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EMPLOYMENT TRIBUNALS

Claimant

Miss J Seed

Respondents

AND

Imperial College of Science,
Technology and Medicine

Heard at: London Central

On: 5 - 8, 11 - 13 March 2019

Before: Employment Judge Brown

Members: Mr D Schofield
Mr D L Eggmore

Representation

For the Claimant: In person

For the Respondent: Mr A Oringher, of Counsel

JUDGMENT

The unanimous Judgment of the Employment Tribunal is that:

1. The Respondent failed to comply with s.80G(1) Employment Rights Act 1996 in relation to the Claimant's application for flexible working.
2. The Respondent's decision on the Claimant's application for flexible working was not based on incorrect facts.
3. The Respondent unfairly constructively dismissed the Claimant.
4. The Respondent's arguments regarding Polkey will be decided at remedy hearing in this case.

REASONS

Preliminary

1. The Claimant brings complaints of constructive unfair dismissal and failure to comply with s.80G Employment Rights Act 1996 in relation to her application

for flexible working against the Respondent, her former employer. The issues to be determined at the liability hearing had been agreed between the parties and they were as follows:

Constructive Unfair Dismissal

1. Did the Respondent without proper cause conduct itself in such a way which was calculated or likely to seriously damage the Claimant's trust and confidence?
2. If so, did the Claimant resign at least in part because of the repudiatory breach?
3. Did the Claimant affirm the contract of employment before terminating it?
4. What was the reason or principal reason for the Claimant's dismissal? Was it for a potentially fair reason under s98(2) ERA or was it that the Claimant had made a flexible working application? (s104C ERA 1996)?
5. Was the dismissal fair in all the circumstances? (s98(4) ERA)?

Flexible Working Application

6. Did the Respondent's treatment of the Claimant's flexible working application of 28 January 2018 breach any of its obligations under s80G(1) ERA to:
 - a. Deal with the application in a reasonable manner;
 - b. Notify the employee of the decision within three months unless a longer period has been agreed between the parties;
 - c. Only refuse the application on the "business grounds" set out in s80G(1)(b)?
7. Did the Respondent reject the Claimant's application for flexible working?
8. If so, was the Respondent's decision based on incorrect facts? (s80H(1)(b))?

2. There was a bundle of documents. The Tribunal heard evidence from the Claimant and read the witness statement of Nazia Hannan, a witness for the Claimant. The Tribunal also heard evidence from Ann Kelly, Maria Lynch, Daniel Dickens, Gianluca Fontana, Robert Brown and Nicolette Davies, witnesses for the Respondent. Both parties made submissions, including written submissions from the Respondent.

Findings of Fact

3. On 15 July 2009 the Claimant commenced employment with the Respondent as a PA and Project Administrator Grade Level 3A, pages 55-57.

The Claimant was employed, at that point, on a fixed term contract. The Respondent is Imperial College of Science, Technology and Medicine “The College” and is a leading university specialising in Science, Technology and Medicine with a reputation for excellence in teaching and research. It has over 14,000 full time students and teaches 235 courses over 9 campuses in London. The Respondent employs 8300 employees.

4. Between November 2011 and May 2012, the Claimant undertook the Respondent’s staff development course called Pegasus, which is directed towards Grade 3A staff who have the potential to rise to Grade 3B, page 62.1. On 1 June 2013 the Claimant moved to the role of Communications and Events Officer Grade 3A in the Respondent’s Global Health Innovation Institute (IGHI) within the Respondent’s Faculty of Medicine.

5. IGHl is one of 6 Global Challenge Institutes at the Respondent. It works to identify develop and defuse health care innovation in order to reduce inequalities in global health. It is led by Professor the Lord Ara Darzi and is a multi disciplinary team of 160 staff members, including clinicians, engineers, scientists, analysts, economists and managers.

6. At the time of the Claimant’s employment, IGHl consisted of 7 Research Centres. The Centre for Health Policy (CHP), The Centre for International Child Health, The Hamlin Centre for Robotic Surgery, The Centre for Digestive and Gut Health, The Helix Centre for Design in Health Care, The Wellcome Trust Centre for Global Health Research and the Centre of African Research and Engagement.

7. Nicolette Davies was the Institute Manager for IGHl and the Claimant’s Line Manager at the material times. Ms Davies and the Claimant worked in the same open plan office, about 3 meters away from each other at the Respondent’s South Kensington Campus. On 15 July 2013 the Respondent’s Human Resources Department wrote to the Claimant, telling her that her fixed term contract had been converted to an open-ended contract in line with the *Fixed Term Employee Regulations 2002*, page 72. Nevertheless, the Claimant’s post continued to be funded by grants which were, in their nature, limited in time.

8. In the Claimant’s Personal Review and Development Plan (“PRDP”) completed in August 2014, Ms Davies recorded that she was happy for the Claimant to work towards promotion and that, to do this, the Claimant should continue to work in the same manner and take more ownership of tasks, page 835. The Claimant contended that Ms Davies told her that the Claimant would have to wait until Ms Davies came back from maternity leave to apply for a promotion. Ms Davies denied this in evidence to the Tribunal. That advice is not reflected in the Claimant’s PRDP outcome and, indeed, the Claimant did not wait to apply for a promotion. The Tribunal found that Ms Davies did not say to the Claimant that she would have to wait, that was not consistent with what was recorded, nor with what actually happened.

9. Ms Davies started maternity leave on 1 November 2014. On 1 May 2015 a new role was created for an IGHl Administrative Assistant; Saba Mirza was appointed.

10. On 1 June 2015 the Claimant discovered from job adverts that comparable roles to hers in others of the Respondent's departments were graded as 3B and not 3A. Mark Steedman was acting Line Manager for the Claimant during Ms Davies' maternity leave. On 16 June 2015 the Claimant showed Mr Steedman the comparable job adverts and he agreed to apply to have the Claimant's job regraded under the Respondent's Job Level Review procedure "JLR". On 25 June 2015 Mr Steedman submitted an application for the Claimant's job to be regraded to 3B. He did not include the comparable job adverts with the application, pages 86-97. However, Mr Steedman did include a supporting case, page 97, and he answered questions about the Claimant's job specification, pages 94-95.

11. On 25 August 2015 Mr Steedman was informed that the Job Level Review application had been unsuccessful. The decision stated that the Claimant's duties were typical of 3A roles across the Respondent, page 98. The outcome letter told Mr Steedman that information about appeals was on the Respondent's intranet. Mr Steedman did not tell the Claimant about the outcome of the application until 15 September 2015 - the day before the Claimant was due to give a social media strategy presentation to the IGHl Management Board. The Claimant was distressed by the news and was so upset that Mr Steedman had to take over the presentation the next day.

12. Under the rules for appeal in the Respondents Job Level Review process, the appeal would have to have been submitted by 15 September 2015. Mr Steedman told the Claimant on 15 September that he believed that they should appeal the outcome. On 16 September 2015 the Claimant spoke to Julia Anderson, Mr Steedman's Line Manager. Ms Anderson agreed to appeal the Job Level Review decision on the Claimant's behalf. Neither Mr Steedman nor Ms Anderson, in fact, submitted an appeal, although the Claimant told the Tribunal that Ms Anderson contacted Human Resources saying that the Department wanted to appeal.

13. The Claimant chased Mr Steedman and Ms Anderson about the progress of her appeal, but received no satisfactory response. Eventually, on 26 October 2015, the Claimant contacted Ann Kelly, Head of Employee Relations and Human Resources for the Faculty of Medicine, asking her for an urgent meeting, Ms Kelly met with the Claimant the same day and agreed to investigate the Job Level Review appeal. When Ms Kelly did so, Ms Anderson told her that the Department intended to appeal, but was yet to submit the paperwork. Ms Kelly reviewed the Claimant's job descriptions and the comparable job descriptions with Kim Everett, Deputy Director of Human Resources. They agreed that the job descriptions which the Claimant had presented were comparable to the Claimant's own. Mr Steedman submitted an appeal on 5 November 2015, attaching examples of the comparable job descriptions and saying that Ms Anderson and Lord Darzi both supported the regrading appeal, page 124. On 10 November 2015 the Claimant was told that her Job Level Review appeal had been successful and that, with effect from September 2015, her post had been regraded to Level 3B. Her job title, from that time, was Communications Manager. The Claimant was told that she would be paid at the higher level from 1 September 2015, page 135.

