

JERSEY / JUDGMENT

Maria Manuela Leite v Jason's Limited

COURT
IN THE EMPLOYMENT AND DISCRIMINATION
TRIBUNAL

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IN THE EMPLOYMENT AND DISCRIMINATION TRIBUNAL

IN THE MATTER:	BETWEEN
	MARIA MANUELA LEITE
	CLAIMANT
	AND
	JASON'S LIMITED
	RESPONDENT
	TRIBUNAL

JUDGMENT

Reference: [2017] TRE216 Hearing Date: 11 & 12 June 2018 Before: Mrs H G Griffin, Chairman
Appearance: For the Claimant: In person, supported by her son, Mr N Ribeiro For the
Respondent: Advocate A Brown Translator: Mr M Lopes THE DECISION The Tribunal finds that
although the Respondent was in repudiatory breach of contract, the Claimant affirmed the
contract. Consequently, the Claimant's claim for constructive unfair dismissal is rejected. The
Tribunal finds that the Claimant's claim that the Respondent failed to provide her with a written
statement of terms succeeds. THE REASONS

1. The Respondent is a barber shop located in St Helier. Mr A Fitzpatrick is the Respondent's sole owner and he also runs the business. At the time of the termination of the Claimant's employment, the Respondent had three employees, including the Claimant.
2. The Respondent employed the Claimant as a hairstylist between 1 April 2009 and 28 November 2017, when she resigned without notice claiming constructive dismissal. Case Management
3. By a Claim Form presented on 11 December 2017, the Claimant brought a number of complaints as set out below. The Claimant's case as formulated in her Claim Form
4. The Claimant claimed that:

- a) she was constructively and unfairly dismissed by the Respondent;
 - b) the Respondent failed to provide the Claimant with itemised pay statements; and
 - c) the Respondent failed to provide the Claimant with a statement of employment terms, (together “the Claims”).
5. The Respondent denied the Claims.
6. The parties attended a Case Management Meeting before a deputy chairman on 2 March 2018 at which various orders were made and subsequently recorded in Case Management

Orders.

7. At the Hearing, the Claimant agreed that she had withdrawn her claim relating to itemised pay statements at the Case Management Meeting. However she denied withdrawing her claim relating to employment terms. In the absence of a written confirmation of withdrawal from the Claimant or in the Case Management Orders, confirmed that the Claimant's claim relating to the provision of a statement of employment terms could proceed. Respondent's counterclaim
8. The Respondent withdrew its counterclaim against the Claimant during the course of the Hearing. Constructive dismissal
9. The Respondent accepted that the Claimant was an employee and had sufficient continuous employment to claim protection from unfair dismissal. 10. In her written submissions and at the Hearing, the Claimant claimed that the following acts amounted to a breach by the Respondent of the implied duty of mutual trust and confidence: a) the Respondent's response (or lack of response) to the Claimant's grievance (“Grievance”); b) the alleged comments made by Mr Fitzpatrick and Mr Marciniak when the Claimant received an abusive telephone call at the salon (“Phone Incident”); and c) the behaviour of Mr Marciniak and Miss Legniece after the Claimant made a mistake on the till on 20 November 2017 (“Till Incident”). 11. The Claimant identified the Till Incident as being the ‘last straw’ which directly led to her resignation on 28 November 2017.
12. The Respondent denied the Claimant's allegations and denied that the Claimant was constructively dismissed. It submitted that, to a large extent, the Claimant's own behaviour contributed to her situation. The Respondent submitted that the Claimant resigned for a number of reasons, namely:
- a) for personal reasons; and
 - b) to start a new job.
13. The Respondent submitted that it acted reasonably in view of the circumstances, the Respondent's size and administrative resources available to it. Breach of Article 3 – statement of terms

14. The Claimant submitted that, in breach of the provisions of Article 3 EYL:
 - a) the Respondent did not provide her with a copy of the Contract; and
 - b) the Contract did not record the Claimant's commencement date or the Respondent's grievance procedures.
15. The Respondent denied the Claimant's arguments submissions. The Respondent submitted that:
 - a) Mr Fitzpatrick provided the Claimant with a signed original copy of the Contract;
 - b) the lack of date on the Contract was an oversight which did not cause any adverse impact on the Claimant; and
 - c) the Respondent followed a fair grievance procedure. Representation
16. The Claimant was not legally represented. She was supported at the Hearing by her son, Mr N Ribeiro. Mr M Lopes provided translation services to the Tribunal.
17. The Respondent was represented throughout the process by Advocate Brown. Documents and evidence Witness evidence
18. On behalf of the Claimant, the Tribunal received witness statements from:
 - a) the Claimant herself;
 - b) JK (a customer);
 - c) PF (a customer); and
 - d) PMG.
19. The Claimant, JK and PF each gave evidence under oath. PMG did not attend the Hearing to give evidence under oath and was therefore unable to attach any weight to his witness statement.
20. On behalf of the Respondent, the Tribunal received witness statements witness statements from:
 - a) M A Fitzpatrick (owner of the Respondent);
 - b) Mr G Marciniak (employee);
 - c) Miss K Legniece; and
 - d) ADC (neighbouring business owner).
21. Each of the Respondent's witnesses gave evidence to the Tribunal under oath. Hearing File
22. The Claimant provided an agreed file of documents to which each party referred during the course of the Hearing.

