



EMPLOYMENT TRIBUNALS

Claimant: ZORICA NIKOLIC-PARRY

Respondent: THE COLLEGE OF OPTOMETRISTS

Heard at: By CVP video link on 4 & 5 September 2024

Before: Employment Judge Sutton KC

Appearances

Claimant In person

Respondent Mr C. Hill, counsel

JUDGMENT

The complaint of constructive dismissal is not upheld, and the Claim is accordingly dismissed.

REASONS

Introduction

1. The Claimant was employed by the Respondent from 8 March 2010 until 2 January 2024, when a 12-week period of notice expired following her resignation. She contends that she was constructively dismissed from her employment.
2. By a Claim form presented to the Tribunal on 8 May 2024, the Claimant raised a complaint of unfair dismissal. In the Particulars of Claim attached to the Claim form, the Claimant identified a range of factors, including the management style of Mr Scott to whom she reported and which she described as abrasive; insufficiently remunerated changes to her workload; and negative interactions with certain of her colleagues, which she contended had the cumulative effect of rendering her working life intolerable and causing her to resign. The Claimant alleged that the conduct summarised amounted, to a breach of the implied term of mutual trust and confidence.
3. In the Grounds of Resistance attached to its Response, the Respondent denied that it had acted in a way that gave rise to a breach of the implied term of mutual trust and confidence or that the Claimant had been driven to resign by its conduct. The Respondent asserted that the Claimant's concerns had been the subject of informal and formal grievance investigations conducted by its Chief Executive, Mr Ian Humphreys, and relied upon the conclusions he had reached. It was contended that if, contrary to its case, her contract of employment had been breached, the Claimant's decision to continue working after certain of the matters relied upon took place, amounted to an affirmation of the contract.

List of Issues

4. Although there was substantial overlap, the parties were unable to agree a final List of Issues. The Claimant provided the following List of Issues dated 27 August 2024:-
 - (i) Did the Claimant experience a demanding, challenging and demoralising work environment as a result of Bill Scott's employment in March 2020?
 - (ii) Did the Claimant experience a lack of support from Bill Scott and the continuously increased workload?
 - (iii) Did Bill Scott's uncompromising style of management result in the resignation of a permanent member of the Finance department in October 2022?
 - (iv) Did the Claimant find it difficult to cope with Bill Scott's abrasive management style and filed an 'informal complaint'?

- (v) Was the Claimant paid £500 in respect of a bonus payment rather than £5,000 the Claimant proposed, and Bill Scott did not object to?
 - (vi) Did Bill Scott provide the Claimant with the explanation regarding bonus while the Claimant was employed with the College? Was the Claimant entitled to get an explanation from Bill Scott regarding the bonus payment while the Claimant was employed with the College?
 - (vii) On 5 April 2023, did Lizzy Ostler's way of speaking to the Claimant in an unprofessional and disparaging fashion in front of other staff members make the Claimant feel humiliated?
 - (viii) During Spring and Summer 2023, was Lizzy Ostler being openly critical of the Finance Team's work for whom the Claimant was responsible for, on a few occasions in Senior Leadership Team meetings? Was this done in order to tarnish the work of the Finance Team and the Claimant? Did this amount to criticising someone's work in front of a wider audience?
 - (ix) On 31 August 2023, did Sandra Holmes shout at the Claimant in an extremely rude and aggressive fashion in front of the staff at the meeting and staff present in the open plan office "Zorica, Zorica, hang on, hang on, I am sick and tired of you interrupting me during the whole meeting"? Did that make the Claimant feel humiliated?
 - (x) After the incident on 31 August 2023 was the Claimant signed off from work due to stress and anxiety?
 - (xi) After 31 August 2023, did the Respondent fail to address Ms Holmes conduct?
 - (xii) Were Sandra Holmes actions on 31 August 2023 and the failure of the College to investigate her behaviour the "last - final straw" that led to Claimant's resignation?
 - (xiii) Did the cumulative effect of the above-mentioned actions or lack of actions from the Respondent make the Claimant feel that she cannot continue to work in such a hostile environment?
 - (xiv) Were the issues described above examples of bullying or some of them?
 - (xv) Did the Respondent fail to provide a claimant a safe working environment?
 - (xvi) Was the Claimant constructively, unfairly dismissed from her employment?
5. For its part, the Respondent produced a somewhat differently formulated List of Issues. Although the Respondent provided, at paragraphs 3 – 10 of its List, an outline of the legal principles which the Tribunal is required to apply in determining the claim,

the essential factual allegations are expressed in closely similar terms to the Claimant's version.

6. The Tribunal was content to proceed based on the Claimant's list as setting out a comprehensive statement of the factual allegations she relied upon as amounting cumulatively to a breach of the implied trust and confidence term.