14. The Claimant did not receive a new job description or new job duties. Maria Lynch told the Tribunal that the Respondent does not issue new job duties as a result of a Job Level Review, but simply confirms the upgrade in a letter. The Tribunal accepted her evidence; the Claimant did not provide evidence to contradict it.

15. On 6 January 2016 Ms Davies returned from maternity leave. The Claimant agreed, in evidence to the Tribunal, that it was in the nature of her job that she had a variety of tasks, depending on the needs of other people in the Respondent's organization. She agreed that work flow would change from time to time and that she needed to encourage and give guidance to others about how to market and promote their work. The Claimant further agreed that she needed to keep abreast of what was going on within the Institute and to be in close contact with staff in the Institute. She also said, however, that this could be done remotely on occasions.

16. In early 2016, John Harrison was appointed as IGHI Commercial Development Manager. The Claimant told the Tribunal that, at the same time, responsibility for production of IGHI's brochure / prospectus was taken from the Claimant and given to Mr Harrison, even though this responsibility was an item on her employment particulars. In the Claimant's job description at page 89 her job duties included, under the heading "Graphic Design", "Designing the Institute's publications... making sure to keep within the colleges branding guidelines", page 91. Ms Davies told the Tribunal that Mr Harrison's role was to engage with fundraisers to fund the work of the institute. Ms Davies was on maternity leave when Mr Harrison took on the brochure work. She said that the content of the brochure was, in fact, the text of the 2014 Review Report for the institute and that Mr Harrison used that material to produce a fundraising document. The Claimant gave very little context or evidence about Mr Harrison taking responsibility for the brochure - she simply told the Tribunal that it happened. She did not describe what the brochure was, what it was used for, or what work she had previously done on it. It does not appear that the Claimant questioned Mr Harrison taking over responsibility for the brochure production at the time. The Tribunal decided that Mr Harrison took responsibility for producing a brochure for the fundraising responsibilities relevant to his job. It was not clear however, what the work the Claimant had previously done with regard to that brochure.

17. The Claimant told the Tribunal that, in about early 2016, Ms Davies told the Claimant that the Claimant should not devote time to leading the IGHI Social Media Management Group. Ms Davies told the Tribunal that the Group was dissolved naturally and that social media platforms were moved in-house and managed by the Claimant. The Claimant did not cross examine Ms Davies on this, or challenge it at the time, and the Tribunal accepted Ms Davies' evidence with regard to it.

18. In about June 2016 the Administrative Support Officer in the Claimant's team, Saba Mirza, applied for a Level 3B role within IGHI's Patient Safety Centre through a competitive process and was successful in her application.

19. In Summer 2016 the vacant Administrative Assistant job role title was changed to Communications and Events Assistant. Ms Nikita Rathod was successfully appointed to it in about October 2016. Ms Davies asked the Claimant to help produce a new job description for Ms Rathod's role, specifying the areas where the Claimant needed support, pages 155-159. The Claimant was also involved in short listing applicants for the post and was on the interview panel for appointment, page 165.1.

20. Before Ms Rathod started in her role, at Ms Davies request, the Claimant set out a breakdown of the Claimant's job duties and Ms Rathod's proposed job duties, page 188.1.

21. In two consecutive years before the Claimant's job was regraded, the Claimant had attended the World Innovation Summit for Health in Doha, along with other IGHI employees. In September 2016 attendance at the 2016 Doha summit was being considered internally at IGHI. On 19 September 2016 the Claimant emailed Jessica Prestt, World Innovation Summit for Health Director, asking whether the Claimant would be needed to attend that year because the Claimant had family and travel commitments to organise. Ms Prestt responded the next day saying that Lord Darzi was happy to arrange communications and twitter feed about the summit from London. The Claimant conceded, at the Employment Tribunal, that she probably gave the impression that she was content not to attend the conference. Ms Davies told the Tribunal that invitations to the Respondent staff to attend the Doha summit in 2016 had been reduced in number and several key senior people were not invited to attend including Professor Ezzati and Professor Beata Kampmann, who were Co-Directors of the Research Centres. The Tribunal accepted Ms Davies' evidence that the number of invitations was reduced and that a number of senior people, including Directors of the IGHI Research Centres, were not invited to the summit in 2016. Mr Davies had detailed knowledge of these matters.

22. The Claimant did not complain, at the time, about not being invited to the summit in 2016. The Claimant put to Ms Davies that Ms Davies had criticised the Claimant's work on the Doha summit afterwards, when the Claimant, in fact, had got up at 5am to put news on to the Respondent's twitter feed. In evidence, Ms Davies said that she felt the Claimant had done a great job and had been allowed time off in lieu of getting up at 5am. Ms Davies said that she remembered praising the Claimant and giving her some constructive feedback about linking communications to the main college website. The Tribunal found that Ms Davies had a good recollection of events and accepted her evidence that she had praised the Claimant's work on the 2016 Doha summit and had given her time off in lieu of the 5am starts; but she also gave some logical feedback about how to make communications even more effective by linking them to the Respondent's main website.

23. The Claimant had responsibility for producing IGHI's communications strategy. She produced a document setting out the proposed strategy, pages 274-275. On 15 June 2017 Ms Davies asked the Claimant to send it to Gianluca Fontana. Mr Davies told the Tribunal that she thought that the Claimant's document was a good piece of work and that she felt that circulating it to

Gianluca Fontana was a good idea because he was Director of Operations for the Centre of Health Policy which was IGHI's main stakeholder.

24. Having received the strategy document, Mr Fontana emailed the Claimant the next working day saying, "This was a very interesting read. Happy to meet and discuss how we can be helpful going forward once the review is completed". Page 274. The Claimant met Mr Montana on 7 September 2017 to discuss the strategy document. In the meeting Mr Fontana suggested hiring a Communications Strategist. There was a dispute of fact between the parties about whether Mr Fontana's proposal was for communication strategy to be completely outsourced and taken from the Claimant. The Claimant contended that Mr Fontana was proposing that the strategy be outsourced; the Respondent's witnesses told the Tribunal that Mr Fontana was proposing that the Respondent buy in help from a Consultant for this particular strategy document. The Respondent's witnesses said that the Claimant was happy with this proposal at the time.

25. On 7 September 2017, after her meeting with Mr Fontana, the Claimant emailed a former colleague, Michael Hoevel. She said she was working on IGHI's communications strategy and asked Mr Hoevel whether he, or his agency, could help with it. She said, "You'll notice that I have clearly misunderstood what key messages actually are so I think this would be an area where I would need the most guidance... I think the current document is more of a communications audit rather than a strategy document and I think it needs a lot of improvement in order to make it useful..." pages 320-321.

26. The Claimant agreed, in evidence, that she welcomed the opportunity to work with a Consultant, to learn from them. The Claimant had intended to present the strategy document to IGHI's Board Meeting on 11 October 2017 but did not, having accepted that the document needed further work. Following the Board Meeting on 11 October 2017, the Claimant emailed Ms Davies reporting on what was discussed, page 315. She said, "Gianluca mentioned ... the possibility of hiring in either an agency or a Director of Comms for IGHI. Ara [Professor Darzi] asked what I thought either way would be of benefit to me and Nikita. I mentioned Michael Hoevel..." page 315.

27. On 12 October 2017 the Claimant forwarded her email exchange with Mr Hoevel to Mr Fontana and Ms Davies, in which she had asked for his assistance on communication strategy on a consultancy basis, page 316. Mr Fontana thanked the Claimant for this. Mr Fontana told the Tribunal that he suggested potential support for the strategy to the Board Meeting and it was agreed, at the Board Meeting that Mr Fontana would discuss the matter with "Laurence". Mr Fontana explained to the Tribunal that Laurence was a freelance journalist who wrote articles for IGHI on part time basis. It appears from the notes of the Board Meeting that one of the outcomes of the meeting was that Mr Fontana would speak to Laurence about this.