Submissions

23. Both parties provided detailed written representations for my attention before the Hearing and also made their arguments orally by way of submissions. Evidence
24. I considered all of the evidence (both written and oral) provided by each of the witnesses. However, I only summarise in this judgment the evidence which was relevant to the issues. I considered the records of meetings between the Claimant and both the Womens' Refuge and CAJ, but I note that those reports were not statements of fact but summaries of information which the Claimant provided to those service providers.

Background

25. The Claimant confirmed that, until the Phone Incident on 30 September 2017, she generally enjoyed a good working relationship with her colleagues and Mr Fitzpatrick. I heard that the Claimant was hard-working, conscientious and a highly respected hair stylist and that the Claimant also had an excellent attendance record; she was always punctual and, until the final week of her employment, was never absent on sick leave and never provided any medical certificates to Mr Fitzpatrick.
26. The Claimant suffered from mental health issues, including depression and anxiety. The Claimant told the Tribunal that she was:
 - a) a very private person;
 - b) inclined to worry excessively about what people thought of her; and
 - c) had a tendency to over-analyse issues.
27. The Claimant submitted that Mr Fitzpatrick knew that the Claimant was vulnerable and that he should have taken extra care when dealing with her in the workplace. She further submitted that because Mr Fitzpatrick knew that she had thyroid problems, he should also have known that she may also have been suffering from depression. The Claimant believed that Mr Fitzpatrick should have investigated her thyroid health issues on the internet in order to find out any other potential health issues.
28. Mr Fitzpatrick gave evidence that he did not know that the Claimant suffered from depression until he received her grievance from her on 23 October 2017, claiming he was aware that she suffered from "mood swings", but he did not know that she was depressed. The parties agreed that, until 22 November 2017, the Claimant was never absent on sick leave.
29. I accepted Mr Fitzpatrick's evidence that he did not know that the Claimant suffered from, and was being treated for, depression before 23 October 2017. Statement of Terms

30. The parties agreed that the Claimant's key terms were set out in a contract of employment ("Contract") which was signed by both parties but which was undated. The Claimant had inserted her own name and address in manuscript into the Contract.
31. Mr Fitzpatrick gave evidence that the Claimant signed two copies of the Contract, one of which he put on file and he gave the other to the Claimant immediately. Mr Fitzpatrick suggested that the Claimant may have lost the Contract during a series of house moves.
32. The Claimant strongly denied having received a copy of the Contract. She gave evidence that she was always very careful with important paperwork and that she still kept copies of contracts from previous employers.
33. Mr Fitzpatrick acknowledged that the Contract did not include a record of the Claimant's employment start date. Mr Fitzpatrick gave evidence that this was an unintentional oversight where he forgot to fill in the space provided on the Contract for the Claimant's start date. Phone Incident – 30 September 2017
34. On the afternoon of Saturday 30 September 2017, an anonymous woman ("Anonymous Caller") telephoned the Respondent's salon ("Salon") asking to speak to the Claimant ("Anonymous Call"). The Anonymous Caller was extremely abusive to the Claimant and accused the Claimant of sending photographs of herself to her husband.
35. The Claimant was deeply affected by the Anonymous Caller. I accepted the Claimant's evidence (which was supported by Miss Legniece) that she was tearful after the call and was shaken up by the experience. Indeed, the Claimant gave evidence that her mental health "went downhill after the phone call" and she "worried what people thought".
36. Miss Legniece gave evidence (which the Claimant denied) that the Claimant started to speak obsessively about the Anonymous Call to Miss Legniece and to the Claimant's customers. After a while, Miss Legniece began to find this tiresome. Allegations against Mr Fitzpatrick
37. The Claimant gave evidence that, in response to the Anonymous Call, in front of customers and colleagues, Mr Fitzpatrick called the Claimant to the telephone in a loud voice saying "a woman is complaining that you sent photos of yourself to her husband".
38. Mr Fitzpatrick denied that:
 - a) he spoke to the Claimant in a loud voice which could have been heard by customers over the noise in the Salon; and
 - b) he said that the Anonymous Caller was accusing the Claimant of sending pictures of herself to her husband.
39. Mr Fitzpatrick gave evidence that:
 - a) he had difficulty in understanding the Anonymous Caller because she had a strong accent and the line was poor;

