



EMPLOYMENT TRIBUNALS

Claimant: Ms A Wynne

Respondent: Fundamental Coaching Limited (t/a FUNDA)

Heard at: Manchester

On: 13 and 14 October 2020

Before: Employment Judge McDonald
(sitting alone)

REPRESENTATION:

Claimant: Mr Sharples (GMB)

Respondent: Mr K Fletcher (Director)

JUDGMENT

The judgment of the Tribunal is that:

1. The claimant's complaint that she was wrongfully dismissed succeeds.
2. The respondent's counter-claim fails and is dismissed,

REASONS

1. The claimant was employed by the respondent as an apprentice from 19 November 2018 until she resigned on 17 February 2020. She says that she was entitled to resign with immediate effect and treat herself as constructively dismissed because the respondent had fundamentally breached her employment contract.

2. The claimant's claim is that the respondent fundamentally breached her contract by terminating an apprenticeship agreement with Burnley College and by breaching the implied term of trust and confidence through various actions which are set out in the List of Issues at para 6 below. She says she is entitled to damages for

the two months' notice which the respondent was required to give her to lawfully terminate her employment contract.

3. The respondent counter claims. It says the claimant simply resigned but failed to give the required two months' notice when doing so. It says it is entitled to damages for the extra costs it incurred in paying someone to do the work the claimant would have done during her two months' notice period.

Preliminary Matters

4. The hearing was helped by CVP videolink. As I have recorded in the Case Management Order of today's date, there were initial difficulties for Mr Sharples in participating in the CVP final hearing. As a result, I held a brief telephone case management hearing. At that hearing I accepted the claimant's claim form as her response to the respondent's counterclaim. Once the initial difficulties were resolved, all parties were able to participate fully in the hearing by CVP.

5. I had before me an agreed bundle of documents consisting of pages 1-258. There were four written statements from the following witnesses:

- the claimant;
- her mother, Ms Suzanne Wynne;
- Mr Phil Parker, the respondent's Chief Operating Officer;
- Mr Kieran Fletcher, the respondent's founder and Creative Director.

6. References in this Judgment to page numbers are to page numbers in the bundle of documents.

7. At the end of the evidence I heard oral submissions from Mr Sharples. The respondent had made what were in effect written submissions by adding comments to the List of Issues. Mr Parker supplemented those with some brief oral submissions. I then reserved my decision.

List of Issues

8. The List of Issues to be decided was as follows:

The claimant's claim

- (1) Did the respondent breach the claimant's contract terms in respect of:
 - (i) their obligations towards the claimant in co-operating with her and the training provider to enable the claimant to gain her NVQ level 3 qualification in Digital Marketing;
 - (ii) the implied term of trust and confidence by;

- (a) encouraging the claimant to give up her college course;
 - (b) deleting the claimant's project work around 21 November 2019;
 - (c) raising unfounded disciplinary allegations against the claimant on 23 January 2020;
 - (d) failing to provide the claimant with evidence of the disciplinary allegations before giving her a final written warning on 13 February 2020;
 - (e) Issuing the claimant with a final written warning on 13 February 2020;
 - (f) terminating the apprenticeship arrangements with Burnley College before or on 13 February 2020.
- (2) In resigning on 17 February 2020 did the claimant resign because of any such breach?
- (3) What is the loss to the claimant of such breach?

The respondent's counterclaim

- (4) If the claimant did not resign because of a fundamental breach by the respondent, as the claimant in breach of contract by resigning without notice?
- (5) If so, what financial loss to the respondent results from that breach?

Relevant Law

9. The claimant's claim is of wrongful dismissal, i.e. that she was dismissed in breach of the terms of her contract of employment. Subject to certain conditions and exceptions not relevant here, the Tribunal has jurisdiction over a claim for damages or some other sum in respect of a breach of contract which arises or is outstanding on termination of employment if presented within three months of the effective date of termination (allowing for early conciliation): see Articles 3 and 7 of the Employment Tribunals (England and Wales) Extension of Jurisdiction Order 1994.

10. An employee is "constructively dismissed" where the employer's actions or conduct amounted to a repudiatory breach of the contract of employment entitling the employee to resign: **Western Excavating (ECC) Ltd v Sharp [1978] 1 QB 761**.

11. Mr Sharples for the claimant said that hers was an approved English apprenticeship within the meaning of section A1 of the Apprenticeships, Skills,

Children and Learning Act 2009 (“ASCLA”). S.A1(2) says that an approved English apprenticeship agreement is an agreement which—

“(a) provides for a person (“the apprentice”) to work for another person for reward in an occupation for which a standard has been published under section ZA11

(b) provides for the apprentice to receive training in order to assist the apprentice to achieve the approved standard in the work done under the agreement, and

(c) satisfies any other conditions specified in regulations made by the Secretary of State.”

12. It is a condition of an approved English apprenticeship that the apprentice is to receive “off-the-job training”, i.e. training which is not on the job training and is received during the apprentice’s normal working hours for the purpose of achieving the approved apprenticeship standard to which the agreement relates (regulation 3 of the Apprenticeships (Miscellaneous Provisions) Regulations 2017/1310.