Evidence

7. The Tribunal heard oral evidence from the Claimant and Mr Ian Humphreys, the Respondent's Chief Executive. Each produced a written witness statement on which they were cross-examined. The Tribunal was provided with an agreed bundle of relevant documents. The Respondent also produced a note to accompany their closing submissions.
8. The Tribunal considered both witnesses to be straightforward and truthful and points of factual conflict were limited. The Claimant was willing to make fair-minded concessions on points which did not assist her case. Although it was shown testimony provided by Mr Scott, Ms Ostler and Ms Holmes for example in their grievance interviews, the Tribunal cautioned itself that those individuals, whose conduct was central to the Claimant's complaint, had not been called to give evidence and it had not had the advantage of seeing their account of events tested in cross-examination.

Findings of Fact

9. The Respondent is the professional body for optometrists in the UK. Its functions include acting as a qualification body for the profession, providing guidance and training, as well as raising awareness of the profession with the public, commissioners, and health care professionals. The Respondent currently employs approximately 70 employees.

The Claimant's appointment and role as Head of Finance

10. The Claimant commenced employment with the Respondent in the role of Finance Manager on 8 March 2010 at a gross salary of £62,500. Following a promotion in 2014, she was appointed Head of Finance. In that role, the Claimant was a member of the Respondent's Senior Leadership Team, responsible to the Director of Finance.
11. As Head of Finance, the Claimant was responsible for leading the department's day to day activities and was accountable for the management and improvement of the Respondent's financial accounting processes and systems. She had line management responsibilities and enjoyed good working relationships with her team.
12. Mr Humphreys noted in his evidence that the Claimant was always a diligent and hardworking member of the Respondent's team. He described her as being 'fun and friendly' but observed that, since the Covid pandemic, she was less often present in

the office and seemed to have struggled in adapting to certain organisational changes described below.

Mr Scott appointed Finance Director

13. In March 2020, Mr Bill Scott was appointed to the role of Finance Director. A restructuring and expansion of the duties which Mr Scott's role encompassed led to an increase in the Claimant's workload. Following Mr Scott's appointment, the Claimant described a less harmonious and settled working environment with a heightened level of staff turnover. This cast an additional burden on the Claimant in having to interview and train up new members of staff.
14. The Claimant explained in evidence that she and staff in her team took against what she described as Mr Scott's abrasive management style. The Claimant herself found Mr Scott's tone and manner of interaction with her difficult and challenging at times and that she experienced stress and anxiety as a result.

Relationship with Mr Scott: the Claimant's informal grievance in 2022

15. In Spring 2022, the Claimant escalated her concerns about Mr Scott's style of management by way of an informal complaint to the Chief Executive, Mr Ian Humphreys. She described Mr Scott interrupting her, speaking over her and not letting her talk. In email correspondence to Ms Haydon in April 2022, she explained that she felt Mr Scott had no respect for her and she found his manner undermining and contrary to the College's values.
16. The Claimant attended a meeting with Mr Humphreys and Ms Haydon on 13 April 2022 to provide a fuller account of her concerns. The minutes of that meeting show a serious engagement on the part of Mr Humphreys with the Claimant's concerns and a commitment to follow matters up with Mr Scott. In terms of desired outcomes, the Claimant made it clear that she wished to achieve a good working relationship with Mr Scott, but that he needed to engage with her and her team in a different manner and to provide more support.
17. Mr Humphreys, accompanied again by Ms Haydon, met with Mr Scott on 5 May 2022. The meeting explored Mr Scott's relations with a number of individuals and concerns which had been raised by other members of staff. At the conclusion of that meeting it was agreed that, whatever his intentions, Mr Scott's methods of interaction with colleagues needed to be addressed and improved to ensure that his style of communication was appropriate and in line with the College's values.
18. During this meeting, Mr Scott explained that he was having difficult conversations with the Claimant around her performance, and that he felt his attempts to manage her were prompting her complaints. Mr Humphreys agreed with Mr Scott that he did need to manage the Claimant's performance but should work on his style of interaction to prevent further complaints and impact on staff wellbeing.

19. Mr Humphreys provided his outcome to the Claimant's informal grievance on 24 June 2022. He found that there was a difference in management style between Mr Scott and the Claimant's previous manager. He recommended that Mr Scott and the Claimant undertake regular 1-1 meetings to improve their communication and suggested that a clearly defined job description be produced for the Claimant to enable her better to understand the remit of her Head of Finance role.
20. He informed the Claimant that he had given Mr Scott guidance on expected behaviours and suggested that she work with him constructively to agree working practices. Mr Humphreys also notified Mr Scott of the outcome and pointed him to training courses on managing conflict and performance.
21. Following facilitated discussions with the Claimant and Mr Scott, Ms Haydon, Head of HR, followed up with a Support Agreement and job profile. On Mr Humphreys' understanding at the time, this process and the actions that flowed from it had resolved matters between the Claimant and Mr Scott.
22. It appears that the informal process and the steps that were put in place did lead to a marked improvement in Mr Scott's relations with the Claimant although there was some resurfacing of the behaviour which had led to the Claimant's earlier complaints. The Claimant contended that a member of her team resigned in response to Mr Scott's bullying behaviour, although the Tribunal has not heard from the individual concerned and cannot assess whether this was the case.