- b) he walked to the rear of the Salon to tell the Claimant that a woman wanted to speak to her about some pictures and her husband. Mr Fitzpatrick did not know what the matter was about.
 - c) he had to repeat himself three times before the Claimant acknowledged him.
40. Mr Fitzpatrick denied that he spoke loudly or inappropriately in front of customers. The Claimant admitted that she initially ignored Mr Fitzpatrick when he called her to the phone.
- Allegations against Mr Marciniak
41. The Claimant gave evidence that Mr Marciniak told customers in a loud voice that someone had accused the Claimant of sending photos of herself to another woman's husband. The Claimant gave evidence that when she tried to deny this, Mr Marciniak said "cala-te", meaning "shut up".
42. Mr Marciniak denied:
- a) saying anything about the Claimant sending photographs to the Anonymous Caller's husband; and
 - b) telling the Claimant to "cala-te".
43. Mr Marciniak did, however, admit that he teased the Claimant, and asked whether the Anonymous Call was "about a bad haircut?" or whether someone was "not happy with their hair cut".
44. Mr Marciniak gave evidence that up until this time, he and the Claimant were good friends but after the Anonymous Call, the Claimant became "aggressive" and started "accusing everyone around her". Mr Marciniak said that he and the Claimant had always previously joked around and teased each other, but this ceased after the Anonymous Call.
- Respondent's response to the Claimant's Grievance Grievance Letter
45. On 23 October 2017 Mr Fitzpatrick received a grievance letter ("Grievance Letter") from the Claimant dated 18 October 2017. The Grievance Letter raised the following grievances:
- a) that AF had told the Claimant in a loud voice in front of colleagues and customers that "a woman is complaining that you sent photos of yourself to her husband";
 - b) that Mr Marciniak had commented in a loud voice that the Claimant had sent photos of herself to someone else's husband and then told the Claimant to "cala-te" (meaning to shut up);
 - c) that Mr Marciniak had belittled the Claimant, called her "crazy" in front of customers and said no-one would believe her story about the photos because she took medication;
 - d) that Mr Marciniak had taken photos of the Claimant during work and then showed them to customers;

- e) that the Claimant did not have a copy of her Contract; and f) that Miss Legniece treated the Claimant like her employee.
46. The Grievance Letter also disclosed that the Claimant was suffering from depression and requested that Mr Fitzpatrick:
- a) treat the Grievance "in confidence";
 - b) give the Claimant the opportunity to meet with him privately to discuss the contents of the Grievance Letter; and
 - c) allow the Claimant to be accompanied by an independent party for moral support.
- Grievance Process
47. Upon receipt of the Grievance Letter, Mr Fitzpatrick became angry, waving the Grievance Letter in the air in front of the Claimant and shouting "what the hell is this?" Mr Fitzpatrick accepted that he behaved in this manner. I accepted the Claimant's unchallenged evidence that Mr Fitzpatrick also read parts of the Grievance Letter out loud to Mr Marciniak. Mr Fitzpatrick then left the Salon to seek advice. In his evidence, Mr Fitzpatrick admitted that he did not speak to the Claimant for the rest of the day.
48. Upon his return from CAJ, Mr Fitzpatrick immediately spoke to Mr Marciniak about the Claimant's allegation that Mr Marciniak had taken photographs of the Claimant and shown them to customers. During this conversation with Mr Marciniak, Mr Fitzpatrick discovered that:
- a) Mr Marciniak had not taken photographs of the Claimant; and
 - b) the Claimant had sent "provocative" selfies of herself to Mr Marciniak.
49. Mr Marciniak showed the selfies to Mr Fitzpatrick, who instructed him to delete them immediately. I was shown a copy of one such photograph. In her evidence, the Claimant admitted that she did send such photographs to Mr Marciniak although she denied that they were provocative, pointing out that she was wearing a summer dress and that lots of people take selfies in everyday life.
50. Mr Fitzpatrick confirmed in his evidence that he did not raise any of the other issues contained in the Grievance Letter with Mr Marciniak. Mr Fitzpatrick gave evidence that, having been present when the Claimant received the Anonymous Call, he knew that the Claimant's Grievance Letter did not accurately reflect what had happened at that time and that Mr Marciniak had not said the words attributed to him by the Claimant.
51. Mr Fitzpatrick was unable to speak to Miss Legniece about the Grievance Letter because she was absent on four weeks' annual leave from 14 October 2017 to 14 November 2017.
- Grievance meeting