28. No Consultant was ever appointed and no proposal to appoint a Director of Communications was ever formalised, or taken forward.

29. The Claimant did not present the strategy to the next Board Meeting because that meeting was cancelled. In the following year, it appears that IGHI was primarily focused on preparing for an external review. The Claimant told the Tribunal that she continued to work on the communication strategy document.

30. On all the evidence before the Tribunal, including:

- a. The Claimant's own email evidence wherein she sought assistance on the strategy document on a Consultancy basis;
- b. The Board Meeting Minutes on Communication Strategy wherein Mr Fontana was tasked with speaking to Laurence, a freelance part time article writer, page 314; and
- c. The fact that Professor Darzi specifically asked the Claimant what would help her, rather than a decision being imposed upon her,

the Tribunal accepted that the Respondent's discussions were primarily about buying in freelance help for the communications strategy, at this time. In any event, as the Tribunal has found, no freelance help was ever appointed and responsibility for the strategy document was not taken from the Claimant.

31. On 3 May 2017 the Claimant asked Ms Davies to approve her attendance at a follow-up day on career and personal development. Ms Davies enthusiastically approved the request on 8 May 2017, page 219.1. On 2 June 2017, the Claimant asked Ms Davies to approve the Claimant's participation in a work shadowing scheme; again, on 2 June 2017, Ms Davies enthusiastically approved the request, page 239.1. On 25 July 2017, the Claimant asked Ms Davies' permission to attend a course on Google analytic training. Ms Davies responded that it sounded good in principle, page 279.1. The Claimant was booked to attend a leadership and management training course in November 2017, page 345.1 and asked Ms Davies to provide 360-degree feedback for the Claimant to use at the course. Ms Davies agreed and said she thought it was a great idea. The Claimant attended a networking skills course with Ms Davies' approval on 22 March 2018, page 4.4.8.

32. It was not in dispute between the parties that the Claimant was always busy in work. On occasion, the Claimant turned down requests for assistance from staff at the Respondent because she said she was too busy. For example, she turned down requests to help with design work twice in May 2017, pages 227 and 273.3. She also turned down a request for graphic design work for a poster in September 2017, page 291.1. In November 2017 the Claimant asked Ms Rathod to take over some design work which the Claimant had agreed to undertake, page 352.

33. On 5 October 2017, Ms Davies, Mr Fontana and Daniel Dickens, Managing Director of the Helix Centre, all met with Luke Blair, the Respondent's newly appointed Vice President for Communications and Public Affairs. Ms Davies was the Operational Manager of IGHI; Mr Fontana was the Operations Director for the

Centre of Health Policy, part of IGHI; and Mr Dickens was Managing Director for the Helix Research Centre. Each of Ms Davies, Mr Fontana and Mr Dickens told the Tribunal that this was an introductory meeting with no agenda. Mr Davies was a Grade 5 employee. Mr Fontana, Mr Dickens and Mr Blair were all Grade 6 employees and therefore they were all considerably senior to the Claimant. All told the Tribunal that Lord Darzi, a Director of IGHI, had suggested that the four individuals meet.

34. The Claimant contended that she was excluded from the meeting, when she ought to have been invited as Communications Manager of IGHI, in the circumstances that Luke Blair was University Vice President for Communications and Public Affairs. Ms Davies and Mr Dickens told the Tribunal that the purpose of the meeting was for IGHI to brief Mr Blair about its work and to discuss communications generally, to see what support Mr Blair could offer. However, Mr Blair said his team was too busy to support IGHI and that IGHI should seek support from Consultants. Mr Dickens told the Tribunal that Mr Blair suggested that Helix explore appointing an outside agency to assist with Helix's branding and positioning as an "innovation lab".

35. The Tribunal accepted the Respondent's witnesses about the purpose of the meeting - that it was primarily to brief Mr Blair about IGHI work. The Respondents' witnesses attended the meeting and were in a position to know its purpose and what was discussed. The Claimant, who only heard about the meeting, was not in as good a position to comment on what was discussed.

36. The Claimant told the Tribunal that Mr Dickens ignored and excluded her. For example, in January 2017, the Claimant sent Mr Dickens an email about different types of communications and marketing assistance which the Claimant could provide to the Helix Centre. Mr Dickens did not even reply to the email. Further, the Claimant invited Mr Dickens and Helix to participate in the Imperial Festival, a public engagement event intended to promote and publicise Imperial College's activities, page 217-218. Again, Mr Dickens showed no interest.

37. Mr Dickens told the Tribunal that he was appointed in January 2017 to turn the Helix Centre around. He spent the first few months learning and analysing the Centre's activities. He then formed the view that the Centre's priority must be to work internally, to invent products, services and intellectual property. He considered that Helix's work was not ready to be communicated and that commercial sensitivity and academic publishing protocols around Doctorate students' work mitigated against publicising Helix's activities at that time. Mr Dickens explained that, therefore, he did not want to participate in the Imperial Festival, nor did he want to develop a website, or twitter presence, in early 2017. By the end of 2017, however, Mr Dickens considered that the Helix Centre had developed intellectual property and services which could now be publicised and for which industrial partners could be sought. He discussed this with Mr Blair at the meeting in October 2017 and in more detail at a meeting in December 2017.

38. Mr Dickens had decided that he wanted to establish Helix as a brand as an "innovation lab" alongside - and potentially in competition with - other innovation labs, for example the Massachusetts Institute of Technology Innovation Lab. He told the Tribunal that he therefore decided to appoint a very experienced

branding strategy expert on an 8-week freelance basis, to establish the Helix brand for the purposes of seeking industry partnerships and fundraising. The person appointed had senior experience in international brands and companies such as Facebook and in the health care industry.

39. Mr Dickens told the Tribunal that he believed that the Claimant's role was managing communications; for example, writing articles, managing events and social media posts, but that she did not have expertise in brand positioning. He acknowledged that he had not replied to some of her emails and said that he apologised for this.

40. Mr Dickens invited the Claimant to a workshop on 9 April 2018 designed to facilitate contributions on the branding process from the wider team. Mr Dickens told the Claimant, at that event, that he did not want to impinge upon her role.

41. The Tribunal considered that Mr Dickens was very clear thinking and considered in his evidence. It accepted his explanation about why he had not wanted to communicate and publicise Helix work during early 2017 and why he did not engage with the Claimant during that time. It also accepted his explanation of the communication assistance that he considered Helix required when the Helix brand needed to be established; and that this was not a service which the Claimant offered. The Tribunal considered that it was logical that, in seeking to compete with other prestigious innovation labs, the Helix Centre needed to be extremely careful in the way that it positioned itself and in protecting its intellectual property. It required careful brand positioning to ensure the success of its newly invented products and intellectual property. The Claimant did not suggest that she was an expert in brand positioning.

42. In the Claimant's 360-degree feedback in November 2017, Ms Davies wrote, "Jo is excellent at certain aspects of communications however due to the nature of the role some aspects require a more senior/experienced comms person ie writing". The Claimant told the Tribunal that she believed that Ms Davies intended to take writing responsibility away from her, perhaps through appointing a more senior person.

43. The Claimant also told the Tribunal that tasks were removed from her and assigned to Nikita Rathod.

44. On 16 May 2017, the Claimant emailed Ms Davies, saying that she had assigned to Ms Rathod all graphic design connected to the Child Health Centre. The Claimant said that it would be good for Ms Rathod's career progression and that the Claimant was trying to progress her own career as a manager and leave behind administrative tasks, which were part of Ms Rathod's job. Ms Davies replied saying that giving Ms Rathod design opportunities was fine and that getting Ms Rathod up to speed on administrative tasks was a priority, page 221. Ms Davies encouraged the Claimant on this occasion and on other occasions during 2016, 2017 and 2018 to define what job tasks came within Mr Rathod's job role and which came within the Claimant's job role. For example, on 17 January 2018, page 361 and on 2 March 2018, page 377.