13. S.A5 of ASCLA, makes it clear that an approved English apprenticeship, has the status of a contract of service

14. The claimant says that there was an express term in her contract that the respondent would provide her with the support necessary for her to gain a qualification from Burnley College. However, if I found there was no such express term the claimant says that a term to the same effect was implied into her contract.

15. Tribunals will not imply a term into a contract simply because it is a reasonable one. Nor will they imply a term because the agreement would be unreasonable or unfair without it. A term can only be implied if the Tribunal can presume that it would have been the intention of the parties to include it in the agreement at the time the contract was made. In order to make such a presumption, the Tribunal must be satisfied that:

- the term is necessary in order to give the contract business efficacy: In **Ali v Petroleum Co of Trinidad and Tobago 2017 ICR 531, PC**, Lord Hughes explained that: “A term is to be implied only if it is necessary to make the contract work...Necessity is not established by showing that the contract would be improved by the addition. And if there is an express term in the contract which is inconsistent with the proposed implied term, the latter cannot, by definition, meet these tests, since the parties have demonstrated that it is not their agreement.”
- it is the normal custom and practice to include such a term in contracts of that particular kind: the custom in question must be reasonable, notorious and certain (see, for example, **Devonald v Rosser and Sons 1906 2 KB 728, CA**, and **Sagar v H Ridehalgh and Son Ltd 1931 1 Ch 310, CA**).
- an intention to include the term is demonstrated by the way in which the parties have operated the contract in practice, including all the surrounding

facts and circumstances. see **Mears v Safecar Security Ltd 1982 ICR 626, CA.**

- the term is so obvious that the parties must have intended it (known as the 'officious bystander' test). In **Shirlaw v Southern Foundries (1926) Ltd 1939 2 KB 206, CA, affirmed by the House of Lords in Southern Foundries 1926 Ltd v Shirlaw 1940 AC 701, HL** held that a term could be implied in a situation where 'if while the parties were making their bargain, an officious bystander were to suggest some express provision for it in the agreement, they would testily suppress him with a common "oh, of course"'. In practice, this means that a term will be implied if it can be said that it is so obvious that it goes without saying.

16. The claimant also says that the respondent breached the implied term of trust and confidence in her employment contract. The existence of that implied term of mutual trust and confidence was confirmed by the House of Lords in **Malik v Bank of Credit and Commerce International SA (in compulsory liquidation) 1997 ICR 606, HL.** **Malik** confirmed that the obligation on each party is that it will not, without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between employer and employee.

17. The question is whether, objectively, there has been a breach of the implied term. For the implied term to be breached the conduct must be such as, objectively, is calculated or likely to undermine the duty of trust and confidence and must be conduct for which there is, objectively, no reasonable and proper cause (**Bradbury v BBC [2015] EWHC 1368 (Ch)** and **Buckland v Bournemouth University Higher Education Corporation [2010] EWCA Civ 121**).

18. If the employer is found to have been guilty of such conduct, that is something which goes to the root of the contract and amounts to a repudiatory breach, entitling the employee to resign and claim constructive dismissal (**Morrow v Safeway Stores [2002] I.R.L.R. 9**).

19. A breach of that implied term can result from the cumulative conduct of the employer rather than one repudiatory act. In many cases there can be a final act or "last straw" before the resignation.

20. In **Omilaju v Waltham Forest LBC (No.2) [2005] I.R.L.R. 35** the Court of Appeal explained that the final act (the so called "last straw") in a series of actions which cumulatively entitled an employee to repudiate his contract and claim constructive dismissal need not be a breach of contract and need not be unreasonable or blameworthy. However, the act complained of had to be more than very trivial and had to be capable of contributing, however slightly, to a breach of the implied term of mutual trust and confidence. It would be rare that reasonable and justifiable conduct would be capable of contributing to that breach

21. The Court of Appeal clarified the correct approach for the Tribunal to take in such cases in **Kaur v Leeds Teaching Hospitals NHS Trust [2019] ICR 1, para 55**:

“In the normal case where an employee claims to have been constructively dismissed it is sufficient for a tribunal to ask itself the following questions:

(1) What was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, his or her resignation?

(2) Has he or she affirmed the contract since that act?

(3) If not, was that act (or omission) by itself a repudiatory breach of contract?

(4) If not, was it nevertheless a part (applying the approach explained in **Omilaju**) of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a (repudiatory) breach of the **Malik** term? (If it was, there is no need for any separate consideration of a possible previous affirmation, because the effect of the final act is to revive the employee’s right to resign even if there was a previous affirmation).

(5) Did the employee resign in response (or partly in response) to that breach?”

22. If the “last straw “conduct of the employer which tips the employee into resigning could not contribute to a breach of the implied duty of trust and confidence, the claim of constructive dismissal must fail if (a) there was no prior conduct by the employer amounting to a fundamental breach; or (b) there was, but it was affirmed. But if, in such a case, there was prior conduct amounting to a breach which was not affirmed, and which also materially contributed to the decision to resign, the claim of constructive dismissal will succeed (**Williams v Governing Body of Alderman Davies Church in Wales Primary School [2020] I.R.L.R. 589**).