Relations with senior colleagues – the Claimant's formal Grievance in 2024

23. Responding to an investigation of the Claimant's formal grievance in 2024, which she submitted during her notice period, Mr Scott explained to Mr Humphreys that he had continued to struggle with the Claimant's approach to work. As the Claimant's manager, he considered that he was required to manage the Claimant to help achieve the Finance department's goals. Mr Scott felt that the Claimant was working at a Finance Manager level and did not take the approach of a Head of Finance, for example, in relation to strategic work and working on budgets.
24. Although Mr Humphreys was not aware of this at the time, Mr Scott had been preparing to introduce a performance improvement plan with the Claimant prior to her resignation. Mr Humphreys stated in evidence that he did not perceive Mr Scott to have been unreasonable in his managerial approach at this point, and that his actions were consistent with an attempt to manage the Claimant.
25. In relation to the interactions between the Education and Finance departments, Mr Scott described Ms Ostler as demanding but not unreasonable and acknowledged she could become frustrated. He recognised that the nature of the Education team's work was demanding.
26. Both Ms Ostler and Ms Holmes were interviewed by Mr Humphreys as part of the same investigation and described issues they experienced when working with Finance.

Ms Ostler felt that the Finance team did not deliver the service expected, with lots of errors, misfiling and poor record keeping. Ms Holmes felt that that the Claimant added a lot of confusion into processes and did not make proper use of systems. Ms Holmes said that she did not have confidence in the work produced by Finance and the Claimant herself.

Lump sum payment for preparation of annual budgets

27. The Claimant was asked by Mr Scott in the Autumn of 2022 and Spring of 2023 to prepare and revise two annual budgets. The Claimant said that she agreed to undertake this work in order to promote better working relations with Mr Scott. The two of them discussed the potential for an additional payment to be made for this work. In her evidence, the Claimant asserted that she undertook the work on the two budgets acting on Mr Scott's assurance that she would be paid a £5,000 bonus. Although that may have been the Claimant's hope, the Tribunal does not find that Mr Scott provided any assurance to that effect.
28. In fact, and in line with the process operated by the Respondent where *ad hoc* payment is claimed for a specific item of additional work, the Claimant completed a form on 12 July 2023 in which she sought an additional payment for producing a budget in October 2022 and a revised budget in March 2023. In her form, the Claimant implicitly criticised Mr Scott for requiring the October budgets to be produced using the Teams platform rather than Excel, which she described as 'disastrous'.
29. As well as highlighting the work involved in production of the budgets, the Claimant pointed to her overall work commitment, which included training 13 members of staff since December 2021 due to high turnover. She claimed that this commitment, along with the heavier burden of budget production justified an additional payment.
30. In an email to Mr Scott sent on 20 July 2023, shortly after the additional payment application form had been completed, the Claimant referred Mr Scott to the matters she had included in the form and said that she felt £4,000, made up of £2,000 for each budget would be 'a fair amount of bonus'. In second email sent later the same afternoon, the Claimant amended this to £5,000 in total. She did not suggest that either sum had previously been agreed with her manager when the work was requested.
31. Ultimately, in September 2023 the Claimant was paid a combined bonus for these pieces of work in the sum of £500. She felt that this was very unreasonable given the demands of the additional work she had undertaken. She drew a comparison between this level of remuneration and the fee that would be charged by an external consultant for equivalent work.
32. The Claimant chased Mr Scott to provide the rationale for the level of bonus she had received. She states that Mr Scott failed to provide any explanation for the disparity between what she contends had been agreed, namely £5000, and the £500 bonus she eventually was paid.

33. In his letter dated 13 November 2023, having had the opportunity to consult with the Head of HR about the size of the award, Mr Scott responded:-

As you will appreciate we cannot discuss payments for specific individuals with you, however the amount paid has taken into consideration the degree to which you have operated outside your role and at a higher role level (which is more senior to some of the staff whose payments you compare yourself with), any extra hours work that need compensation that cannot be accommodated via toil.

Assisting in the preparation and monitoring of budgets (including the work you were involved within) is an integral part of your job description evaluated by the external consultants. In addition your job profile allows additional work to be allocated as required. As such the level of complexity you handled in helping with this is also not out of sync with a head of department role level. However, your support was appreciated and in recognition I was not able to guide you to degree I would normally have, it was agreed that a lump sum of £500 would be awarded to recognise the role you undertook in the budgeting process.