45. The Tribunal found that, in May 2017, based on the Claimant's own email, it was the Claimant who allocated Ms Rathod graphic design tasks and it was she who explained that this was consistent with the Claimant's own role as a manager in developing an employee who reported to her. On an objective reading of the email, the Claimant took the decision and was happy with it, page 221.

46. In December 2017 the Claimant discovered that she was pregnant.

47. The Claimant contended other work was taken from her after this time. She told the Tribunal that the design of the Sowerby Final Report was removed from her. On 31 January 2018 the Claimant emailed Ms Davies regarding the Sowerby Report saying, "They want to release the report in April. Not sure if this will be the best use of my last few months before maternity leave ... so will need to think realistically if this is doable or if it should be outsourced". Page 373.

48. The Claimant told the Tribunal that she later decided that she would undertake the Sowerby Report. On 3 May 2018 the Claimant asked when the Sowerby Report would be ready for her to design because she was going on maternity leave in July, page 455. The person who was responsible for the Report replied, saying that Mr Fontana had suggested that the design work be outsourced, page 454.

49. Mr Fontana told the Tribunal that, in many of his discussions with the Claimant, she had told him how busy she was and he was trying to relieve the burden of work on the Claimant by outsourcing the work. It appears from the documentary evidence that the Claimant did not complain about this outsourcing at the time.

50. The Claimant also told the Tribunal that project management for the Respondent's new Centre for Health Policy website was taken from her. The Claimant and Mr Fontana met on 26 April 2018 to discuss designing and updating the website and the Claimant then obtained quotes from web designers for this purpose. The Claimant asked Mr Dickens whether she could meet the web designer that he had suggested in Helix studios on 17 April 2018, page 431. Mr Dickens replied saying that the studio was booked all afternoon, but wished the Claimant well with the designer who Mr Dickens said was "a super nice and talented person". The Claimant contended that Mr Dickens had lied about the availability of the studio. In evidence, Mr Dickens denied this. The Tribunal found that it would be highly unlikely that Mr Dickens would deliberately deny the Claimant the use of the studio to meet a person who Mr Dickens held in such high esteem. The Tribunal accepted Mr Dickens evidence that the studio was genuinely unavailable.

51. The Claimant told the Tribunal that, having obtained quotes from web designers, she was then told by Mr Fontana not to pursue the matter. Mr Fontana told the Tribunal that he needed to get authorisation for expenditure on the website from Lord Darzi and Mr Fontana judged that it would best to meet Lord Darzi face to face, in order to secure the funding and to discuss any objections that Lord Darzi might raise. Mr Fontana considered that this would take time and thus told the Claimant to put the matter on hold.

52. The Tribunal accepted Mr Fontana's evidence about this. He knew about the funding arrangements and it is unsurprising that a project might be put on hold while funding was obtained for it.

53. The Claimant told the Tribunal that Mr Fontana had asked the Claimant to lie to the University about the website, in order to gain information about their web designers, as the university would not have supported the website being developed outside the University's own site. Mr Fontana told the Tribunal that he was requesting preliminary quotes from web designers which could have been used for different websites and that Luke Blair had suggested that the website be set up outside the University website, as the Helix Centre had done already. Mr Fontana therefore considered that they had permission to pursue the matter, so he was not asking the Claimant to do something which was unauthorised. Mr Dickens explained that the web designer had, indeed, done such work previously for the Helix Centre. The Tribunal accepted Mr Fontana's evidence; Mr Fontana knew far more about the background to this piece of work. The Claimant had only superficial knowledge and the Tribunal accepted Mr Fontana's comprehensive explanation of the relevant events.

54. On 5 March 2018 Ms Davies sent the Claimant the text that she was drafting to accompany IGHI's 2018/2019 budget submission, page 398. The Claimant read the text and realised that her job was listed as Communications and Events Officer, rather than Manager, and that Ms Rathod's job title was also wrongly stated in the text. The Claimant emailed Ms Davies asking whether Ms Davies had intentionally described the Claimant in this way. Ms Davies responded the same day, saying that it was an error. Ms Davies told the Tribunal that she had been using a report from previous years as a template. The Claimant disputed this, because her job title had been manager in the previous year also and Ms Rathod's job title was different then too.

55. The Tribunal accepted Ms Davies' evidence about the matter. The Tribunal found that it was likely that a manager who was producing a budget submission would not "reinvent the wheel" each year, but would use previous budget submissions from previous years as a template. It was likely that the mistake did creep into the document that way. The Tribunal took in to account the other actions of Ms Davies around this time, and in previous years, which indicated that Ms Davies continued in her support of and commitment to the Claimant and the Claimant's role. For example, in the Claimant's Personal Review and Development Plan signed off by Ms Davies on 16 April 2018, page 422, the Claimant had assessed her own performance as "highly effective" or "effective" in six areas of responsibility. Ms Davies accepted the Claimant's assessment, save that she assessed the Claimant's performance as "outstanding" in management and delivery of events, page 422. Ms Davies also commented that the definition between the Claimant and Ms Rathod's job roles was becoming clearer, and that the Claimant was participating in leadership and management programme. She said, "Jo has done extremely well in increasing the institute's profile on social media and disseminating key messages to the institute's stakeholders". Ms Davies said that it was important for the team to raise their profile within the Centres, that location was a barrier to this and that she had suggested the Claimant should spend one to two days a week at the

Respondent's St Mary's campus to engage further. She said she believed that this would help generate content for the Claimant to promote, page 425.

56. The Tribunal found that Ms Davies' comments were complimentary and forward looking. The Personal Review and Development Plan included future objectives for the Claimant, which were to be reviewed when the Claimant returned from maternity leave, page 426. The Tribunal found that the document, as a whole, reflected the Claimant's and Ms Davies' shared positive view about the Claimant's performance to date and her continued progression.

57. Ms Davies also confirmed to the Claimant that funding had been extended for her post for two years from May 2018, page 519. Ms Davies further told the Claimant, in a meeting on 25 May 2018, that the Claimant's job was completely safe and would remain at Level 3B and that the Claimant was not to worry about this at all. The Claimant reported this in an email to her partner the same day, page 540.

58. It appears from the Claimant's email that Ms Davies told the Claimant that a higher-level communications appointment might be made in the future to cover all Lord Darzi's activities, which were numerous and not just within IGHI, and that Ms Rathod's role might be reviewed in the future, if such a higher-level communications appointee was made. Ms Davies nevertheless repeatedly assured the Claimant that the Claimant's role would be retained and safe.

59. The Tribunal also takes into account its other findings about the training which the Claimant had sought and which Ms Davies enthusiastically supported throughout 2017 and 2018.

60. On 5 January 2018 the Claimant told Ms Davies that she would be making a formal proposal for flexible working. She sent Ms Davies a written formal flexible working request under *s.80G Employment Rights Act 1996* on 28 January 2018. In it, she said she was expecting a baby in early August 2018, but that she commuted by train to work which took her about 4 hours each day. She said that she wished to work flexibly and that the proposed flexible arrangement would start in May 2018, when she would be heavily pregnant. In her proposal, the Claimant suggested that she would notify colleagues on Monday about the days on which she would come into work that week, and that she would attend the office when necessary, for her face-to-face meetings, to attend events, conferences and training courses and undertake management activities, amongst other things. She said that she intended to fit in as many meetings as possible on the days when she was at work and that she would have a face-to-face meeting with her direct report each week, page 366. In her application, the Claimant did not propose that she would attend work on any particular day, or days, in a week. On an objective reading of the application, the Claimant was proposing to work mainly from home and to attend the office relatively infrequently. The Claimant also proposed she would set out her plans to colleagues in a meeting and would change the plans if appropriate.

61. The Claimant was away from work on sick leave between 19 February and 4 March 2018. Ms Davies met with the Claimant on 7 March 2018, when Ms Davies completed the New and Expectant Mothers Risk Assessment. Ms Davies

also briefly discussed the Claimant's flexible working application with her. They discussed two separate periods of flexible working: the first to be in the Claimant's third trimester, and the second when the Claimant returned from maternity leave in February 2019.