23. Where the employee waits too long after the employer’s breach of contract before resigning, he or she may be taken to have affirmed the contract and thereby lost the right to claim constructive dismissal. In the words of Lord Denning MR in **Western Excavating (ECC) Ltd v Sharp** 1978 ICR 221, CA, the employee “must make up his mind soon after the conduct of which he complains: for, if he continues for any length of time without leaving, he will lose his right to treat himself as discharged”.

24. An employee is entitled to notice of termination in accordance with the contract (or the statutory minimum notice period under section 86 Employment Rights Act 1996 if that is longer) unless the employer establishes that the employee was guilty of gross misconduct.

25. The measure of damages for a failure to give notice of termination is the net value of pay and other benefits during the notice period, giving credit for other sums earned in mitigation.

Findings of Fact

26. Below I set out my findings of fact based on the evidence I heard and read. In some cases, there was a dispute about what had happened. That applied in particular to what had been said at the meeting between the claimant, Mr Parker and Mr Fletcher on the 12 November 2019. In those cases, I needed to decide whose evidence I preferred. That depended on my assessment of the reliability of each witness's evidence so I first set out my conclusions on that.

Credibility and reliability

27. On balance, I preferred the evidence of the claimant. There were times when she appeared to evade answering some questions by saying that she did not recollect matters. On most points, however, I found her evidence to be a credible witness and her evidence to be clear and reliable.

28. Mr Fletcher's evidence I found to be confused and confusing. I have taken into account that he told me that he has dyslexia and that this can have had an impact on the way he answered questions in cross examination. Even allowing for that, however, I did not find his evidence to be reliable.

29. Mr Parker's evidence was not very helpful because he tended not to answer the direct questions put to him. In addition, Mr Parker in particular referred to the fact that there was a separate dispute with, as I understand it, Burnley College. He hinted that because of that there was evidence which he could not put forward at the Tribunal including CCTV footage. I made it clear that if the respondent was seeking to rely on any evidence it had to be before me. Mr Parker confirmed that he was not relying on the CCTV evidence. I have to make a decision based on the evidence before me, and that is what I have done.

The contractual terms

30. The claimant started work for the respondent on 19 November 2018 as an apprentice. She was initially paid £3.70 per hour. The contract was re-issued as at 21 October 2019 to reflect a pay rise to £7.70 per hour (pages 39-43) ("the Contract").

31. Alongside the Contract with the claimant the respondent signed an Apprenticeship Agreement ("the Agreement") with a training provider, Burnley College ("the College"). This was to enable the claimant to gain a recognised qualification from the College in Digital Marketing at Level 3 ("the Qualification"). The benefit of the apprenticeship to her was that she would gain experience in the workplace while gaining that qualification. I also accept her evidence that she needed a portfolio of work from the workplace in order to be able to achieve that qualification. It did not make any specific reference to her being released to attend the College.

The terms of the Contract

32. The Contract is a standard contract of employment although it gives the claimant's job title as "Apprentice" (clause 3 on p.39). It does not cross refer to the

Agreement and does not cross refer to the Agreement. There is no express term confirming the claimant can attend off site training at the College one day a week. There are no express terms setting out the respondent's obligations in terms of supporting her to achieve the Qualification.

33. Although the claimant suggested that her working hours were flexible hours, neither the Contract nor her initial letter of appointment dated 27 November 2018 (pages 68-69) suggest that was the case. Clause 8 of the Contract says that her normal hours of work are 40 hours per week between Monday and Sunday on a rota basis starting each day at 9.00am (p.39).

34. After the first 4 weeks of her employment the claimant was entitled to two months' notice of termination of the Contract (Clause 20.2) and was required to give the respondent two months' notice of termination of the Contract (Clause 20.3) (p.41).

35. Clause 22.1 of the Contract prohibited the claimant from disclosing confidential information relating to the respondent without consent (p.42).

The terms of the Agreement

36. By clause 2, the Agreement continued until the later of a specified expiry date or the Latest Apprenticeship Programme Completion date (p.47).

37. Clause 4 of the Agreement sets out the employer's obligations:

- Clause 4.1.1 required the respondent to employ and pay the apprentice for the duration of the relevant Apprenticeship Programme (subject to earlier termination of the Agreement in accordance with its terms or termination of the Contract).
- Clause 4.1.3 required that the respondent procure that the apprentice enter into an Apprenticeship Agreement.
- Clause 4.1.4 required the respondent to provide such training and/or carry out such actions as were assigned to the employer in the Apprenticeship Programme, and in any event to support each apprentice in their learning and development to the reasonable satisfaction of the College, as the training provider.
- Clause 4.1.7(c) required the respondent to ensure that the apprentice was enabled to complete the apprenticeship within their working hours and make available time for the apprentice to be able to complete the Apprenticeship Programme including:
 - (i) Permitting 20% of each apprentice's employed hours to be used for off the job training (i.e. one day per week);

- (ii) Releasing the apprentice for the training provider for undertaking such training and courses with the training provider as set out in the Apprentice Proposal;
- (iii) Providing the apprentice the use of equipment necessary to enable the apprentice to fulfil training objectives;
- (iv) Cooperating with the training provider to arrange for any necessary end point assessment allowing the apprentice to attend the same.