52. Mr Fitzpatrick gave evidence that on 25 or 26 October 2017, when he and the Claimant were alone in the Salon, he sat down with the Claimant to discuss the Grievance Letter ("Grievance Meeting"). He did not do this formally and did not notify the Claimant in advance of the discussion.
53. Mr Fitzpatrick gave evidence that at the Grievance Meeting he:
- a) explained to the Claimant that the till-roll paper which he provided to her with her pay each week was her payslip. According to Mr Fitzpatrick, the Claimant commented that the "lady confused me", which Mr Fitzpatrick understood to mean that the Claimant had been confused by the advice given to her at CAJ;
 - b) showed the Claimant a copy of the Contract and reminded her that he had provided her with a copy at the time of signing. The Claimant did not request a copy at the time and Mr Fitzpatrick did not offer to provide her with one;
 - c) informed the Claimant that he had spoken to Mr Marciniak who had informed him that he had not taken photographs of the Claimant but that the Claimant had sent selfies of herself to Mr Marciniak. Mr Fitzpatrick informed the Claimant that he had instructed Mr Marciniak to delete all of the selfies immediately;
 - d) suggested that they "put the telephone incident behind them" and "move on"; and
 - e) reminded the Claimant not to bring her personal life into the Salon (something about which Mr Fitzpatrick had had reason to raise with the Claimant on a number of previous occasions, as the Claimant was very frank with her customers about her personal life).
54. Mr Fitzpatrick gave evidence that after his discussion with the Claimant, he believed that the grievance had been appropriately addressed and that the Claimant was happy with the outcome and wanted to "move on". He did not offer the Claimant a right of appeal.
55. The Claimant failed to make any mention of the Grievance Meeting in her witness statement. However, during cross-examination the Claimant confirmed AF's summary of the Grievance Meeting but said that she and Mr Fitzpatrick did not sit down together and that Mr Fitzpatrick did not give her a chance to say anything. Workload
56. In her evidence, the Claimant confirmed that between 23 October 2017 (the date on which Mr Fitzpatrick received the Grievance Letter) and 20 November 2017 (see below), nothing of any consequence happened at work. However the Claimant gave evidence that, during this period, she was overworked and was suffering from poor mental health following the Anonymous Call. The Claimant did not inform Mr Fitzpatrick of her increased anxiety and depression and she continued to attend work, although there was some evidence to suggest that the Claimant suffered panic attacks during this time.
57. There is no dispute that the Claimant's increased work load was caused by Miss Legniece's four week absence on annual leave, which was then immediately followed by Mr Fitzpatrick's two week holiday from 14 November to 28 November. It was normal practice at

the Salon to cover for work colleagues when they were away, but Miss Legniece's period of leave was unusually long. The Claimant gave evidence that because of the lengthy periods of leave, the Claimant was expected to provide cover without a day off (except on a Sunday) for six weeks. 20 November 2017 – last straw incident

58. Mr Fitzpatrick went on annual leave on 14 November 2017, the same day on which Miss Legniece returned from her four week break. Mr Fitzpatrick therefore did not see Miss Legniece from 14 October 2017 until 28 November 2017 when he returned from his holiday.
59. On 20 November 2017, the Claimant made a mistake on the till; while taking payment from a customer, she accidentally keyed in Miss Legniece's code instead of her own. In order to correct her mistake, the Claimant asked that when Miss Legniece took payment from her next customer, she offset the mistake by using the Claimant's code instead of her own.
60. Miss Legniece refused to do as the Claimant requested and insisted to the Claimant that the correct procedure was for the Claimant to make a note of her error and put the note in the till.
61. Miss Legniece's refusal to follow the Claimant's instruction angered the Claimant. In her evidence, the Claimant explained that she had been working for the Respondent for nine years, whereas Miss Legniece had only been there for a few months. Miss Legniece should therefore have listened to the Claimant and that her refusal to follow her instruction was unreasonable. She alleged that Miss Legniece "started shouting at me and was very rude I had to ask her to stop shouting."
62. The Claimant then asked Mr Marciniak to tell Miss Legniece to correct her error as she had requested. Mr Marciniak also refused to do so because this was not the correct procedure to follow. Mr Marciniak confirmed that he told the Claimant that her continual mistakes of this kind were causing him extra work when cashing up at the end of the day.
63. Miss Legniece denied shouting at the Claimant. She gave evidence that while she was with her customer, she overheard the Claimant say to Mr Marciniak in an "extremely loud voice" that it was Miss Legniece's fault that there was a problem with the till because she would not reverse the Claimant's mistake. According to Miss Legniece, she said to the Claimant "excuse me, this is not my fault it's your mistake" and that the Claimant then started shouting at her in front of a customer.
64. Miss Legniece gave evidence that after the customer left, she approached the Claimant and said "how dare you judge me in front of customers". Miss Legniece denied that she raised her voice but spoke in a firm manner and pointed her finger at the Claimant. She gave evidence that the Claimant then started screaming at her.
65. Miss Legniece was very upset by the Claimant's behaviour, started crying, left the Salon and did not return until she received a text from Mr Marciniak, telling her to ignore the Claimant's behaviour and to carry on as normal.