62. Ms Davies told the Tribunal that she agreed that the Claimant could work flexibly from home during the third trimester. She told the Claimant that Ms Davies would need to seek advice from Human Resources regarding flexible working when the Claimant returned to work from maternity leave. The Tribunal accepted Ms Davies' evidence about agreeing to flexible working in the third trimester during the meeting on 7 March 2018. This was not disputed by the Claimant and was supported by the Claimant's and Ms Davies' email exchange on 26 April 2018 about what had happened at 7 March meeting, pages 432-433.

63. The Respondent's Flexible Working Policy was at pages 78-83 of the Tribunal bundle. In its Formal Flexible Working Policy, at pages 79-83, the Respondent sets out a number of guidelines to managers considering an application. For example, at page 80 under paragraph 4.3 Considering an Application, the Policy says, "The Line Manager should meet with the member of staff within 10 working days of the completed application being received. If it is difficult to arrange a meeting within 10 working days the Line Manager should arrange to meet as soon as possible thereafter". At paragraph 4.4 Arranging the Meeting, the policy states, "the Line Manager should write to the member of staff giving the date, time and venue of the meeting and should advise them that they may be accompanied by a trade union representative or work colleague if desired. They should also inform the member of staff if they have asked an HR representative to attend the meeting". The policy says, at 4.5 and 4.6, that, where an application is either accepted or refused, normally the Line Manager will write to the member of staff, copied to the HR advisor, within 10 working days following the meeting. Where an application is refused the policy states that "The Line Manager will write to the member of staff informing them of the decision and providing clear business grounds as to why the application cannot be accepted and the reasons why the grounds for refusal apply in the circumstances. The Line Manager will also provide details to the member of staff regarding their right of appeal against the decision". Page 81.

64. The policy sets out the business grounds for refusing a request and states that the reasons given must come within those business grounds, pages 80-81. The policy also sets out a procedure for appeals, page 82.

65. The Claimant chased Ms Davies about the outcome to her flexible working request on 25 April 2018, page 433. Ms Davies confirmed, in writing, that flexible working in the third trimester was fine, page 433. In an email exchange on 26 April 2018, the Claimant expanded further on when she would expect to work at home in the third trimester, page 432.

66. In evidence at the Tribunal the Claimant agreed that Ms Davies raised the Claimant's flexible working request with the Claimant when they were in the office, seeking clarification about what the Claimant wanted. However, the Claimant said that she simply repeated what she had already asked for.

67. On 26 April Ms Davies suggested to the Claimant that they should meet again when Ms Davies had received advice from Human Resources, page 432. Ms Davies did then seek advice from Human Resources and met with Maria Lynch, HR Manager, on 1 May. Ms Davies then emailed the Claimant on 14 May 2018, suggesting that they meet the following week to discuss the Claimant's flexible working request, page 503.

68. The Claimant and Ms Davies met on 24 May. Following the meeting the Claimant emailed her partner saying that she had "kind of" got what she wanted. She said that Ms Davies had offered the Claimant an official one day a week working from home, with the option to work more days which would be agreed with Ms Davies. On 24 May 2018 Ms Davies sent the outcome in writing by email to the Claimant saying, "I can confirm that IGHI is supportive of formalising your working from home one day a week and for additional requests to be considered on an ad hoc basis depending on work commitments". Page 542. The same day the Claimant replied shortly afterwards saying, "That sounds reasonable," but also proposing that she would alternate with one day working from home one week and two days working from home the next, page 542. Later still on the same day, the Claimant wrote to Ms Davies, saying that she wanted to appeal the decision, in order to obtain a more flexible outcome, page 558. On 25 May Ms Davies replied, offering to meet the Claimant again, but the Claimant responded the same day saying that she had already submitted a formal appeal document to Maria Lynch because the way in which the application had been dealt with, including the delays involved, had been unacceptable, page 558.

69. The Claimant submitted a flexible working appeal on 25 May 2018, pages 543-548. In it, she said that she had been given reasons for refusing her requests as follows, "I may isolate myself" and "IGHI management and HR felt my application was unclear in what I was requesting for my new work pattern". She said that the reasons did not fall within the lawful business grounds for refusing the request. The Claimant also said that college procedures had not been followed. She set out the Respondent's procedures and the ways in which they had not been followed. In her appeal, the Claimant said that she proposed that her new working arrangement would consist of at least two official days per week of remote working, with the amount of days varying each week, depending on work commitments and requirements to be in the office, page 546.

70. The Claimant also submitted a grievance on 28 May 2018, pages 551-555. Her grievance concerned the way in which Ms Davies had handled her flexible working request. In it, the Claimant said that the Respondent had breached its Flexible Working Policy: Ms Davies had not met her within 10 days, nor had she advised the Claimant that she could be accompanied at the meeting, nor had she written to the Claimant within 10 days of such a meeting giving a decision or clear business grounds if the application had been rejected. The Claimant said that Ms Davies had not told her about her right to appeal. She said that she considered that Ms Davies had dismissed the application in a disrespectful and unthoughtful way.

71. The Tribunal finds that Claimant was correct in her description of what the Respondent's Formal Flexible Working Policy required, page 80-28.

72. Maria Lynch, HR manager suggested that the Claimant meet her and Ms Davies for an informal chat, to see if the situation could be resolved, page 561. The Claimant agreed and met with Ms Davies and Ms Lynch on 30 May, pages 563-564. At the meeting, pages 568-571, the Claimant said that Ms Davies had been in breach of the Policy, that she had demonstrated lack of respect and that the meeting on 24 May had not been a proper meeting. The Claimant said that she had submitted a formal flexible working request, but that Ms Davies had not dealt with it accordingly. Ms Davies apologised and said that she had dealt with the flexible working request informally. The Claimant reiterated her proposal that she would plan her working week at a Monday team meeting and would work from home unless she had face-to-face meetings. Ms Davies responded that, as she had previously discussed with the Claimant, the Claimant needed to raise her profile and be physically present, in order to be aware of the Centres' activities and to engage with teams, to understand their projects and future plans. The Claimant then said that she wanted to work two days from home. Ms Davies said that she would consider two days every other week.

73. There was a dispute between the parties about whether there was an agreement about the way forward at that meeting. On 30 May 2018, Ms Lynch emailed the Claimant and Ms Davies saying that she was confirming the agreed way forward, which was for the Claimant to resubmit her formal flexible working request and for Ms Davies to reconsider the request under the Respondent's Formal Flexible Working Policy. If the Claimant was dissatisfied, she still had the right to appeal, page 573. The Claimant replied, saying that she had not agreed and wished to pursue the grievance and the appeal, which she would be amending to reflect the meeting on 30 May, page 575.

74. The Claimant told Ms Davies afterwards that she would work from home for the rest of the day, as the meeting had been quite intense, page 572. The Tribunal found that whatever Ms Lynch or Ms Davies thought about the agreement at the meeting, it was clear that within a short period of time that the Claimant did not agree to the proposed outcome. She made this clear very promptly in email correspondence to Ms Lynch.

75. The Claimant did revise her grievance to include complaints about the way the meeting on 30 May had been conducted. She said that she was complaining about Maria Lynch too; she felt that words were being put in to her mouth and that the Claimant was being blocked from pursuing her appeal and her grievance, pages 618-620.

76. The Claimant submitted a further revised grievance on 5 June 2018 in which she set out numerous complaints, about the way in which Mark Steedman, Nicolette Davies, Daniel Dickens and Gianluca Fontana had treated her since 2016, page 600.

77. On 5 June 2018, Ann Kelly, Head of Employee Relations and Human Resources in the Respondent's Medical Department acknowledged the Claimant's grievance and said it would be taken forward. She said that the first step would be to send it to Ms Davies and asked the Claimant to confirm that she was happy for that to happen, page 615.

78. The Claimant resigned on 7 June 2018, saying that Ms Kelly was delaying in progressing the grievance by asking the Claimant to confirm her willingness for Ms Davies to see the grievance form, page 614. In evidence to the Tribunal the Claimant agreed that it was unfair to complain about Ms Kelly seeking to confirm that the Claimant was happy for Ms Davies to see the grievance.