Whilst we fully appreciate you managed changes to your department including staff changes and training, these activities are a core part of your senior level and manager role, in addition to managing turnover, therefore it was not felt that this in itself should attract a payment. Consideration was given to your comments that you worked extra hours during the period of staff changes (no specifics were given) and whether any payment should be made for this, however, the College believes it may have already compensated this via toil over 2021, 2022 and 2023. Other support including from myself and temps was also provided during this period to you. Should you feel we need to consider this further, please provide specifics details of extra hours worked.

34. The issue of the additional payment was raised by the Claimant in her formal grievance, which she submitted after she had resigned. Mr Humphreys, who conducted the grievance investigation, explained in evidence that the College did not give bonuses, but employees or their managers were able to complete a form for a lump sum payment to be made as an allowance in respect of additional work or responsibility they had undertaken.
35. This is a discretionary payment and there is no contractual entitlement to it. The process is that allowance forms are passed to the Chief Executive to review with human resources in order to decide whether a lump sum additional payment should be made and if so the appropriate amount to award. Mr Humphreys explained that care is taken to ensure that any lump sum is in line with the level of prior payments and the Respondent is mindful of its status a charitable body.
36. Such requests are usually made by line managers, often without the knowledge of the individual concerned. Over the last few years, the highest value lump sum that Mr Humphreys had authorised was for £5,000. In that case, the person was covering two roles in addition to their own. The next highest were awards of £2,000 – £2,500 in respect of two employees who had covered a more senior role for over 7 months. They had to step up without supervision into a role of seniority during that cover.

37. The Respondent typically awards between £500 - £700 to staff who are undertaking one-off activities which required more work, or a higher grade, level of thought or responsibility. The Claimant had herself received an earlier payment of £500 in respect of additional facilities work she assisted with in 2018.
38. When interviewed by Mr Humphries during the formal grievance investigation, Mr Scott said that he had agreed to review with the Claimant her claim for an allowance which he understood was based on her working long hours earlier in the year. The Claimant had not redesigned the budget but was working on nominal codes. The College's external financial consultant, Roger Horton, had restructured the budgets. In his consideration of her formal grievance, Mr Humphreys reviewed the Claimant's Head of Finance job profile, which did include responsibility for budgets.
39. Mr Humphreys explained that the decision was ultimately one for himself, reached in consultation with human resources. Following a review of the form, the extra contribution made by the Claimant, the scope of her role and the need to observe consistency with other roles. Mr Humphreys endorsed the reasons for the size of the award given in Mr Scott's letter of 13 November 2023.

Deteriorating relationship with Ms Ostler

40. The Claimant observed in her evidence that her relationship with two senior colleagues deteriorated significantly after the Spring of 2022. She relates this to the need for her to highlight discrepancies in sales invoices issued by the College's Education Department.
41. The Claimant considered that the raising of these issues and the need to chase for responses soured her relationship with Ms Ostler, the Director of Education and her deputy, Ms Sandra Holmes. This change in behaviour meant that small mistakes were blown out of proportion with the aim, as the Claimant saw it, of discrediting her work and that of her direct reports.
42. At an office meeting, held in an open plan environment, on 5 April 2023, the Claimant says that Ms Ostler spoke to her in a manner she regarded as unprofessional and humiliating, within earshot of two of junior colleagues. At the conclusion of the meeting, Mr Scott, who was sitting opposite the Claimant, described Ms Ostler's tone of voice and attitude as 'robust'.
43. After the meeting, the Claimant emailed Ms Ostler to let her know how she felt and to ask her to stop behaving in that manner in the future. In her response, sent on 5 April 2023, less than an hour after the Claimant's email was sent, Ms Ostler responded: -

'I am sorry that you were upset, I was too. I had no intent to humiliate you at all, but I am very frustrated at how long this has taken, and that what we had discussed had dropped off your radar and we are now halfway through the year. I think we came to a good conclusion, so I hope we can both take that away.'
Best wishes Lizzy

44. The email communications that followed between Ms Ostler and the Claimant were respectful and cordial, with Ms Ostler thanking the Claimant for her work on revisions to the budget and commending her for making 'huge progress'.
45. The Claimant stated in evidence that, during the spring and summer of 2023, Ms Ostler was openly critical of the Finance Team on several occasions at Senior Leadership Team meetings which the Claimant herself attended. She maintained that no other department's work was commented upon or criticised in this way and the Claimant felt singled out in front of her fellow senior colleagues. The Claimant said that Ms Ostler's criticisms were either unfounded or exaggerated.
46. An instance of behaviour on Ms Ostler's part which the Claimant found objectionable was an email sent on 25 July 2023 in which Ms Ostler commented 'we need to find a way to get it (invoice) against the right line on the management accounts.' The Claimant regarded this email, copied to the Chief Executive, as having been sent deliberately to denigrate her work. She found the email 'demotivating and humiliating' and wrote to Ms Ostler on the same day protesting about her lack of appreciation of the Claimant's work and efforts to meet Ms Ostler's reporting needs.
47. Ms Ostler again responded promptly by email sent the same afternoon, in a conciliatory tone, explaining that the Chief Executive had been copied into the email chain because of the sum involved and the need for sign-off at his level. The email concluded 'your efforts are appreciated...I hope mine are too'.