38. Clause 8.1 of the Agreement deals with termination of that agreement. It enabled either the respondent or the College (as the training provider) to terminate the agreement with immediate effect by giving written notice in specific circumstances. Of relevance to this case was clause 8.1.1 which enables either party to terminate the Agreement where the other party “commits a material breach of any term of this agreement and fails to remedy that breach within a period of 30 days” (p.52).

39. The Agreement does not include a term whereby the respondent could terminate with notice other than in the circumstances set out at clause 8.1. I find it was a fixed term contract for the duration of the Apprenticeship Programme unless terminated one of the specific reasons set out in 8.1 applied.

40. The claimant’s Apprenticeship Programme was set out at schedule 1 of the contract (p.60). It confirmed a start date of 28 November 2018 and an end date of 30 April 2020. Under “Employer Actions” at paragraph 11 it defined the training to be delivered by the respondent:

“On the job training to your apprentice to allow them to gain the key skills required in the general workplace (such as teamworking, problem solving and communication) as well as your specific sector (such as use of new and relevant sector). At the end of the apprenticeship, as well as achieving a National Vocational Qualification, the training provided by the employer will mean the apprentice will gain a technical certificate to show they understand the underpinning theory and/or knowledge relating to the employer’s industry profession.”

What happened up to November 2019

41. In an undated text message from Mr Fletcher to DLP, the respondent’s legal advisers, Mr Fletcher instructed DLP to issue a new contract to the claimant at £7.70 per hour (p.193). That text message (which although undated but must have been sent around September or October 2019) Mr Fletcher says, “Antonia is my apprentice and is growing progressing in her role”.

42. That I find reflects the position as at October 2019 when it seems there had been no significant issues between the respondent and the claimant. She was attending the College on Tuesdays and working for the respondent for the rest of the

week. The claimant's evidence is that matters began to change after 12 November 2019.

November 2019 to January 2020

43. On 11 November Phil Parker sent a text message to the claimant asking her to meet him on 12 November at 8.30am so they could go through all the videos she was working on. I find that the claimant was due to attend college for her maths lesson on that day but was not able to do so until around 3.30pm (pages 81-84). Instead she was in a meeting with Mr Parker and Mr Fletcher.

44. I find that around the time when the meeting took place there was a tension between the needs of the respondent for the claimant to complete work for it and the commitment that the respondent had made to allow the claimant to be released to attend College. In a text message sent on the morning of Tuesday 5 November 2019 (p.76) which was her day at College, Mr Fletcher writes "Antonia with the current workload at [the respondent] I want you in the office today. Please make your way to the office thanks".

45. At that meeting it is accepted that there was discussion about the claimant achieving her maths qualification. There is a dispute about what was said but I prefer the claimant's version of events. I find that Mr Fletcher told her that she did not need the qualification and that he said she did not need the apprenticeship if she was going to be staying with the respondent. I find he also asked why she needed to go to college and that the claimant told him that it was important for her to complete the apprenticeship and get the qualification because she had worked hard for it (by that time she was only some four or five months from the end of the two-year apprenticeship programme). I find that Mr Fletcher turned to Mr Parker and said, "that's not what I wanted to hear is it, Phil?".

46. The claimant's version of events seems to me more consistent with the email from Mr Whitaker of the College to Mr Fletcher on 19 November 2019 (p.88B) which refers to "rumours" that the claimant is planning on leaving the apprenticeship and taking up a full-time position at the respondent and with the claimant's pay being raised to a full hourly rate with effect from October 2019. Both seem to me to support the claimant's case that in November 2019 the respondent was actively encouraging the claimant to give up her course at the College and work for it full time.

47. The claimant alleged that around 21 November 2019 the respondent (and specifically Mr Fletcher) had deleted marketing projects which the claimant had worked on from its computer system. The reason the projects were particularly important to the claimant (apart from the work she had done on them) was that they were needed for her portfolio for the College to prove her apprenticeship requirements had been completed. Without that supporting evidence she would not be able to achieve the Qualification.

48. The respondent accepted that the projects had been deleted. I accept Mr Fletcher's evidence that what he was doing was deleting projects in which he had

been “tagged”. That is consistent with the claimant’s text message to Mr Fletcher (p.86) in which she asked him to “please restore [those projects]”. I accept the respondent’s evidence was that those projects were restored. I find that the deletion of the claimant's project work was not a deliberate act targeted at the claimant.

January 2020-the disciplinary hearing invitation

49. It is not disputed that on Thursday 23 January 2020 the claimant was handed a letter inviting her to attend a disciplinary hearing on Monday 27 January 2020 (pp.93-94). The letter sets out five allegations. They were that she had:

1. high levels of absences with 7 specific dates mentioned from 8 March 2019 to 28 November 2019.
2. been late for work on “various occasions” with no dates specified;
3. discussed confidential information “breaching confidentiality agreement”;
4. failed to carry out work professionally, accurately or otherwise reasonably;
and
5. potentially placed the company’s reputation at risk.

50. Although the letter refers to the meeting being a “disciplinary hearing” the letter does elsewhere suggest the meeting was an investigatory one. The letter says that the claimant “will not be disciplined in the meeting and no decisions will be made about your conduct”. The letter goes on to say “in the event no further investigations are necessary the company may make the decision to adjourn and then reconvene with a decision as to action”.

51. The circumstances leading up to that seem to me to be potentially relevant. After the New Year the claimant was on holiday from 13-17 January 2020 and was then in College from 20-23 January 2020 to work on the Synoptic project for her college course. In effect, therefore, the claimant was away from work for some two weeks. I find the respondent, specifically Mr Fletcher, was not happy about that. On 8 January 2020 the claimant sent a message to Francesca Chapman at the College to say that the respondent was not happy with her taking 4 days off work to do the Synoptic project and asking what she should do (p.90). Francesca Chapman then emailed Mr Fletcher on 7 January 2020 but heard nothing back. Ms Chapman confirmed that Mr Whitaker from the College had emailed Mr Fletcher on 6 December 2019 to notify them of the dates. On 9 January 2020 the claimant emailed Francesca Chapman back to say that she had spoken to Mr Fletcher and he was now saying that she could do the Synoptic week (page 91).

52. There was a dispute about what happened in the week starting 13 January 2020. The claimant had booked four days off work i.e. 13, 15, 16 and 17 January. These would be her working days with the respondent. Mr Parker’s evidence was that she had said that she would be in College on the Tuesday 14 January as usual. However, when Mr Parker contacted the College on Tuesday 14 January to check the claimant was in attendance he was told that she had called in ill. Mr Parker’s

suggestion in his statement was that “nobody would be naïve enough” to believe that somebody would book all other days in the week off as leave but be attend College on the remaining day of the week. The suggestion seems to be that the claimant was not really ill on that Tuesday and had simply taken the day off to make a full week’s holiday.

53. The disciplinary invitation letter does not refer to any accusation that the claimant failed to attend College on 14 January 2020. The fact that the respondent was unhappy about the time the claimant was spending away from work and that it was checking up on her when she was supposed to be at College do seem to me to reflect a continued frustration on the part of the respondent about the time the claimant was spending on achieving the Qualification rather than working for it.

54. The “Allegation Evidence” supporting the disciplinary “charges” was set out in two short paragraphs in the disciplinary meeting invitation letter (p.93). The first said that the claimant had failed to carry out work professionally, accurately or otherwise reasonably despite informal meetings regarding her performance “on many occasions and the recent ones of 23 October 2019 and 12 November”. It said “this consists of failing to use the appropriate software as instructed and failing to complete tasks to the correct standard”. The second paragraph related to the breach of confidentiality allegation. It alleged that the claimant had between 12-19 November 2019 discussed “confidential information outside of work with Ben [Whitaker] from Burnley College”. It did not say what the confidential information was. The letter did not provide further details of the dates when the claimant had allegedly been late for work nor did it explain how she had “potentially placed the company’s reputation at risk”.

January/February 2020 – disciplinary hearing, outcome and termination of the Agreement

55. The disciplinary hearing took place on 31 January 2020. It was chaired by Mr Fletcher and the claimant was accompanied by her trade union representative, Chris Weaver. It is not clear whether the hearing was regarded by the respondent as an investigatory hearing or a disciplinary hearing. The template which DLP had prepared for Mr Fletcher to use (pp.96-117) is headed “Disciplinary Hearing” but in parts reads as though the purpose is to gather evidence from the claimant.

56. What is clear from that pro-forma is that there was no intention to hold a further hearing – the text Mr Fletcher is given says “when we have been through all the questions the meeting will adjourn...a discussion will be held in your absence before a decision is reached”. It further says “should you raise any issues requiring further investigation then these will be investigated prior to reaching a decision” and that “a decision will be communicated in writing”.(p.97). This is not an unfair dismissal case but it does not seem to me that the process followed accords with the ACAS Code of Practice on Disciplinary & Grievance Procedures. That Code stresses the importance of an employee being given sufficient information about the allegations and being given the opportunity to set out their case at a disciplinary meeting once the details of the allegations and supporting evidence have been provided (paras 10-12 of that Code).

57. At the start of the meeting Mr Weaver asked for the investigation evidence and information to substantiate the allegations against the claimant. Mr Fletcher's response was that this was confirmed in the disciplinary letter. Mr Weaver then advised the claimant that she should not take part in the disciplinary hearing because the evidence substantiating the allegations was not being made available to her. The hearing started at 11.00am and the handwritten meeting notes (pages 95-117) indicate that there were multiple adjournments before Mr Weaver and the claimant eventually left at 12.26pm. The sequence of events at the hearing is not entirely clear. What I find is clear, however, is that there was no investigation evidence or further details of the allegations provided to the claimant beyond what was already set out in the two short paragraphs in the disciplinary invitation letter (pp.93-93).

58. The claimant lodged a grievance on 31 January 2020 after the disciplinary hearing had taken place stating that she had been bullied and harassed by senior management (pages 119-120). After the disciplinary hearing the claimant was signed off sick for two weeks with stress (page 121).