79. In her resignation letter of 7 June 2018 the Claimant said, "Since my job level review and promotion in 2015 ... IGHI have committed a number of fundamental breaches of contract including intent to constructively dismiss me using covert tactics over a three year period; victimisation and harassment from my Line Manger, colleagues and then also even by the Faculty of Medicines HR Department on me trying to resolve the issue; direct and indirect sex and pregnancy discrimination during the handling of my application for flexible working; proven dishonesty by IGHI management during an official appeals process back in 2015 and more recently failing to follow the grievance procedure correctly", page 613.

80. In the Claimant's witness statement, she told the Tribunal that she resigned because she felt unable to resolve issues internally. The Tribunal accepted her evidence and found that the Claimant had made clear her objections to the procedure adopted by the Respondent regarding her flexible working request, both in her appeal and in her grievance. The appeal and grievance were unresolved at the date of the resignation.

81. After the Claimant's resignation, the Respondent investigated the Claimant's grievance and provided an outcome, pages 934-940. The grievance and outcome acknowledged that Ms Davies had not treated the Claimant's flexible working application formally under the Respondent's procedure and that it had not been managed appropriately. The outcome said that the request should have been managed formally and within appropriate timescales. It did not uphold the Claimant's other complaints.

82. The Claimant alleged, at the Tribunal, that Mr Fontana had sent her away from a meeting on 11 May 2018, to come back an hour later, by which time the pizza which had been ordered for the meeting was cold. The Claimant acknowledged, during the Tribunal hearing, that she had been told by email to attend at the end of the meeting, but had missed the email. She accepted that this matter was explained by her failing to receive Mr Fontana's communication about the meeting.

83. The Claimant told the Tribunal that she had suggested to Ms Davies that she could undertake some graphic design work while on maternity leave. She said that Ms Davies told her that she "did laugh" when she heard the Claimant was proposing this. On 22 May 2018 the Claimant had sent Ms Davies a draft prospectus that the Claimant had been working on over the weekend, to keep her design skills up to date. The task was not one which the Claimant was required to do within her role. The Claimant told the Tribunal that Ms Davies did not respond. Ms Davies told the Tribunal that she did not laugh at the Claimant, but that she was surprised that the Claimant was working in the weekends during her third trimester, when the Claimant had wanted to work flexibly during the third trimester. The Tribunal noted the Claimant's email of 26 April 2018, page 432, in

which the Claimant said that she would probably start slowing down gradually and that she wanted to start to work from home from May 2018. The Tribunal accepted Ms Davies' explanation that she was surprised that the Claimant was doing additional work from home in her third trimester, when the Claimant had made a flexible working request in respect of her third trimester, and the Claimant had said that she would probably start slowing down at this time. It accepted that Ms Davies was not making assumptions about the Claimant's capabilities, but was responding to what the Claimant had said.

Relevant Law

Flexible Working

84. Provisions regarding the right to request flexible working are contained in *Part VIII A ERA 1996, ss80F -80I*.

85. By s80G(1), " An employer to whom an application under section 80F is made—

- (a) shall deal with the application in a reasonable manner,
- (aa) shall notify the employee of the decision on the application within the decision period, and
- (b) shall only refuse the application because he considers that one or more of the following grounds applies—
 - (i) the burden of additional costs,
 - (ii) detrimental effect on ability to meet customer demand,
 - (iii) inability to re-organise work among existing staff,
 - (iv) inability to recruit additional staff,
 - (v) detrimental impact on quality,
 - (vi) detrimental impact on performance,
 - (vii) insufficiency of work during the periods the employee proposes to work,
 - (viii) planned structural changes, and
 - (ix) such other grounds as the Secretary of State may specify by regulations.

(1A) If an employer allows an employee to appeal a decision to reject an application, the reference in subsection (1)(aa) to the decision on the application is a reference to –

- (a) the decision on the appeal, or
- (b) if more than one appeal is allowed, the decision on the final appeal.

(1B) For the purposes of subsection (1)(aa) the decision period applicable to the employee's application under section 80F is –

(a) the period of three months beginning with the date on which the application is made, or

(b) such longer period as may be agreed by the employer and the employee.”

86. An agreement to extend the period may be made before the period ends or retrospectively, within a further 3 months after the primary 3 month period has ended, *s80G(1C) ERA 1996*.

87. By *s80H*: “(1) An employee who makes an application under section 80F may present a complaint to an employment tribunal—

(a) that his employer has failed in relation to the application to comply with section 80G(1),

(b) that a decision by his employer to reject the application was based on incorrect facts ”

88. ACAS has produced a statutory Code of Practice: *COP 5 on Handling in a Reasonable Manner Requests to Work Flexibly (2014)* under *s199 Trade Union and Labour Relations (Consolidation) Act 1992*. The Code must be taken into account by Tribunals where it is relevant to a question arising in the proceedings – *s207 (2) TULR(C)A 1992*.

89. The Code provides, at paragraphs [4] and [5], “ [4] Once you have received a written request, you must consider it. You should arrange to talk with your employee as soon as possible after receiving their written request. If you intend to approve the request then a meeting is not needed. [5] You should allow an employee to be accompanied by a work colleague for this and any appeal discussion and the employee should be informed about this prior to the discussion.”

90. There is no statutory *right* to be accompanied.

91. The Code advises that employers should give their decision in writing as soon as possible 'as this can help avoid future confusion on what was decided' (para [9]).

92. In *Commotion v Ruddy* [2006] ICR 290, the EAT upheld a Tribunal's finding that an employer's decision to reject a flexible working request was based on incorrect facts because the facts were “outdated ..off the cuff and made without research”. The EAT decided that, although the Tribunal is not entitled to look to see whether the employer acted fairly or reasonably in deciding to reject the flexible working request, the tribunal is entitled to look at the ground which the employer asserts was the reason why the application was not granted and to see whether it was factually correct.

93. If it finds a complaint well-founded, a tribunal must make a declaration to that effect, and may award such compensation as it considers just and equitable, not exceeding a maximum of eight weeks' pay: *ERA 1996 s 80I*,

Constructive Dismissal

94. *s 94 Employment Rights Act 1996* states that an employee has the right not to be unfairly dismissed by his employer. In order to bring a claim of unfair dismissal, the employee must have been dismissed.

95. By *s95(1)(c) ERA 1996*, an employee is dismissed by his employer if the employee terminates the contract under which he is employed, in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct. This form of dismissal is known as constructive dismissal.

96. In order to be entitled to terminate his contract and claim constructive dismissal, the employee must show the following:

- a. The employer has committed a repudiatory breach of contract.
- b. The employee has left because of the breach, *Walker v Josiah Wedgewood & Sons Ltd* [1978] ICR 744;
- c. The employee has not waived the breach- in other words; the employee must not delay his resignation too long, or indicate acceptance of the changed nature of the employment.

97. The evidential burden is on the Claimant. Guidance in the *Western Excavating (ECC Limited) v Sharp* [1978] ICR 221 case requires the Claimant to demonstrate that, first the Respondent has committed a repudiatory breach of his contract, second that he had left because of that breach and third, that he has not waived that breach.

98. Every breach of the implied term of trust and confidence is a repudiatory breach, *Morrow v Safeway Stores* [2002] IRLR 9;

99. In order to establish constructive dismissal based on a repudiatory breach of the implied term of trust and confidence, the employee must show that the employer has, without reasonable and proper cause, conducted himself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between them, *Mahmud v Bank of Credit and Commerce International SA* [1997] ICR 606, *Baldwin v Brighton and Hove City Council* [2007] ICR 680 and *Bournemouth University Higher Education Corporation v Buckland* [2009] IRLR 606.

100. The question of whether the employer has committed a fundamental breach of the contract of employment is not to be judged by the range of reasonable responses test. The test is an objective one, a breach occurs when the proscribed conduct takes place.

