139. Having concluded that the claimant's resignation amounted to a dismissal and that the respondent has not established a potentially fair reason for that dismissal, the judgment of the tribunal is that the claimant was unfairly dismissed.

Notice Pay

140. The claimant had accrued an entitlement to eight weeks' notice pay and received one week's pay in respect of her notice. We conclude that the respondent failed to pay to the claimant the balance of her contractual notice.

Employment Judge R F Powell

Date 3 November 2019

JUDGMENT & REASONS SENT TO THE PARTIES ON

.....4 November 2019.....

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FOR THE TRIBUNAL OFFICE