59. The outcome of the disciplinary hearing was confirmed in a letter to the claimant dated 13 February 2020 (pp.147-151). It was from DLP rather than the respondent. The decision was to uphold four of the five allegations and issue a final written warning. The allegation which was not upheld was the allegation of breach of confidentiality. This was because in the claimant's absence at the disciplinary hearing "we are unable to understand your version of events and understand what was discussed" (p.149).

60. What is striking about the outcome letter is the extent to which it sets out details about the allegations not put to the claimant in the invitation letter.

61. In relation to allegation 1 it added dates when the claimant had not attended College (as oppose to work) which are stated to be 15 January 2019 and 4 February 2019 but which should refer to 2020. Neither of those dates were included in the original allegations and the date in February is after the disciplinary hearing took place.

62. In relation to allegation 2 it clarified that, despite the second allegation being stated in the invitation letter to be "being late for work", this actually referred to dates when the claimant was late attending College. It set out the relevant dates, the most recent of which was 9 July 2019, i.e. over 6 months before the allegation was brought.

63. In relation to allegation 3 it states that "the confidential information was regarding the future plans of FUNDA and their employees". Mr Fletcher in evidence suggested that the alleged breach of confidence was the claimant using some slides of the respondent's in a presentation at the College. That seems to me wholly inconsistent with the way the breach is described in this outcome letter and in the invitation letter which specifically refers to the breach involving a discussion with Mr Whitaker of the College.

64. In relation to allegation 4 it set out the specific criticisms being “failing to use the required software and making constant grammar mistakes requiring management to continuously check your work before it can be posted on social media”

65. In relation to allegation 5 it said that “publishing incorrect information on behalf of the [respondent] has a negative impact on the organisation’s image which has a potential to bring the [respondent]’s reputation into disrepute”.

66. None of these further details had been provided prior or at the disciplinary hearing.

67. Significantly, the disciplinary outcome letter dated 13 February 2020 also stated that:

“Due to these incidents and the matters arising the organisation have reviewed their policy on apprentices. Having apprentices is no longer considered to be consistent with the goals of the organisation. For these reasons, separate to any allegations discussed in the remit of this process, the contract with Burnley College has been terminated. This is a separate matter that will be discussed with you under separate process.”

68. The respondent did not deny that it had terminated the Agreement with the College. Although Mr Parker said in his evidence that it was simply a case of the respondent no longer paying the College and that that did not prevent the claimant continuing to attend the College (if someone else paid) I find the respondent did terminate the Agreement. Mr Parker and Mr Fletcher were both clear in evidence that they had terminated the contract with Burnley College because they were not getting value for money.

69. On 17 February 2020 the claimant resigned with immediate effect by emailed letter (pp.155-161). She gave her reasons for resigning as a breach of the implied term of trust and confidence and the respondent’s breach of contract in terminating her apprenticeship. In the same letter the claimant appealed against the disciplinary outcome. She made it clear in her resignation letter that she viewed the disciplinary allegations as spurious and as a “direct result of my refusing to end, (November 2019), my apprenticeship before I had completed the entire course” (p.160).

February-March 2020 – resignation and disciplinary appeal outcome

70. The appeal hearing took place on 5 March 2020. Since it happened after the claimant resigned what happened at the hearing cannot be part of the breach of contract she relies on as justifying her resignation. However, the findings and outcome of the appeal are relevant to the issue of the validity of the disciplinary allegations brought against the claimant prior to her resignation.

71. The appeal panel consisted of Hubert Krasinski and Alex Ralph of DLP. The appeal panel overturned the decision to issue a final written warning with regards to absences and lateness (allegations 1 and 2 in the disciplinary invitation letter) but

upheld the decision to issue a final written warning with regards to performance (it is not entirely clear but that would seem to mean allegations 4 and 5 in the disciplinary invitation letter). The appeal outcome letter said that “If [the claimant] had engaged in the initially disciplinary then maybe any issues could have been resolved to the satisfaction of all parties”.

72. The appeal panel found that:

- Allegation 1 (absences): there were explanations for all dates when the claimant was alleged to be absent. They included a day when she was on leave, a day when she had filed a fit note, a Sunday (when the claimant was not scheduled to work) and days where her absence for all or part of a day had been authorised by the respondent’s management including when her mother was taken to hospital.
- Allegation 2 (lateness): the appeal panel accepted these dates were “Out of time” and so difficult to answer. The claimant had in her appeal pointed out that one of the dates was a date when she was not due to be in College
- Allegations 4 and 5 (poor performance and potential damage to the respondent’s reputation): the appeal panel stated that the claimant’s performance was accepted to be of a “high standard” but that there had been a “clear decline” leading to the matter being raised at meetings on 23 October 2019 and 12 November 2019.

73. The appeal outcome letter also suggested that it was the College which had raised concerns about the claimant and that it was Mr Fletcher who had spoken up for her to the College, deciding to retain the claimant despite Ms Chapman suggesting that there were difficulties with her work at the College and that she was behind. The appeal outcome letter says this was evidenced in CCTV footage of a meeting between the respondent and the College. As I have noted above, the respondent did not produce that footage so I cannot take it into account.

Discussion and Conclusions

74. In this part of the judgment I set out my answers to the issues in the List of Issues by applying the relevant law to the facts as I have found them.

Did the respondent breach the Contract in respect of its obligations towards the claimant in co-operating with her and the training provider to enable the claimant to gain her NVQ level 3 qualification in Digital Marketing;

The terms of the Contract

75. I accept Mr Sharples submission that read together, the Contract and the Agreement constituted an English Apprenticeship Agreement as defined by ASCLA 2009 Section A1. I find that the claimant, the respondent and the College clearly intended that that was the arrangement between them. I find a central purpose of the

Contract was to enable the claimant to complete her apprenticeship and obtain the Qualification. The Agreement specifically required the respondent to assist the claimant to complete her apprenticeship (in particular clause 4.1.4 and 4.1.7 of the Agreement). It is also clear that the Agreement envisaged that it would last until the apprenticeship had been completed, providing only specific circumstances in which it could be terminated before then (clause 8.1).

76. The Contract itself does not cross refer to the Agreement. The Agreement includes a Third-Party Rights clause (clause 20.11 at p.58) which means the claimant could not enforce its terms against the respondent. For that reason, I do not find that there was an express clause in the claimant's contract requiring the respondent to co-operate with her and the College to enable the claimant to gain the Qualification. However, I do find there was an implied term to that effect. If not on the basis of custom and practice, I find that up until the point where there were difficulties (in November 2019) that is the basis on which the parties clearly implemented the contract in practice, with the respondent supporting the claimant and allowing her to attend College one day a week.

Was there a breach of that term entitling the claimant to resign?

77. Mr Sharples relied on 3 matters as being a breach of the "cooperation" term. The first was deletion of the claimant's project work. My finding of fact was that this was not a deliberate act by the respondent and that the work had been restored so it cannot amount to a breach of contract. The second was the respondent's failure to provide an employer's reference. The respondent (as both Mr Fletcher and Mr Parker confirmed in evidence) had not provided an employer's reference. That employer's reference was needed to obtain the qualification. The employer's reference was plainly important and the respondent would clearly have known that it would cause difficulty if they failed to provide it. I am not convinced that that would in itself amount to a breach of the cooperation term serious enough to amount to a repudiatory breach of contract entitling the claimant to resign.

78. I am satisfied, however, that the third matter put forward by Mr Sharples was. That third matter was the termination of the Agreement with the College. That undermined a fundamental part of the apprenticeship arrangement. It was wholly unclear who would be paying the College if the respondent was not and how the claimant would be able to finish her course at the College and obtain the Qualification.

79. As I have said, Mr Parker and Mr Fletcher were both clear in evidence that they had terminated the Agreement because they were not getting value for money. It seems to me that the respondent viewed the training provider contract as something for its benefit rather than for the benefit of the claimant. That seems to me consistent with the evidence that Mr Fletcher and Mr Parker gave (which is that they were happy for the claimant to continue to go to College but were not willing to pay for it anymore), and with the fact that the respondent did not discuss the terminating of the Agreement with the claimant. It seems to me that they viewed that training Agreement as a service being rendered to it rather than part of a tripartite arrangement between it, the claimant and the College.

80. There was no suggestion in the disciplinary outcome letter that the reason the Agreement had been ended was concerns about the claimant's ability to complete her College course -instead it said there was a change of policy on apprenticeships generally.

81. In brief, I accept Mr Sharples's primary submission that terminating the Agreement was a breach of the claimant's contract of employment and that it was a repudiatory breach entitling her to resign and treat herself as being constructively dismissed,

82. Strictly speaking that means I do not need to decide whether the respondent was also in breach of the implied term of trust and confidence. For completeness, and in case I am wrong about the breach of the "cooperation term" I have set out my conclusions on that second implied term below.

Did the respondent breach the Contract in respect of the implied duty of trust and confidence by doing the things set out at 1(ii)(a)-(f) of the List of Issues?

83. Although I found that the respondent did encourage the claimant to leave her College course (1(ii)(a)) I do not find that that in itself would breach the implied term of trust and confidence, especially given that I have found that what the respondent was seeking to do was to cement the employment relationship rather than undermine it. I did not accept on the facts that the respondent had deliberately deleted the claimant's projects (1(ii)(b)) and so that cannot form the basis of a breach of contract.

84. I do however accept the submissions from Mr Sharples that the disciplinary allegations made were unwarranted (1(ii)(c)). The disciplinary appeal outcome letter demonstrated that the absence allegations were completely unwarranted. I cannot see any reason why the reasons for absence on those dates would not have been known to the respondent before the disciplinary proceedings were instituted. Even if not, a brief investigation would have brought them to light. Instead, the respondent issued the claimant with a final written warning in relation to them (1(ii)(e)). When it comes to the allegations of lateness, Mr Parker suggested that the claimant had been spoken to before about being five or ten minutes late on a regular basis, although he himself conceded that she always made up the time. The only specific dates referred to in the disciplinary outcome letter were dates of lateness at the College, the last of which took place some six months before the disciplinary hearing.