101. To reach a finding that the employer has breached the implied term of trust and confidence requires a significant breach of contract, demonstrating that the employer's intention is to abandon or refuse to perform the employment contract, Maurice Kay LJ in *Tullett Prebon v BGC* [2011] IRLR 420, CA, para 20.

102. The non-payment of wages by an employer to an employee can constitute a repudiatory breach of contract. In *Cantor Fitzgerald International v Callaghan* [1999] IRLR 234, the Court of Appeal held that, "...the question of whether non-payment of wages, or interference by an employer with a salary package, is or is not fundamental to the continued existence of a contract of employment, depends on the critical distinction to be drawn between an employer's failure to pay, or delay in paying, agreed remuneration, and his deliberate refusal to do so. Where the failure or delay constitutes a breach of contract, depending on the circumstances, this may represent no more than a temporary fault in the employer's technology, an accounting error or simple mistake, or illness, or accident, or unexpected events (see for example *Adams v Charles Zub Associates Limited* [1978] IRLR 551). If so, it would be open to the court to conclude that the breach did not go to the root of the contract. On the other hand, if the failure or delay in payment were repeated and persistent, perhaps also unexplained, the Court might be driven to conclude that the breach or breaches were indeed repudiatory."

103. In *Amnesty International v Ahmed* [2009] IRLR 884 the EAT said, at paragraph [71] "The provisions of the various anti-discrimination statutes and regulations constitute self-contained regimes, and in our view, it is wrong in principle to treat the question whether an employer has acted in breach of those provisions as determinative of the different question of whether he has committed a repudiatory breach of contract. Of course, in many if not most cases conduct which is proscribed under the anti-discrimination legislation will be of such a character that it will also give rise to a breach of the trust and confidence term; but it will not automatically be so. The question which the tribunal must assess in each case is whether the actual conduct in question, irrespective of whether it constitutes unlawful discrimination, is a breach of the term defined in Malik. Our view on this point is consistent with that expressed in two recent decisions of this tribunal which consider whether an employee is entitled to claim constructive dismissal in response to breaches by the employer of his duty under the Disability Discrimination Act 1995: see *Chief Constable of Avon & Somerset Constabulary v Dolan* (UKEAT/0522/07) [2008] All ER (D) 309 (Apr), per Judge Clark at paragraph 41, and *Shaw v CCL Ltd* [2008] IRLR 284, per Judge McMullen QC at paragraph 18."

104. Once a repudiatory breach has occurred, it is not capable of being remedied so as to preclude acceptance. The wronged party has a choice of whether to treat the breach as terminal. However, the wronged party cannot ordinarily expect to continue with the contract for very long without being considered to have affirmed the breach, *Buckland* per Sedley LJ, at paragraph [44].

Resignation in Response to Breach

105. In *Nottinghamshire County Council v Meikle* [2004] EWCA Civ 859, [2004] IRLR 703, CA the Court of Appeal held that what was necessary was that the employee resigned in response, at least in part, to the fundamental breach by the employer; as Keene LJ put it:

"The proper approach, therefore, once a repudiation of the contract by the employer has been established, is to ask whether the employee has accepted that repudiation by treating the contract of employment as at an end. It must be in response to the repudiation but the fact that the employee also objected to the other actions or inactions of the employer, not amounting to a breach of contract, would not vitiate the acceptance of the repudiation. It follows that, in the present case, it was enough that the employee resigned in response, at least in part, to fundamental breaches of contract by the employer."

106. In *Wright v North Ayrshire Council* [2014] IRLR 4, EAT, Langstaff P said that once a repudiatory breach of the employment contract by the employer has been established in relation to a constructive dismissal claim, the correct approach, where there was more than one reason why an employee left a job, was to examine whether any of them was a response to the breach. If the breach played a part in the resignation, then the employee has been constructively dismissed. However, Langstaff P also said that where, there is a variety of reasons for a resignation, but only one of them is a response to repudiatory conduct, a tribunal may wish to evaluate whether in any event the claimant would have left employment and adjust an award accordingly.

Reasonableness

107. If the Claimant establishes that he has been dismissed, the ET goes on to consider whether the Respondent has shown a potentially fair reason for the dismissal and, if so whether the dismissal was in fact fair under s98(4) ERA. In considering s98(4) the ET applies a neutral burden of proof.

Polkey and Contributory Fault

108. If the Tribunal determines that the dismissal is unfair the Tribunal may go on to consider the percentage chance that the employee would have been fairly dismissed, *Polkey v AE Dayton Services Limited* [1988] ICR 142.

109. In *Gover v Propertycare Limited* [2006] ICR 1073, the Court of Appeal held that the Polkey principle does not only apply to cases where the employer has a valid reason for dismissal but has acted unfairly in its mode of reliance on that reason, so that any fair dismissal would have to be for exactly the same reason. Tribunals should consider making a *Polkey* reduction whenever there is evidence to suggest that the employee might have been fairly dismissed, either when the unfair dismissal actually occurred or at some later date.

Discussion and Decision

Flexible Working

110. The Tribunal considered, first, whether the Respondent dealt with the Claimant's flexible working application in a reasonable manner. In considering this question, the Tribunal has considered the Statutory Code. It has also taken in to account the Respondent's own Policy on flexible working - in particular, the Formal process, from page 80. The Tribunal infers that the Respondent considers that its own procedure is a reasonable approach to flexible working applications and appropriately balances the needs of the employer and employee in considering flexible working requests.

111. The Tribunal has found that Ms Davies did not meet the Claimant within 10 days of receiving her application and that the delay was not explained by the Claimant's absence from work. The Respondent was therefore in breach of its own policy.

112. The first, very brief, discussion about the Claimant's flexible working request, took place on 7 March 2018. In advance of the meeting, Ms Davies did not tell the Claimant that the Claimant could be accompanied by a trade union representative or work colleague. That was in breach of paragraph 44 of the Respondent's own procedure and was also contrary to the Statutory Code paragraph [5].

113. Ms Davies did not confirm the outcome of that meeting within 10 days, in breach of paragraph 4.5 of the Respondent's policy.

114. Ms Davies gave a written outcome to part of the request only, regarding flexible working in the third trimester, on 24 April. She did not give an outcome to the post-maternity flexible working request at that time, but deferred a decision on this. Again, the written outcome was not sent soon after the meeting, in breach of the guidance in the Statutory Code.

115. A meeting to discuss the post-maternity leave flexible working was not held until 24 May, a very considerable time after the application was made. While Ms Davies did confirm the outcome of that in writing, insofar as the Claimant was asking for complete flexibility to decide on her own pattern each week and Ms Davies refused that, Ms Davies did not give reasons for the decision in writing, in breach of the Respondent's procedure at paragraph 4.6. She did not advise the Claimant on her right to appeal, in breach of the Respondent's procedure at paragraph 4.8.

116. Taking all those matters in to account and considering, as a whole, the application and the procedure adopted, the Tribunal found that Ms Davies' approach was serially in breach of the guidance contained in the Code of Practice and of the Respondent's own procedure. It concludes that the application was not dealt with in a reasonable manner, even in the circumstances that the Claimant and Ms Davies maintained an ongoing discussion in the work place. The Tribunal has taken it into account that the Claimant's application was unspecific and gave little clarity to the Respondent as to the working pattern according to which the Claimant would attend the office. Nevertheless, the Tribunal has concluded that Respondent failed to deal with the application in a reasonable manner because of the numerous breaches of policy and guidance the Tribunal has identified.

117. The flexible working request was not substantively discussed with regard to post-maternity leave flexible working until more than 3 months after the application was made. The Respondent did not notify the Claimant of the decision on flexible working regarding the post-maternity request within 3 months of the application. The decision on post-maternity flexible working was not communicated to the Claimant until 24 May and, necessarily, the Respondent did not determine the appeal within the statutory 3-month time limit.

118. The Respondent was in breach of *s80G(1)(a) ERA 1996* and *s80G(1)(aa) ERA 1996*.

119. The Tribunal found that the Respondent did reject the Claimant's application for flexible working, insofar as the Claimant was seeking flexibility to work from home depending on work commitments - and only to attend work where there was a specific need to do so. The Respondent agreed to allow the Claimant to work from home one day a week, and on others day as agreed by Ms Davies, but not, as the Claimant proposed, on a pattern dictated by the Claimant week to week. The Claimant maintained her desire to work from home in a pattern of her choosing, as default, both in her original application and in her appeal, where she sought two official days working from home but she also said, "the amount of days would vary each week," page 546.

120. However, the Tribunal finds that the Respondent did give the Claimant reasons for the decision (although not in writing), because the Claimant referred to those reasons in her appeal letter, page 544. The reasons that she was given were "I may isolate myself" and that IGHl and HR felt that the application was unclear. The Tribunal considered that the Claimant isolating herself came within the ambit of *s.80G(1)(b) ERA*, (ii) *detrimental impact on ability to meet customer demands* (v) *detrimental impact on quality* and (vi) *detrimental impact on performance*.

121. It is clear that, at the latest, on 16 April 2018 in the Claimant's PRDP, Ms Davies was telling the Claimant that she needed to spend one to two days a week at St Mary's learning about the work of the team and identifying the matters which could be promoted externally. The Claimant was told by Ms Davies in the meeting on 24 May that she did need to raise her profile and to be present in the Department as a result. Accordingly, the reasons were based on correct facts and came within *s.80G*.

122. The Respondent was therefore not in breach of *s80G(1)(b) ERA 1996*.

Constructive Dismissal

123. The Claimant contended that, from 2015 to 2018, the Respondent excluded her from meetings, removed key tasks from her and intended to delete her position. She asked the Tribunal to take an overall view of the events in coming to its decision. The Tribunal has taken into account all its findings of fact in coming to its decision.

124. The Tribunal has found that, with two exceptions, Ms Davies, Mr Fontana, Mr Dickens and other managers had reasonable and proper cause for every

decision they made and action they took in relation to the Claimant and that they did not without reasonable or proper cause act in such a way as was calculated or likely to seriously damage or destroy the relationship of trust and confidence between employer and employee.

125. So, for example, the Respondent had reasonable and proper cause for not inviting the Claimant to an informal meeting to convey information from IGHI senior managers to the newly appointed Luke Blair. The meeting involved very senior members of staff the Claimant was of relatively junior member staff. The meeting was primarily directed to the Directors providing information to Mr Blair on the work of their Centres and they were the appropriate people to do that.

126. Furthermore, when Mr Fontana suggested that an external consultant be sought regarding communication strategy, he and other managers did so in an inclusive way. The Claimant's input was sought, the Claimant provided quotes from Michael Hoevel and she was specifically asked in a Board Meeting by Lord Darzi what would be of assistance to her. In any event, no appointment was ever made and responsibility for strategy was not taken from the Claimant, contrary to what she has contended.

127. With regard to attendance at the Doha summit, many more senior employees, including Centre Directors were not invited to attend the Doha summit. A reduced number of tickets was available and the Claimant, along with senior strategic employees, was not prioritised for attendance.

128. Further, Mr Dickens did not want to engage with the Claimant's marketing and promotion activities during 2017 for reasonable and proper cause. He was the managing director of the Helix Centre and made strategic decisions to concentrate on developing intellectual property and products, before marketing these to the outside world, or to industry. That was a decision that Mr Dickens was entitled to make; it was within his scope of authority and expertise. The Helix Centre was attempting to compete internationally with other prestigious innovation labs, for example MIT, and it was entirely rational for Mr Dickens to want a carefully planned approach to publicity and public engagement.

129. With two exceptions, regarding the matters which the Claimant has complained of, the Tribunal has explained, in its finding of fact, that it has accepted the Respondent's explanation for its actions.

130. The two exceptions are these: First, the failure to appeal the Claimant's Job Level Review outcome in 2015 and; Second, Ms Davies's failure to deal with the Claimant's flexible working request in accordance with the Respondent's own policy in 2018.

131. With regard to the 2015 failure to appeal the job level review, Mr Steedman did delay in telling the Claimant the outcome of her review and failed to appeal the result, when he promised that he would. The appeal was not pursued until the Claimant followed it up. If the Claimant had not pursued the matter, she might never have been promoted or paid accordingly. The Tribunal considers that that was a serious breach of the duty of trust and confidence at the time. However, the matter was rectified, the Claimant was promoted to a higher salary and the

salary and the job title were appropriately back dated. The Claimant continued to work for two and a half years thereafter. She clearly affirmed that breach by accepting the higher salary which was awarded to her.

132. Regarding the 2018 flexible working request, Ms Davies actions breached the Claimant's rights under *ss.80F - I Employment Rights Act 1996*.

133. The Respondent contended that, nevertheless, it did not act without reasonable or proper cause in such a way as to seriously damage the relationship of trust and confidence between employer and employee. It contended that its actions did not go to the root of the contract.

134. The Tribunal reminded itself that unreasonableness itself does not equate to a breach of duty of trust and confidence. It also reminded itself that a breach of statutory duty does not automatically amount to a breach of the duty of trust and confidence, as set out in the *Amnesty International v Ahmed* [2009] IRLR 884 and *Cantor Fitzgerald International v Callaghan* [1999] IRLR 234 cases.

135. However, the Tribunal has found that the Respondent failed to deal with the Claimant's flexible working application in any reasonable manner. It has found that, procedurally, there was a series of delays and that the Respondent failed to tell the Claimant that she could be accompanied at the relevant meeting, or about her right of appeal. These were thoroughgoing failures. There was no reasonable or proper cause for the serious delays, or for Ms Davies' failure to deal with the flexible working in accordance with the Respondent's own policy. The Claimant had a right which she exercised in important circumstances - that she was pregnant and wanted to plan for her future employment. For a very large proportion of her pregnancy, however, the Claimant was not given an answer and was not even met with. She was not given an answer about her post-maternity leave request until late May 2018.

136. The Tribunal has not found that the substantive decision, when it came, was unreasonable. Nevertheless, the procedure adopted by the Respondent was so delayed and in such serial breach of policy that the Tribunal has that found that the manner in which the Respondent dealt with the Claimant's flexible working application amounted to a breach of the duty and trust and confidence. Without reasonable and proper cause, the Respondent acted in which a way as was likely to destroy or seriously damage the relationship and trust and confidence. In coming to its decision on this, the Tribunal took in to account the fact that the Respondent is a large employer, with substantial Human Resources, to which managers had access.

137. The Tribunal accepted the Claimant's evidence that the Respondent's treatment of her flexible working application did seriously damage her confidence in the Respondent. She complained about the delays in her grievance and her appeal and said that they had caused her stress. The Claimant said that she had found Ms Davies' treatment of her request to be disrespectful. In her original grievance, which she submitted on 28 May 2018, shortly before her resignation, the Claimant gave a detailed complaint about the way in which the flexible working request had been dealt with.

138. The Tribunal has concluded that the Respondent's breach of the duty of trust and confidence was clearly in the Claimant's mind when she resigned.

139. The Tribunal finds that the Claimant did not delay and did not affirm the breach. Her grievance and appeal made clear that she was not accepting the Respondent's breaches of procedure and that she sought redress for them. At the time of her resignation, neither the appeal nor the grievance had been remedied.

140. Furthermore, the Claimant put in her grievance and her appeal at the end of May 2018 and resigned a couple of weeks thereafter. There was no significant delay.

141. The Claimant was therefore constructively dismissed. One of the matters on which she relied in resigning amounted to a breach of the duty of trust and confidence.

142. The Respondent has not shown that there was a fair reason for dismissal. No real reason was suggested for the Respondent's actions regarding the flexible working request, apart from Ms Davies' informal approach to the matter. Treating the application informally was clearly inappropriate when the Claimant had repeatedly said that her application was formal.

143. Accordingly, the Tribunal finds that the Claimant was unfairly constructively dismissed. The Tribunal will decide matters regarding Polkey at the remedy hearing.

Employment Judge Brown

Dated: 10 May 2019

Judgment and Reasons sent to the parties on:

16 May 2019

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For the Tribunal Office