Lack of appreciation for work of Finance team

48. The Claimant considered that the work of her team was insufficiently recognised and praised. By way of example, she pointed to an occasion in the spring of 2023 when Mr Humphreys, the Chief Executive, directed only 'modest' praise for the work of the Finance team for its work on the audit, while acknowledging the contribution of 'all teams' to its delivery.
49. The Claimant felt that the contribution of other teams was relatively minor compared with that of her own team. She perceived that this marked a shift in the organisation's attitude towards her and that her efforts were not appreciated.

Meeting on 31 August 2023 – Ms Sandra Holmes' conduct

50. The Claimant arranged a meeting to discuss examiners' payroll codes, with the aim of automating the process. The meeting was conducted by internet link on 31 August 2023 and was attended by Ms Sandra Holmes, Deputy Education Director, the Claimant and members of the Education team. A junior colleague within the Finance team, Ms Ling, was also present. The Claimant acknowledges that her internet connection was not functioning well during the meeting.
51. At one point during the meeting, the Claimant states that Ms Holmes commented 'Zorica, Zorica, hang on, hang on, I am sick and tired of you interrupting me during the

whole meeting'. She contends that Ms Holmes' tone was rude and aggressive and that she was left feeling distressed and humiliated.

52. The Claimant was not aware of the fact that, in consequence of her poor internet reception, she was talking over what others were saying in the meeting and no one messaged her to point this out. She recalls being interrupted herself on several occasions.
53. Ms Holmes was interviewed by Mr Humphreys about this episode as part of a formal grievance investigation undertaken during the Claimant's period of notice. Ms Holmes said that meeting had been called by the Claimant as a result of a back and forth between the Finance and Education departments to find a solution to an issue, which was creating a lot of work for both teams
54. She recalled that the meeting was frustrating – the Finance and Education teams were at cross purposes about why it had been called. Ms Holmes stated that every time she spoke, the Claimant spoke over her, which caused Ms Holmes to get cross and loudly say "please don't speak over me". She acknowledged she had been loud, but explained this was partially because she was not clear if the Claimant could hear her. On reflection, Ms Holmes accepted this may not have been appropriate.
55. Ms Ling Li in her interview with Mr Humphreys explained that the Claimant's proposed finance process would have involved a potentially unnecessary workload impact for Education and that this created tension.
56. Ms Simakova's view was that the Claimant seemed to be taking the comments in the meeting personally, despite no accusatory comments being made. She explained that the Claimant seemed to be defending herself, which meant she felt a need to respond to any comments. Ms Simakova perceived that Ms Holmes had felt like she was being interrupted.
57. Following this episode, the Claimant was signed off work due to stress and anxiety and felt demotivated at work. She says that Ms Holmes offered no apology for her conduct at the meeting.
58. After the meeting, Mr Scott attempted to make contact with the Claimant by telephone on two occasions but she declined to take the calls. Ms Haydon contacted the Claimant the following week to propose a meeting but the Claimant responded that she was not able to discuss the episode without crying.
59. When the Claimant returned to work, she met with Mr Scott on 29 September for a one-to-one meeting. He said that he had spoken with Ms Ostler about the meeting, without giving a specific account of what had been discussed. The potential for a grievance was discussed, with Mr Scott saying that it would be a long process. He commented that, in the 1980s it was normal for people to shout at each other. The Claimant expressed the hope that society had moved in since then.

Resignation tendered on 10 October 2023.

60. The Claimant characterised the episode as the 'last straw' which, taken in combination with Mr Scott's abrasive management style and lack of support, the 'bonus' issue and Ms Ostler's emails and comments, led to a such a hostile environment that she had no option but to resign.
61. When she handed in her resignation, the Claimant was told by Ms Haydon, Director of People, that she could raise a formal grievance under the Respondent's procedures as an alternative to resignation. But the Claimant stated that, at that point, she had lost faith that changes to the 'abrasive management culture' would happen and that she was not sufficiently robust emotionally to go through a further formal process at that time.
62. Mr Scott had notified the Claimant immediately after the tendering of her resignation that he had found a replacement to fill her roll. This precipitate action appears at best to have been insensitive and ill-judged, but the Claimant candidly stated in evidence that it did not impact on her decision to stand by her decision to resign.