66. I was obliged to discount ADC's evidence relating to the argument on 20 November 2017 because his evidence was entirely at odds with that provided by the Claimant, Mr Marciniak and Miss Legniece. Whilst I was satisfied that ADC did see an incident as he described, it clearly did not occur on 20 November 2017.
67. The Claimant and Miss Legniece continued to argue the following day. I accepted Miss Legniece's evidence that the Claimant spoke continually about the Till Incident, eventually prompting Miss Legniece to tell the Claimant that "I don't want to talk. Imagine that I don't exist." The Claimant interpreted these words as stating that, in Miss Legniece's opinion, the Claimant no longer existed.
68. On 22 November, the Claimant went to her doctor and was signed off with depression. She posted her resignation letter to the Respondent on 28 November 2017. The Claimant identified the Respondent's failure to appropriately deal with her Grievance Letter as the principal reason for her resignation. The Law 69. Article 61 of the Employment (Jersey) Law 2003 ("Law") states that an employee shall have the right not to be unfairly dismissed. Article 62(1)(c) of the Law states: "62. Circumstances in which an employee is dismissed
- (1) For the purposes of this Part an employee is dismissed by his or her employer if (and, subject to paragraph(2), only if) – ...
- (c) the employee terminates the contract under which he or she is employed (with or without notice) in circumstances in which the employee is entitled to terminate it without notice by reason of the employer's conduct." 70. In order to establish a successful complaint for constructive dismissal, four conditions must be met: a) the employer must be in breach of a contractual term (either an express term or an implied term); b) the breach of contract must be fundamental, amounting to a repudiatory breach of contract; c) the employee must resign in response to the employer's repudiatory breach of contract; and d) the employee must not delay too long in terminating the contract; otherwise the breach may be found to have been waived and the contract affirmed. (See: *Robinson v States of Jersey, Department of Education, Sport & Culture* (JET 1910-028/05); *Oprey v Woolworths plc* (JET 2604-085/07); *Western Excavating (ECC) v Sharpe* [1978] ICR 221). Mutual trust and confidence 71. A breach of contract may be in the form of a breach of an express or an implied term. The most common implied term is that of 'mutual trust and confidence'. The test of whether conduct amounts to a breach of this implied term was addressed in *Malik v BCCI* [1997] UKHL 23, and has been applied by the Tribunal on previous occasions (*Carratu v United Fashions Limited* JET 110/2011). In *Malik*, the House of Lords stated: "... the employer will not, without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee."
72. Thus, before finding that there has been a breach of trust and confidence, the Tribunal must be satisfied both that: a) there was conduct which destroyed or seriously damaged trust and confidence between employer and employee; and b) the employer's conduct was done

without reasonable and proper cause. 73. Any breach of the implied term of trust and confidence will necessarily strike at the root of the contract and will therefore always be repudiatory (*Morrow v Safeway Stores* [2002] IRLR 9). 74. In the recent case of *McLoughlin v London Linen Supply Limited* UKEAT/0299/16/BA, the EAT provided some helpful guidance as to how tribunals should assess claims that there has been a breach of the implied term of trust and confidence. In his judgment, Richardson J referred to *Woods v WM Car Services (Peterborough) Ltd* [1981] IRLR 347, in which the Court of Appeal stated: “17. ... To constitute a breach of [the implied term of trust and confidence between employer and employee], it is not necessary to show that the employer intended any repudiation of the contract: the Tribunal's function is to look at the employer's conduct as a whole and determine whether it is such that its effect, judged reasonably and sensibly, is such that the employee cannot be expected to put up with it... The conduct of the parties has to be looked at as a whole and its cumulative impact assessed.” 75. Richardson J then went on to remind tribunals that: “Firstly, it is important to assess the conduct of the parties as a whole. It may be necessary for the purpose of making findings to look at different aspects of conduct individually, but it is vital in the end to look at the overall picture. Secondly, the assessment applies an objective standard of reasonableness....

29. ...The question is whether looking at the matter objectively, the conduct was likely to destroy or damage the relationship of trust and confidence. People will react differently when they are badly treated at work. Some will put up with it; some will not. If the conduct is likely to destroy or damage the relationship of trust and confidence, the fact that some people will put up with it does not negate a breach of this implied term.” Acceptance and resignation in response to breach
76. A repudiatory breach by an employer does not bring the contract to an end automatically. The contract is not terminated until the point at which the breach is accepted by the employee (*Société Générale, London Branch v Geys* [2012] UKSC 63).
77. It is not necessary for an employee to expressly communicate their acceptance of the breach to the employer. However, the fact that they have accepted the repudiatory breach must be unequivocal and unambiguous.
78. In *Weathersfield Ltd v/a Van and Truck Rentals v Sargent* 1999 IRLR 94, CA the Court of Appeal held that it is not necessary for an employee to inform the employer of the reasons for resignation in order to prove that the resignation was caused by the employer's breach of contract; it is up to the Tribunal to decide whether or not the employee resigned in response to the breach rather than for some other reason.

79. The employee must be able to show that he or she resigned in response to the relevant breach, although this does not mean that the breach must be the only cause of the employee's resignation. Once a repudiatory breach of contract has been established, an employee can claim constructive dismissal so long as the breach "played a part" and was "one of the factors relied upon" in the employee's resignation [Nottinghamshire County Council v Meikle

[2004] IRLR 703; Abbey Cars (West Horndon) Ltd v Ford UKEAT/0472/07; Wright v North Ayrshire Council UKEAT/0017/13]. Affirmation 80. If an employee delays too long in resigning in response to an employer's breach of contract, the employee may be deemed through their conduct to have affirmed that contract with the result that the employee will lose the right to claim constructive dismissal (Western Excavating v Sharp). However, in Bournemouth University Higher Education Corporation v Buckland 2010 ICR 908, the Court of Appeal stated that, due to the pressure on employees at such times, a careful analysis of the facts is necessary before deciding whether there really has been an affirmation. 81. In the case of Cantor Fitzgerald International v Bird [2002] IRLR 867, McCombe J stated that 'affirmation' 'is essentially the legal embodiment of the everyday concept of "letting bygones be bygones"'. 82. In El-Hoshi v Pizza Express Restaurants Ltd EAT 0857/03, the EAT stated that there must be some express or implied event which indicates affirmation. The EAT stated that mere delay was a neutral act and was not itself capable of amounting to affirmation. However, there may be circumstances where affirmation may be implied by a prolonged delay in resignation (Mari v Reuters Ltd UKEAT/0539/13). 83. I take from the above cases that an employee's delay in resigning in response to a repudiatory breach by the employer is one factor which the Tribunal must take into account in deciding whether or not the contract has been affirmed. However, delay in and of itself will not lead automatically to the conclusion that the employee has affirmed; there must be an event which indicates affirmation and the Tribunal must look at all the circumstances to establish whether, on the facts of each case, the employee did indeed affirm the contract through their conduct. Course of conduct and the 'last straw' 84. In Maclagan v States Employment Board 79/15 the JEDT confirmed the principle that a course of conduct can cumulatively amount to a repudiatory breach of the implied term of trust and confidence, entitling an employee to resign and claim constructive dismissal. A 'last straw' incident does not, by itself, have to be repudiatory in its nature, but it must contribute (however slightly) to the breach of the implied term of trust and confidence (Lewis v Motorworld Garages Ltd 1986 ICR 157, CA). In circumstances where: a) one of the events in the course of conduct was serious enough in itself to amount to a repudiatory breach of contract; and b) the employee did not treat the breach as such by resigning, 85. In Omilagju v Waltham Forest London Borough Council 2005 ICR 481, CA, the English Court of Appeal set out what constitutes a 'last straw'. The court stated that a tribunal must only focus on "whether the final straw is the last in a series of acts or incidents which cumulatively amount to a repudiation of the contract by the employer." The court set out the following guidelines on how to assess whether an act or omission amounts to the 'last straw': a) the

act may not be entirely innocuous or trivial; b) it is not necessary for the act to be of the same character as earlier acts; c) the act “must contribute, however slightly, to the breach of the implied term of trust and confidence” although the act does not have to be “unreasonable” or “blameworthy” conduct; and d) the test of whether an employee’s trust and confidence has been undermined is an objective one.

Conclusion

Constructive dismissal

86. The Claimant submitted that the Respondent:

- a) failed to properly consider her grievances;
- b) did not conduct a proper investigation or Grievance Meeting; and
- c) unreasonably disregarded the Claimant's request that it deal with the grievance in a confidential manner.

87. The Respondent submitted that:

- a) it was unreasonable for the Claimant to expect that Mr Fitzpatrick could carry out a grievance investigation without speaking to the person against whom the allegations were made;
- b) Mr Fitzpatrick carried out an appropriate investigation in the circumstances;
- c) Mr Fitzpatrick conducted the Grievance Meeting in a manner which was appropriate in the circumstances; and
- d) the Claimant confirmed that she was happy with the outcome of the Grievance Meeting and wanted to move on. Was there a breach of contract which was repudiatory in nature? The Phone Incident

88. The Claimant submitted that the alleged conduct of Mr Fitzpatrick and Mr Marciniak at the time of the Anonymous Call amounted to a repudiatory breach of contract.

89. There was no doubt that the Claimant was deeply shocked, upset and humiliated by the Anonymous Caller. In her own evidence, the Claimant confirmed that the Anonymous Call increased her anxiety about what people thought of her and it was the Anonymous Call which triggered a deterioration in her mental health.

90. It was clear to me that the Claimant’s feelings of humiliation and embarrassment meant that she was, understandably, very sensitive to any comments made by her work colleagues after she had received the Anonymous Call. However, being upset by a work colleague's behaviour does not automatically amount to a breach of the implied duty of mutual trust and confidence; whilst Mr Fitzpatrick and Mr Marciniak may have behaved in a thoughtless and insensitive manner, their behaviour was not so serious as to breach this implied duty.

Grievances

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91. I considered whether Mr Fitzpatrick's conduct of the grievance process as a whole amounted to a breach of the implied duty of mutual trust and confidence.
92. It was clear to me from the evidence that the Claimant was anxious about sending the Grievance Letter. However, irrespective of whether Mr Fitzpatrick thought that there were grounds for the Claimant's grievances, the Claimant sent the Grievance Letter in good faith and was entitled to expect her employer to act professionally and in a non-threatening manner.
93. By his own admission, Mr Fitzpatrick reacted badly to the Grievance Letter; instead of behaving in a professional manner, he expressed his anger in front of the Claimant and in front of other members of staff. Mr Fitzpatrick did not challenge the Claimant's evidence that he read out parts of the Grievance Letter to Mr Marciniak. I therefore accepted the Claimant's evidence in this regard.
94. In reaching a decision regarding the conduct of the Grievance Meeting, I noted the following:
- a) the Claimant was anxious about submitting her Grievance Letter;
 - b) the Grievance Letter disclosed the Claimant's vulnerable mental health and requested confidentiality;
 - c) Mr Fitzpatrick's initial reaction was humiliating and unprofessional;
 - d) the Respondent was a small employer with only three employees;
 - e) the Respondent did not have an HR function; and f) Mr Fitzpatrick had never previously dealt with a formal grievance and took the Claimant's grievances personally because he was upset by them.
95. I applied the test as set out in Malik. I kept in mind the Respondent's small size and limited resources and noted that a small employer such as the Respondent will not always be able to undertake a lengthy and detailed process. However, whatever the size of the employer, employees must feel that they are able to submit grievances without fear of humiliation.
96. In this case, Mr Fitzpatrick's outburst upon receipt of the Grievance Letter served to taint the entire grievance process. After the outburst, the Claimant would have been in no doubt of Mr Fitzpatrick's feelings of anger and frustration and, particularly in view of her fragile mental health, the Claimant was unlikely to challenge Mr Fitzpatrick at the Grievance Meeting when he suggested that they "move on". I therefore concluded that Mr Fitzpatrick's outburst did amount to conduct which destroyed or seriously damaged trust and confidence between the Respondent and the Claimant and it tainted the entire grievance process. I was also satisfied that there was no acceptable explanation for such an outburst.
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97. The Respondent was therefore in breach of the implied duty of mutual trust and confidence in its conduct of the grievance process. In accordance with Safeway Stores, this breach was automatically repudiatory in nature. Till Incident
98. I considered whether the Till Incident by itself was a breach of the implied duty of mutual trust and confidence.
99. The evidence showed the Till Incident to be an argument borne from the Claimant's mistake on the till and her subsequent resentment that Miss Legniece refused to do as the Claimant instructed. Having applied the provisions in Malik, I did not accept that the Till Incident amounted to a breach of the implied term of mutual trust and confidence. Did the Claimant resign in response to the breach? 100. I next considered whether the Claimant resigned in response to the Respondent's failure to conduct an appropriate grievance process or for some other reason. The evidence showed that the Claimant resigned for a number of reasons, including:
- a) the fact that she was working very hard for a prolonged period to cover holidays;
 - b) her belief that the "atmosphere at work was not going to be the same again" after the Till Incident; and
 - c) the fact that she searched for and found a new job on 27 November 2017. 101. However, I also noted that the Claimant identified the flawed grievance process in her resignation letter and, whilst I did not believe that this was the primary reason for her resignation, I accepted that Mr Fitzpatrick's conduct of the grievance process "played a part" in her decision to resign. In accordance with the guidance set out in Nottingham County Council, I therefore concluded that the Claimant did resign in response to the breach. Did the Claimant affirm the contract? 102. Finally, I considered whether or not, through her conduct, the Claimant affirmed the contract. On this point I considered only the Claimant's behaviour at work and ignored the contents of her discussions with her advisors (as disclosed in the CAJ summary). 103. I noted that:
- a) the Claimant continued to work as normal until 22 November 2017, when she was signed off sick by her doctor;
 - b) the Claimant took on significant extra work during this period due to Miss Legniece's absence; and
 - c) the Claimant knew and understood that the grievance process ended at the Grievance Meeting, but she did not resign for over a month after that date. 104. Whilst I acknowledge that delay in itself is a neutral act and is one just factor which I must consider in determining the question of affirmation, I was satisfied on the facts that the Claimant's overall conduct showed that she did affirm the contract. Last Straw 105. I considered the Claimant's submission that the Till Incident was the "last straw" which caused her to resign, thereby effectively 'rekindling' the previous repudiatory breaches. 106. I did not see any evidence to suggest that there was a course of conduct by the Respondent which

cumulatively amounted to a repudiatory breach of contract. The Respondent committed one repudiatory breach of contract, namely in its conduct of the grievance process. However this was a one-off event and the Claimant's own evidence was that, up until the Anonymous Call, Mr Fitzpatrick was a good employer. I did not accept that the other issues about which the Claimant complained amounted to a course of conduct. 107. I therefore rejected the Claimant's submission that the Till Incident amounted to a "last straw" event. 108. Therefore, because the Claimant affirmed the contract and waived the Respondent's breach, the Claimant's claim of constructive unfair dismissal is rejected. Employment Contract 109. I considered:

- a) whether the Respondent provided the Claimant with a signed copy of the Contract when the two parties signed it;
- b) the impact on the Claimant of the Respondent's failure to include the Claimant's start date on the Contract; and
- c) whether the Respondent should have provided more details regarding a grievance procedure. 110. Having considered all the evidence, I concluded that, on the balance of probabilities, Mr Fitzpatrick did fail to provide the Claimant with a copy of the Contract at the time of signature. His evidence that they each had separate original signed copies meant that the Claimant would have had to write out her name and address on the Contract twice. I considered it unlikely that Mr Fitzpatrick would have asked the Claimant to do this and a more likely scenario would have been that Mr Fitzpatrick photocopied the Contract and gave a copy to the Claimant. I also accepted the Claimant's evidence that she is careful with her paperwork and would not have mislaid such an important document. 111. Regarding the failure to provide the Claimant's start date and/or continuous employment date, this is a breach of Article 3 of the EJJ. 112. I did not consider the failure to provide further details of a grievance procedure to be in breach of Article 3(g)(vi) which simply provides that a statement of terms shall contain "any terms and conditions relating to disciplinary and grievance procedures." Whilst the Tribunal expects employers to have a set of proper disciplinary and grievance policies, failure to have one does not constitute a breach of Article 3. 113. On the grounds that the Respondent:
 - a) failed to provide a copy of the Contract; and
 - b) to include the Claimant's start date/continuous employment date on the Contract, I found that the Respondent was in breach of the provisions of Article 3 of EJJ. 114. I did not believe that Mr Fitzpatrick deliberately failed to provide a copy of the Contract to the Claimant. However, when she raised in the Grievance Letter and it was clear that she did not have a copy of the Contract, Mr Fitzpatrick still did not provide her with one. This was a prolonged oversight on the part of the Respondent. The EJJ is clear in its requirement that a copy of the statement of terms are provided to an employee within four weeks of the commencement of employment. 115. In view of the above, I concluded that the Respondent should pay the maximum amount of compensation permitted under the EJJ. The

Respondent shall therefore pay to the Claimant four weeks' pay as compensation for failing to provide her with a written statement of terms and for failing to include the Claimant's start date in the Contract. 116. At the Case Management Meeting, the parties agreed that the Claimant's weekly wage was £440 per week. £440 x 4 = £1,760 117. The Respondent shall pay to the Claimant the sum of £1,760 as compensation for its failure to provide the Claimant with a written statement of terms. Summary of Award Compensation for failure to provide written statement of terms £1,760 TOTAL AWARD £1,760 Mrs H G Griffin, Chairman Date: 2 July 2018

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Prepared on 22 October 2026 · Esheria