85. Mr Sharples submitted the most egregious allegation was the one of breach of confidentiality. Given that the allegation referred to 12-19 November 2019, Mr Sharples submitted (and I accept) that the allegation was clearly about the conversation which the claimant had had with her tutor, Ben Whitaker following the 12 November 2019 meeting with the respondent. That was the meeting at which I have found the respondent encouraged her to leave the College course. I accept Mr Sharples's submission that that was clearly something it was appropriate for her to raise with her tutor.

86. When it comes to the performance issues, I accept Mr Sharples's submission that the allegations that the claimant's performance was not up to standard are inconsistent with the decision by the respondent to take her on in October 2019, giving her a pay rise following her appraisal. Although the disciplinary appeal outcome suggested the real concern was a decline in performance after October 2019 the invitation letter (p.93) refers to her being spoken to "on many occasions" which implies a more widespread and longstanding problem.

87. Taken together I do accept that the allegations brought against the claimant were "unwarranted". At the very least, they were unwarranted in regard to the absences, the conversation with Mr Whitaker and the grossly out of time lateness allegations.

88. As my finding of facts make clear, I accept the respondent did fail to provide the claimant with the evidence to support the allegations before issuing a final written warning (1(ii)(d)).

89. The respondent suggested that the issuing of a final written warning only came about because the claimant and her union representative refused (aggressively in Mr Fletcher's description) to participate in the disciplinary meeting. Although Mr Fletcher in his evidence referred to the meeting as an investigatory meeting I find it was to be the only opportunity the claimant had to input into the process before a decision was made. Mr Fletcher suggested that in some way it was up to the claimant to provide detail at the disciplinary hearing. I cannot see how she could reasonably be expected to do so when she had not been given details of the alleged dates of lateness and had not been given any detail prior to the hearing of what confidential information had allegedly been disclosed. Even if the allegations in relation to a decline in performance were sustainable (the only allegations which it seems to me potentially were) it would seem to me that issuing a final written warning in response to a "dip" in performance without previous formal warnings having been issued would itself be a breach of the implied term.

90. When it comes to cancellation of the training provider contract neither Mr Parker nor Mr Fletcher suggested there had been any consultation with the claimant prior to that cancellation (1(ii)(f)).

91. Taking matters in the round it seems to me that if there was not a breach of the implied term that the respondent should take all steps to support the claimant in achieving her NVQ, the breaches of the implied term of trust and confidence were sufficient to enable the claimant to resign and claim that she was constructively dismissed. The respondent had brought disciplinary proceedings against her on matters which I have found were (at least largely) unwarranted. It had failed to provide her with any details of the allegations made against her. It then proceeded to issue a final written warning, having provided no evidence to substantiate the allegations. Even had there been no other conduct by the respondent I would have found that that would be sufficient to breach the implied duty of trust and confidence. Viewed objectively, it seems to me that the employer had brought disciplinary allegations with little or no basis and had handled the disciplinary process in such a way that it was likely or calculated to seriously damage the employment relationship.

If I am wrong that that in itself was sufficient, then I find that the decision to terminate the Agreement without any consultation with the claimant would itself (and certainly cumulatively with those previous breaches) would have been sufficient to breach the implied term of trust and confidence. A breach of that term is a repudiatory breach and would have entitled the claimant to resign and treat herself as having been constructively dismissed.

Summary Conclusions

92. In summary then I find that the respondent was in breach of implied terms and that that breach in the case of the first implied term was fundamental because it went to the heart of the tripartite agreement between the claimant, the college and the respondent. The purpose of the employment at the respondent was for the claimant to achieve a qualification while working in the workplace. Failing to support her in that, and indeed bringing that element of the arrangement to an end, did strike at the root of that contract and seems to me a fundamental breach. In any event, I have found that there was a breach of the mutual term of trust and confidence and the authorities made clear that that is in itself a fundamental breach.

93. There was no suggestion that the claimant had delayed in resigning in response to that breach. There was no question in this case of any affirmation.

94. The claimant's claim that she was constructively dismissed succeeds. She was dismissed in breach of her contract which required two months' notice to terminate that contract.

95. Since the claimant was entitled to resign in response to the respondent's repudiatory breach she was not in breach of contract in doing so and the respondent's counterclaim fails.

Remedy

96. The claimant and the respondent agreed that the starting point for the compensation was 2 months' notice pay. There was agreement on the gross sum (£2598.75 and on which deductions should be made from that. There were three deductions, namely for overpayment of holiday (agreed at £133.98), for monies earned by the claimant while employed by Burnley College (£50.83) and for an overpayment of one week (the gross amount for which was agreed at £288.75). The debate was about whether National Insurance should be deducted from the overall 2-month sum and what deductions should be made from the overpayment.

97. At the hearing, Mr Sharples indicated that he might be in a position to take further instructions on this and I therefore directed that by seven days both parties write to the Tribunal, copying to each other, setting out their final positions on the compensation to be awarded to the claimant if the Tribunal found that her claim succeeded.

98. The Tribunal does not appear to have received any further emails from the parties. I order that the parties write to the Tribunal within 14 days of this judgment

being sent to them to confirm whether the amount due has now been agreed or to set out their final positions in relation to that amount.

Employment Judge McDonald

Date: 21 December 2020

JUDGMENT AND REASONS SENT TO THE PARTIES ON

22 December 2020

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