Post -resignation grievance

63. In the event, the Claimant decided to raise a formal grievance by letter of 26 November 2023 during the currency of her notice period. A grievance meeting with the Claimant took place on 12 December 2023, conducted by Mr Humphreys. He understood that the main thrust of the Claimant's grievance was that her work and that of the Finance department was not appreciated and sufficiently acknowledged. She also felt that Ms Holmes should have apologised to her following the meeting on 31 August and that Mr Scott should have openly supported her to a greater extent.
64. The Claimant stated that the combination of Ms Holmes' behaviour on 31 August; Ms Ostler's conduct earlier in the year and the lump sum payment, taken in combination, made her feel she must resign.
65. Mr Humphreys pointed out to the Claimant that he had specifically singled her out for praise as well as commending the work of her department and thanking them for their efforts.
66. Mr Humphreys said during the grievance meeting that he was concerned as to how the College could support the Claimant during the final portion of her employment and raised the facility of a stress risk assessment. The Claimant declined this step, saying that she felt it was 'not a good investment of [her] time'.
67. In terms of what the Respondent could learn from the Claimant's experience going forward, the Claimant said to Mr Humphreys that it should work on the culture of 'ungratefulness' that she felt she had experienced.

68. Mr Humphreys asked the Claimant if there were any triggers for her anxiety that the college could address during the balance of her period of employment. The Claimant responded that she was comfortable continuing to report to Mr Scott, but that she did not attend meetings with Ms Ostler or Ms Holmes in order to mitigate her stress.
69. Having met with the Claimant to discuss her concerns, Mr Humphreys conducted interviews with a range of staff members, including Ms Ostler; Mr Scott, Ms Kristina Simakova (Education Manager), Ms Ling Li (Finance Assistant), Mr Roger Horton, financial consultant and Ms Sandra Holmes. The notes of interview reflect a balanced and probing approach.
70. A formal outcome to the grievance was provided to the Claimant on 3 March 2024, by which time the period of notice had elapsed and she was no longer an employee of the Respondent. Mr Humphreys' findings were in summary as follows.
71. In relation to the complaint concerning Ms Holmes' conduct on 31 August 2023, the evidence showed that Ms Holmes had raised her voice, but in a context of poor internet connection, he could understand why she might have felt it was necessary.
72. Mr Humphreys concluded that this was a difficult conversation where both Finance and Education were defending their respective departments while trying to find a solution. Both Ms Holmes and the Claimant were equally upset – from Ms Holmes' perspective, because she kept being interrupted, and from the Claimant's perspective, as she was reacting defensively to Ms Holmes' points.
73. The tone of the discussion was further exacerbated by the poor internet connection. This was a tense conversation between peers each of whom were two senior members of staff. Mr Humphreys found that this was not bullying or harassment towards the Claimant, but a highly charged meeting with frustrated participants on both sides.

Work during notice period

74. The Claimant decided to work through the three months period of her notice. She says that during this time she did her best to avoid contact with members of the Respondent's staff she says had contributed to her decision to resign. She explained that she worked her notice out of loyalty to the Respondent and because there were various administrative functions that relied on her know-how and experience.
75. The Claimant secured alternative employment on 14 June 2024, six months after she left the Respondent.

Legal principles and guidance

76. The complaint is one of constructive unfair dismissal. It is therefore necessary for the Claimant to establish a dismissal pursuant to section 95(1)(c) of the Employment Rights Act 1996. To discharge this burden, the Claimant must show on the balance of

probabilities that she was entitled to terminate her contract of employment by reason of the Respondent's conduct.

77. If the Claimant establishes that she was constructively dismissed, the Tribunal goes on to consider whether such dismissal was fair or unfair, having regard to the requirements of s.98 of the Act.
78. In Kaur v Leeds Teaching Hospitals NHS Trust [2018] EWCA Civ 978, the Court of Appeal set out five questions that should be addressed in order to determine whether an employee has been constructively dismissed:-
- a. What was the most recent act or omission on the part of the employer which the employee says caused, or triggered, their resignation?
 - b. Has the employee affirmed the contract since that act?
 - c. If not, was that act or omission by itself a repudiatory breach of contract?
 - d. If not, was it nevertheless part (applying the approach explained in Waltham Forest v Omilaju [2004] EWCA Civ 1493) of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a repudiatory breach of the implied term of trust and confidence?
 - e. Did the employee resign in response to that breach?
79. The test for whether there has been a repudiatory breach of contract is an objective one, and the issue of whether a breach of contract is sufficiently serious to be classed as repudiatory is a question of fact and degree.
80. In Eminence Property Developments Ltd v Heaney [2010] EWCA Civ 1168, the Court of Appeal explained that the test encompasses whether, looking at all the circumstances objectively, that is from the perspective of a reasonable person in the position of the innocent party, the contract breaker has clearly shown an intention to abandon and altogether refuse to perform the contract.
81. The Court of Appeal observed in Tullett Prebon Plc v BGC Brokers LP [2011] EWCA Civ 131, that an employer's intention may form part of the overall assessment of whether, objectively speaking, there has been a repudiatory breach.

Implied term of mutual trust and confidence

82. As formulated by the House of Lords in Malik v Bank of Credit and Commerce International [1998] AC 20, conduct relied upon as constituting such a breach of the implied term must impinge on the relationship in the sense that, looked at objectively, it is likely, without reasonable or proper cause, to destroy or seriously damage the degree of trust and confidence the employee is reasonably entitled to have in his employer.

Last Straw cases

83. An employee can claim to have been constructively dismissed if he or she resigns in response to a series of breaches of contract or a course of conduct by their employer which, taken cumulatively, amounts to a breach of the implied term of trust and confidence (i.e. that crosses the “*Malik*” threshold).
84. In *Waltham Forest v Omilaju*, referred to above, the Court of Appeal gave guidance as to approach to be taken in “last straw” cases
- a. The final straw itself must contribute something to the breach, although what it adds might be relatively insignificant;
 - b. The final straw must not be utterly trivial;
 - c. The act does not have to be of the same character as earlier acts complained of;
 - d. An entirely innocuous act on the part of the employer cannot be a final straw, even if the employee subjectively views the act as hurtful and destructive of their trust and confidence in the employer.

Affirmation

85. An employer’s repudiatory breach does not bring the contract to an end automatically; the contract is not terminated until the breach is accepted by the employee. Where the employee affirms the contract after the breach, they will have waived their right to accept repudiation.
86. In *WE Cox Toner (International) Ltd v Crook* [1981] ICR 823, the EAT set out the principles that apply to affirmation in the employment context at [828]:
- a. Mere delay by itself (unaccompanied by any express or implied affirmation of the contract) does not constitute affirmation; but prolonged delay may be evidence of implied affirmation.
 - b. If the innocent party calls on the guilty party for further performance of the contract, they will normally be taken to have affirmed the contract since such conduct is only consistent with the continued existence of the contractual obligation.
 - c. If the innocent party further does acts which are only consistent with the continued existence of the contract, such acts will normally show affirmation. However, if the innocent party performs the contract to a limited extent but at the same time makes it clear that he is reserving his rights to accept the repudiation or is only continuing to allow the guilty party to remedy the

breach, such further performance does not prejudice his right subsequently to accept the repudiation.

Employee must resign in response to the breach

87. To establish constructive dismissal the employee must be able to show that they resigned in response to the relevant breach rather than for some extraneous reason. This encompasses the employee showing that the breach “played a part” and be “one of the factors relied upon” in their leaving; see *Abbycars (West Horndon) Ltd v Ford* UKEAT/0472/07.

Conclusions

88. Having recorded its findings of fact and the legal principles and guidance that fall to be applied in this case, the Tribunal turns to consider the issues set out at the start of these Reasons.
89. Issues (i) – (iv) address the Claimant’s working relationship with Mr Scott. The Tribunal accepts that the Claimant found Mr Scott’s style of management irksome and uncongenial and at times demoralising. As noted by Mr Humphreys, there was a contrast in approach between Mr Scott and his predecessor, with whom the Claimant appears to have had a better working relationship.
90. The Tribunal found evidence that Mr Scott had a tendency to behave in somewhat blunt and heavy-handed manner and to show a lack of sensitivity when a more supportive and empathic approach would have been helpful and productive. It is clear that he had reservations about the Claimant’s fitness for the Head of Finance role, but instead of encouraging and nurturing her, he seems to have made increasing demands upon her time and energies.
91. But these deficiencies in Mr Scott’s person management skills and approach did not, in the Tribunal’s judgment, reach a level, whether viewed as individual interactions or in terms of their cumulative effect, of a breach of the implied trust and confidence obligation, which requires a severe test to be applied. The Tribunal has revisited the correspondence in the hearing bundle to gain an impression of the day-to-day communications passing between the Claimant and her manager and has also had regard to the acknowledged improvement in Mr Scott’s style of interaction following the informal grievance and the interventions that were put in place as part of that process.
92. The Tribunal accepts that the cumulative impact of Mr Scott’s style of management, taken with other matters discussed below, was upsetting and demoralising for the Claimant and that she experienced symptoms of stress and anxiety. But the Claimant’s response, while relevant to its inquiry, cannot itself establish a breach of the implied term given the essentially objective assessment the Tribunal is required to undertake.

93. The Tribunal detected in the Claimant's evidence and the contemporaneous correspondence a heightened sensitivity to criticism. The Claimant took considerable pride in the work of her team and set high professional standards for herself. She was justifiably aware of the contribution she had made to the financial administration of the College over many years. She did not find it easy to process criticism of herself or her team's work, and that fragility was inevitably heightened when the pressures of her role and the demands made upon her increased.
94. Turning to issue (v), it is uncontroversial that the Claimant was paid £500 for the additional work she had undertaken on the two budgets. The Tribunal does not find that the Claimant undertook this work acting on an assurance from Mr Scott that she would receive a substantially higher sum. That may have been her hope, but it was not one that was encouraged by her manager, still less the subject of a binding commitment. Both she and Mr Scott appreciated that the matter of approving an award and setting a figure would ultimately fall within the discretionary purview of the Chief Executive, with advice from the Head of HR.
95. Although the point was not specifically advanced by the Claimant, the Tribunal does not find that the exercise of Mr Humphrey's discretion in assessing the appropriate level of payment gave rise to a breach of the implied term. He has explained the rationale for setting the figure at £500 and the reason why much higher awards were judged appropriate in quite different circumstances such as a sustained period of acting up into heavier and more responsible roles.
96. The Claimant rightly contends, at issue no. 6 that she received an explanation of the reasons why the additional award was set at the level it was after she had resigned, although during the period of notice. The Tribunal does not consider that the fact that this explanation was not forthcoming at the time the additional payment was notified to the Claimant gives rise to a breach of the implied term or that it contributed to a series of acts or omissions for the purposes of the 'last straw' doctrine.
97. When it was provided to the Claimant, the explanation for the level of award was, in the Tribunal's judgement, credible and rational. The Claimant's complaint under this heading is somewhat undermined by her erroneous contention that she had been promised a much higher award as a precondition of undertaking the work on the two budgets.
98. The Tribunal turns to issues number (vii) and (viii) which each concern the Claimant's interactions with Ms Ostler. Having considered the Claimant's account of events and her reaction to critical comments made by Ms Ostler, along with contemporaneous correspondence and notes of interview during the formal grievance process, the Tribunal does not consider that Ms Ostler's conduct amounted to a breach of the implied term or contributed to a pattern of conduct the cumulative effect of which was to give rise to a breach.
99. It is clear that relations between Ms Ostler's and the Claimant's departments were strained at times, and this was reflected in the tenor of some of the exchanges. But

these interactions did not exceed the threshold of what is to be expected in this type of working environment, allowing for the inherent tensions and differences of opinion and perception that are likely to arise. There is no evidence that Ms Ostler's style of interaction was gratuitous or aimed at causing hurt or offence.

100. Neither did the Respondent encourage or endorse Ms Ostler acting in such a manner. As already noted, the Claimant, for commendable reasons, was proud and protective of the work of her department and took criticism very much to heart.
101. Issues (ix)-(xii) focus on Ms Holmes conduct on 31 August 2023 and the Respondent's response to that event. Ms Holmes' choice of words on that occasion was intemperate. In that environment, they were likely to be embarrassing to the Claimant and that was indeed their impact.
102. But the conduct needs to be considered in its context, and in particular the fact that, unbeknownst to the Claimant, she was in fact repeatedly talking across Ms Holmes because of the lag on the internet connection. While that does not excuse intemperate and discourteous language, it does explain why Ms Holmes lost her composure and spoke as she did. It was an isolated episode where language of that kind was used by Ms Holmes towards the Claimant and not representative of their typical style of interaction.
103. Although the Respondent, and Mr Scott specifically as the Claimant's line manager with a duty to support to her, might have considered it appropriate to request an apology from Ms Holmes and make an open statement that the comments should not have been made, the fact that did not occur does not serve to elevate the episode to a breach of the implied trust and confidence term. Neither can it realistically be viewed as part of a series of acts or omissions the cumulative effect of which was to amount to a breach.
104. Addressing the balance of the issues raised by the Claimant, the Tribunal does not find that the cumulative effect of the matters complained of gave rise to a hostile or unsafe working environment which justified the Claimant in her decision to resign. Neither did the episodes which have been focussed upon amount to bullying – viewed singly or in the round. The fact that the Claimant found her role less and less congenial, and that she was stung by criticisms of her department's work, does not objectively support the conclusion that the trust and confidence obligation was breached.
105. In conclusion, the Tribunal rejects the contention that the Claimant was constructively dismissed from her employment with the Respondent and the claim must fail on that ground. It is unnecessary to determine whether, had such a breach of contract been established, the Claimant by her subsequent conduct should be taken to have waived the breach and affirmed the contract.

Case Number 2219588/2024

Employment Judge Sutton KC

9 October 2024

London Central

Date sent to the parties:

22 October 2024

For the Tribunal Office: