

EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: S/4105274/16

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Held in Glasgow on 6 & 7 March 2017

Employment Judge: Laura Doherty

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Ms Linda Jean Scriven

Claimant
Represented by:
Mr P Harvey -
Solicitor

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20 **Clyde Taxis and Garage**

Respondent
Represented by:
Mr Howson -

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

30 The Judgment of the Employment Tribunal is that the claim of unfair dismissal is dismissed.

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REASONS

1. On 21 October 2016 the claimant presented a complaint of unfair dismissal
40 under Section **95(1) (c)** of the Employment Rights Act 1996 ("ERA").

2. It was said by the claimant the respondents breached the implied term of mutual trust and confidence in her contract of employment. That breach is

E.T. Z4 (WR)

5 said to have arisen as a result of a number of incidents. Firstly it is said the claimant endured a long period of verbal abuse from Mr Des Divers (a taxi driver working for the respondents), and this was within the respondent's knowledge. Secondly, that after countless requests to consider the claimant's position the respondents failed to do so. The last straw incident is said to have occurred on 19 August 2016 in the course of meeting when Mr Gemmell called the claimant a liar and stated that she could not be trusted, questioned her ability to do her job without favour or prejudice towards any driver, and refused her request for a meeting between himself, and Mr Divers.

3. The respondents do not accept that they breached the implied term of mutual trust and confidence in the claimant's contract of employment.
- 15 4. In the event the Tribunal finds that the claimant was dismissed the respondents position is that she was dismissed for a fair reason, which is conduct. The conduct is said to be the claimant's ability to carry out her job professionally in that she did not assign work to Mr Divers. In the event the Tribunal finds the dismissal unfair, the respondents also argue contributory conduct, and a for a deduction under the principles to be derived from the case of *Polkey –v- A E Dayton Services*.
- 20 5. The claimant's pre-dismissal earnings were agreed, as was the period of employment. It was agreed the claimant earned £259.20 gross and £225 net per week.
- 25 6. The claimant gave evidence on her own behalf, and evidence was given by Mr Auld, her partner.
- 30 7. Mr Gemmell Snr (Mr Gemmell), a partner in the respondents business gave evidence, as did Mr Divers. A joint bundle of documents was lodged.

Findings in Fact

8. From the information before it the Tribunal made the following findings in fact.
9. The respondents are a garage/taxi company, operating in Dunoon. The respondents have around five full time employees' and provide work to around 20 taxi drivers. So far as the taxi business is concerned, taxi drivers who work for the respondents are regarded self employed. The respondents rent taxi cars and radio equipment to them, and pay for fuel. There is a portocabin at the respondent's site, where the radio controller for taxis is based. The radio controller's job is to co-ordinate customer requests with taxi driver availability.
10. The respondents taxis operate from a number of ranks, and jobs are allocated to the rank drivers closest to the job. In some instances customers request a particular driver. Bookings are taken and recorded by the controller, but the drivers do not see the bookings when they come in.
11. From time to time the radio controller and the taxi drivers get into arguments over work, and to an extent difficult exchanges with taxi drivers is a feature of the radio controller's job.
12. The claimant, whose date of birth is 5 June 1958, was employed by the respondents as a radio controller from 1 October 2007 to 3 September 2016.
13. Mr Gemmell considered the claimant was good at her job, and valued her as an employee.
14. One of the drivers who hired a taxi from the respondents was a Mr Des Divers. Mr Divers is the father of Mrs Angela Gemmell, who is married to Mr David Gemmell Jnr. Mr Gemmell Jnr and Mr Gemmell are partners in the respondents business, with Mr Gemmell having set the company up in 1996. Mr Divers started to work with the respondents in July 2016.

15. Initially Mr Divers and the claimant had a reasonable working relationship. There was, however an incident which took place around January 2016. Mr Divers took the view that the claimant had not allocated him a job which he was entitled to; the claimant's view was that Mr Divers was not entitled to the work.

16. Mr Divers came into the office where the claimant worked and confronted her about what he thought was her failure to allocate him a job he was entitled to. The claimant did not accept his position. This was a heated meeting.

17. The claimant complained about this incident to Mr Gemmell. She considered that Mr Divers had behaved aggressively towards her.

18. Mr Gemmell took this up with Mr Divers. Mr Divers did not accept the claimant's position in relation to the allocation of the job, or he had behaved aggressively, but he accepted that he had gone into the radio controllers office and challenged her.

19. Mr Gemmell told Mr Divers that he was not to go back into the radio controller's office and that if he had an issue with work he was not to take it out with the claimant. Mr Gemmell told Mr Divers that it was unacceptable for him to go into the portocabin and it was not to happen again.

20. Mr Divers accepted this and did not go back into the claimant's office when the claimant was there.

21. Mr Gemmell reported back to the claimant that Mr Divers denied having behaved aggressively, but explained that he has been told not to go back into her office to confront her about work, and that if there were any

complaints these had to go through either him, or Angela Gemmell, who also worked in the business. Mr Gemmell told the claimant that Mr Divers had been not told him not to go back into the portocabin and that he accepted that.

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23. After this incident the claimant and Mr Divers did not like each other.

24. The claimant initially worked a shift pattern, which she was working in the afternoons. Mr Divers worked nights; this meant there was a crossover between their shifts.

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25. At some point after the January incident, the claimant's shift pattern changed. This came about primarily because the other radio controller retired, and the claimant wanted to work his shift which was an early shift, from 6am to 12pm, 6 days a week. Mr Gemmell was content that the claimant works this shift; he saw a collateral benefit in that the claimant and Mr Divers would no longer work together other than on a Monday, when Mr Divers worked on a dayshift or on shifts where the claimant had to step in for someone who was ill or on holiday. This was not a regular occurrence.

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26. At some point in March 2016 Mr Divers approached Mr Gemmell, to complain about the claimant. His complaint was that he had not been allocated a job which had been booked by a customer (Mr Alford) who had requested him as the driver.

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27. When he received this complaint Mr Gemmell looked at the records, which indicated that Mr Alford had phoned on 20 March to make a booking to be collected at 7.25am on 21 March 2016, and had requested that Mr Divers pick him up.

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28. Mr Gemmell spoke to the claimant, and asked what had happened. The claimant told Mr Gemmell that Mr Divers had phoned in and told her that he was on his way to Innellan (which is some way out of town), and because of

this she sent another driver (IT4) to collect the customer, as the customer was going for the ferry.

- 5 29. Mr Gemmell accepted this. However he was approached by Mr Ward, another driver with the respondents. Mr Ward told him that what Mr Divers reported to Mr Gemmell was correct.
- 10 30. The information which Mr Gemmell had from Mr Divers and Mr Ward suggested that Mr Divers was at the taxi rank (as opposed to out of town), where Mr Alford, the customer who had booked Mr Divers, was dropped off at the taxi rank by IT4 .Mr Alford approached Mr Divers and asked why he had not been sent out to collect him as he requested. He told Mr Divers he was going to complain to Mr Gemmell.
- 15 31. Mr Alford did phone Mr Gemmell to complain about the fact that Mr Divers did not pick him up and that he was fed up with not getting the driver he requested.
- 20 32. Having obtained this information Mr Gemmell became suspicious about the veracity of what the claimant had told him. His suspicions were aroused not just by what the other driver and Mr Alford had reported to him, but by the fact that it was a different controller who had taken the Alford booking the day before, and there was no note on that to the effect that the customer was going to catch a ferry, which called into question in his mind how the claimant could have known this.
- 25 33. Mr Gemmell however decided to do nothing with this information. He valued the claimant as an employee, and he took the view if he confronted her with this information she was unlikely to apologise or accept she was wrong, and he considered the best course was to let matters with the claimant settle down.
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34. Over the next 3 months Mr Gemmell received some complaints from Mr Divers about the fact he was not getting the jobs he thought he was entitled to. Mr Gemmell did nothing about this as he considered that without witnesses and there was nothing further he could do about it.

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35. In the period from January to July 2016 the claimant occasionally said to Mr Gemmell that Mr Divers had made snide remarks to her.

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36. On 14 August 2016 Mr Divers telephoned Mr Gemmell. He was upset about the way he said he was being treated by the claimant. He said he was not getting a *fair crack of the whip* and he was fed up with it all, and wanted it all to go away. He asked Mr Gemmell if he could do something about it.

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37. Mr Gemmell said he would speak to the claimant. Mr Gemmell did not speak to the claimant until 18 August 2016. He did not set out to speak to her that day, but he was in the office on other business, and the claimant was there. The claimant started to complain about Angela Gemmell, saying that she was questioning her about jobs she was giving out. Mr Gemmell understood that Angela Gemmell had questioned the claimant about a job in relation to Mr Divers, and had been satisfied with the answer given by the claimant. The claimant complained to Mr Gemmell on that she wanted this questioning to stop.

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38. Mr Gemmell considered it was an opportune moment to try to resolve any issues between the claimant and Mr Divers. He told the claimant that Mr Divers had complained to him that he was not getting a fair crack at work, and that he wanted any issues between him and the claimant to stop. Mr Gemmell told the claimant that he wanted her and Mr Divers to put any issues behind them, and to start working together and effectively to start again with their relationship. The claimant agreed to try this.

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39. Shortly after the meeting concluded the claimant sent a text to work colleagues, including one produced at page 32, which states "*Want to hear something hilarious? Des told big David all the drivers are laughing at him*

because I am bullying him". The claimant texted one member staff, and one driver, in this vein following her discussion with Mr Gemmell.

- 5 40. The fact that this had happened was brought to Mr Gemmell's attention on the evening of the 18th of August. He was very disappointed and angry at the claimant. He took the view that she was trying to 'stir things up' between her and Mr Divers, in circumstances where he was trying to get them to sort out their differences.
- 10 41. Mr Gemmell went to see the claimant in the office on 19 August 2016. He told her he was not pleased at all about her sending these text messages. The claimant gave no response to this. Mr Gemmell told the claimant that he had lost trust in her because of her attitude.
- 15 42. Mr Gemmell went on to say that he investigated what had taken place in March 2016, and found out that what she had told him was not true. The claimant then asked Mr Gemmell if he was calling her a liar and he responded that was her word, not his. The claimant then said that if it he did not trust her she would leave. Mr Gemmell told her that it would not be
20 necessary, and all she had to do was come back into line and settle her differences with Mr Divers and start again. In response to this the claimant said she would try.
43. After that meeting, which took place on a Friday, the claimant was due to
25 work a Saturday shift, which she attended. On the Sunday, however, she decided to resign and she wrote to Mr Gemmell and hand delivered a letter, which was in the following terms:-

30 *"Dear David*

I Linda Scriven do hereby hand in my notice after 8 years working for your company.

The reason this is as follows:

1. *Per our conversation on Friday 19 August, where you told me that I was liar and couldn't be trusted.*
2. *Questioning my ability to do my job without any favour or prejudice towards any drivers.*
3. *Requesting a meeting with a driver and yourself to try and resolve this, but was immediately turned down by you.*
4. *Having endured a long period of verbal abuse, and on one occasion, this driver entered the office to continue his verbal assault towards me, which is on CCTV, putting me in a vulnerable position.*
5. *I feel that now, because of this situation, which is still ongoing, after countless requests to the company that my side of the events is not heard, is due to personnel reasons which you are aware of.*

I enjoy my job and feel that I do it professionally and efficiently, but after 8 years, due to this ongoing situation, I have no choice but to give you 2 weeks notice dated from Monday 22 August. "

44. Mr Gemmell accepted the claimant's resignation, and wrote to her confirming this on 23 August 2016 and advising that she did not require to work her notice but would be paid her in lieu of notice.

45. After her employment with the respondents terminated, the claimant immediately started to look for other work. She managed to secure employment in Ashgrove Care Home, on 3 October 2016, where she

continues to work. The claimant's average income from that employment is £183.47 per week.

Note on Evidence.

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46. There were a number of conflicts of evidence which the Tribunal had to resolve in order to determine this case. Having said that, not all the conflicts which the Tribunal heard evidence on were necessary to resolve in order to determine the issues before it, in particular the detail of some the incidents which are alleged to have taken place about the of allocation of work to Mr Divers by the claimant.

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47. There were however, material conflicts which the Tribunal had to address.

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48. In doing so it considered the evidence on the points which were in conflict, and considered the credibility and reliability of the witnesses generally.

The Claimant

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49. The Tribunal did not form the impression that the claimant deliberately set out to mislead. It did however, form the view that she was so convinced of the rectitude of her own position, and her conviction that she had been wronged was so strong, that it coloured, on occasions significantly, her evidence before the Tribunal. The Tribunal formed the view that the claimant embellished and exaggerated her evidence from time to time. An example of this is that she complained that she was subjected to verbal harassment on a regular basis by Mr Divers, from January until August. When asked about the detail of this, her evidence was unspecific. She said on one occasion he called her a bitch, but gave no context of this in the sense that she did not identify when he had said it, or give a description of how it come to be said.

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50. The only other example she gave, was Mr Divers making comments about particular jobs had been allocated, along the lines of *“that’s the way its going to be”* then or *“it`s like that is it?”*

5 51. Mr Divers denied calling the claimant a bitch, but he accepted he had made comments along those lines. Given the lack of detail around the alleged incident when Mr Divers was said to have called the claimant a bitch, the Tribunal was not persuaded that he had done so. Further it considered that to categorise the comments Mr Divers made from time to time in relation to
10 the allocation of work as a constant campaign of verbal abuse and harassment, was an embellishment and exaggeration on the part of the claimant.

Mr Auld

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52. Mr Auld is the claimant’s partner. He said that on one occasion he heard Mr Divers say over the radio *“it`s like that is it?”* when he was present in the taxi office. The context he gave to it was that the claimant had given out a job, and Mr Divers contacted the office by radio to say he was the closest drive
20 to the job. The claimant said it was a rank car job, and the rank driver said that he would take the job; Mr Divers said *“it`s like that is it?”*. Particularly in the context of Mr Divers accepting he would on occasion make comments along these lines, the Tribunal found that Mr Auld’s evidence was in this regard credible, however the remainder of his evidence, to the effect that he
25 noticed the claimant becoming more anxious and upset because of work issues and he had to comfort her, was, in the Tribunal’s view, of little or no relevance. He accepted said he had difficulty in getting the claimant to open up about what was wrong and the Tribunal could draw very little from his evidence.

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Mr Gemmell

53. The Tribunal found Mr Gemmell to be a credible and reliable witness. The Tribunal in forming this view took into account that he readily made appropriate concessions on matters which were potentially prejudicial to his position. For example, he readily accepted that he may not have warned the claimant that his conversation with her on 18 August 2016 was in confidence, which was a departure from the position set out in the ET3. He also readily accepted that in terms of the investigations which he carried out of the March incident, he did not obtain witness statements at the time, and had not in fact spoken to all of the witnesses at that point. Significantly he volunteered that he made statements to the claimant during the meeting of 19th August which were potentially prejudicial to his position, and the Tribunal considered that his willingness to do so enhanced his credibility.

Mr Divers

54. The Tribunal found Mr Divers again in the main to be a credible and reliable witness. Like Mr Gemmell, he made appropriate concessions, accepting that he made comments on occasion such as *"it's like that is it?"* to the claimant. The Tribunal found his denial of having made repeatedly sarcastic remarks to the claimant to be a credible one; he genuinely seemed perplexed when it was put to him that he had done so.

55. The first conflict the Tribunal had to resolve was whether the claimant was subjected to constant verbal harassment by Mr Divers. It was the claimant's evidence in chief that he called her a bitch, but she could not recall when. She said it was *"just constant harassment where he called me a bully and unfair"*. It was the claimant's evidence that she spoke to Mr. Gemmell every time this happened by phoning him to complain. She said that Mr. Gemmell said he would speak to Mr Divers, but he did not then tell her what happened.

56. Mr Divers denied subjecting the claimant to constant harassment and verbal abuse; although he accepted that he made comments from time to time such as the ones described above.

5 57. The Tribunal concluded that Mr Divers and the claimant did not like each other, however for the reasons given above, on the basis of the evidence to the effect that Mr Divers made comments along the lines of "*is that how it's going to be?*", and "*is that the way it is then?*", from time to time about the allocation of jobs, it could not conclude that he had subjected the claimant
10 to sustained verbal harassment from January to July.

58. Mr Gemmell denied the claimant complained to him. His evidence was that the claimant occasionally said to him in passing that Mr Divers had made a snide remark to her. The Tribunal preferred Mr Gemmell's evidence to that
15 of the claimant on this point.

59. It was not satisfied for the reasons given above that Mr Divers did constantly subject the claimant to harassment. This conclusion made it unlikely she would have phoned Mr Gemmell to complain as she said, and
20 the Tribunal preferred Mr Gemmell's version, which was that the claimant occasionally mentioned to him in passing that Mr Divers made snide remarks to her

The request for a meeting

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60. The claimant said that she requested meetings on a number of occasions and this had always been denied by Mr Gemmell. It was Mr Gemmell's evidence that no such requests for meetings had been made. The Tribunal was satisfied that this evidence was to be preferred over that of the
30 claimant. The claimant did not identify with any meaningful degree of specification when the meetings were asked for other than on the 18th of August. The Tribunal formed the impression that it was likely, as suggested by Mr Gemmell, that the claimant had no desire to meet Mr Divers and it

found his evidence on this point to be more plausible than that of the claimant.

The meeting on 18 August 2016

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61. The claimant's evidence was that on 18 August 2016 (first August meeting) Mr Gemmell came into the office and said to her that she had to "*stop this.*" The claimant denied doing anything, and Mr Gemmell told her that Mr Divers had said that she was bullying him and withholding work. The claimant said that Mr Divers was "*an arse*", and Mr Gemmell responded that he knew he was an arse, but that he had to watch what he was saying, because he was Angela Gemmell's father.

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62. The claimant said the outcome of the meeting it was that it was all down to her, and everything was her fault. She said she asked for a meeting with Mr Divers, and was told that would not happen. The claimant said at the end of that meeting Mr Gemmell patted her on the shoulder and said she did a good job and asked if she was "*okay*" and the claimant said she was not okay.

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63. Mr Gemmell's evidence is that he took the opportunity when he met with the claimant on 18 August, when she complained about Angela Gemmell asking her about a job not allocated to Mr Divers jobs, to tell her that Mr Divers had contacted him to say he thought he was not getting a fair crack at the jobs, that he wanted it all resolved, and that the claimant agreed to try again to work with Mr Divers.

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64. Firstly, the Tribunal did not conclude that Mr Gemmell had told the claimant that this meeting was in confidence, or that he was passing on what Mr Divers said to her in confidence albeit this is said to be the case in the ET3. Mr Gemmell conceded readily in evidence that while he hoped he may have said the words *in confidence*, he could not be sure that he had.

65. On balance, the Tribunal preferred Mr Gemmell's version of events. It did so firstly, by reference to the generally credible manner in which he gave his evidence. In concluding that Mr Gemmell's evidence as to what occurred at the meeting and how the meeting was left was to be preferred, the Tribunal also takes into account the claimant's evidence on this point. The claimant said in evidence that Mr Gemmell patted her on the shoulder, and said she was a good worker and he didn't want to lose her, and asked her if she was okay. While the claimant said that she told Mr Gemmell she was not okay, the Tribunal was satisfied that at the conclusion of that meeting she had not made that clear to Mr Gemmell, and he understood the claimant had agreed to try again with Mr Divers.

66. In reaching this conclusion, the Tribunal takes into account the authenticity of Mr Gemmell's evidence in relation to his reaction to the text messages. Mr Gemmell gave very convincing evidence about the fact that he was disappointed and angry at the claimant for having sent the text messages in the context of him trying to resolve issues between her and Mr Divers, and thinking he had made some progress in this regard, only to find the claimant sending text messages which were intended, in his words, to "*stir things up*".

67. On balance, the Tribunal accepted Mr Gemmell's version of what occurred at the meeting of 18 August 2016 over that of the claimant.

25 **The meeting of 19 August 2016.**

68. There was again a conflict between the claimant's evidence and Mr Gemmell's evidence as to what occurred at that meeting.

30 69. The claimant said Mr Gemmell came into the office on 19 August 2016 (second August meeting), and was shouting and bawling at her saying it was a private conversation and that she had let him down. Mr Gemmell was trying to make her apologise for having allocated Mr Diver's jobs to

other drivers, and having told him that another driver did the pickup in March because Mr Divers was in Innellan. She said that Mr Gemmell shouted at her that she didn't even have the decency to apologise, and that she was nothing but a liar and could not be trusted.

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70. It was Mr Gemmell's evidence that he was angry, but he did not raise his voice or shout at the claimant at the second meeting. He accepted that he went to see the claimant in order to speak to her about the text messages, and he was angry about these. He told her that he was not pleased at all about her having sent these text messages, to which she made no response. Mr Gemmell said that he told the claimant that he had lost trust in her because of her attitude.

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71. He then spoke to her about the incident in March 2016, and told her he had investigated further and found out that what she had told him about the incident was not true. Mr Gemmell said that the claimant then said to him "*are you calling me a liar*", and he responded that that was her word, and not his. The claimant then said "*if you can't trust me then I will have to leave*", and he responded that she did not have to do that, and all she had to do was come back into line and settle her differences with Mr Divers, and start again. He said that the claimant again said she would try to do this.

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72. On balance, the Tribunal preferred Mr Gemmell's version of events to that of the claimant. In reaching this conclusion, again it takes into account that it found Mr Gemmell to be a credible and reliable witness. Mr Gemmell denied shouting and bawling at the claimant. He made an appropriate concession that he was angry, but denied shouting. He also made appropriate concessions as to what he said at the meeting, accepting without difficulty, that he made statements which were potentially prejudicial to his position, and the fact that he was prepared to do so, enhanced his credibility in the Tribunal's view.

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73. The claimant on occasions was prone to embellishment and exaggeration, and that from time to time she gave her evidence an excitable and emotional manner, which rendered it likely, as suggested by Mr Gemmell, when he told her he had found out what she had said was not to be true about the incident in March, that she responded "*are you calling me a liar*". The Tribunal was satisfied on balance that that Mr Gemmell account of the meeting was to be preferred to that presented by claimant.

74. The Tribunal was fortified in its conclusion, and it formed the view that Mr Gemmell did genuinely really value the claimant as an employee, and considered her to be very good at her job. It accepted his evidence that he did not want the claimant to leave, and therefore accepted, when she suggested that she would have to leave, he immediately sought to persuade her not to do so.

Submissions

Claimant's Submissions

75. Mr Harvey for the claimant submitted that the respondents breached the implied term of breach of trust and confidence in the claimant's contract of employment. The employer should act in a reasonable manner and will not, without proper cause, act in a manner which will breach the implied term of mutual trust and confidence. The first question for the Tribunal was had there been a breach, in response to which the claimant resigned?

76. The claimant had resigned in response to the breach, and her letter of resignation detailed 5 specific points. Points 1, 2 and 3 all occurred at the meeting of 19 August 2016, and points 4 and 5 are a background of continuing incidents. The meeting on 19 August 2016 was the last straw in a continuing act and the claimant was entitled to rely on this. The respondent's dispute points 4 and 5 have any substance. In this regard, Mr Harvey submitted the Tribunal should prefer the evidence of the claimant to

that of Mr Gemmell. He submitted that Mr Auld's evidence should not be regarded as peripheral; he was truthful, and suggested that the claimant was not given the full story which corroborates the fact that the claimant was being subjected to abuse by Mr Divers. He submitted it was a high bar set by the respondents and it was put to both the claimant and Mr Auld that they were lying in cross-examination, and Mr Harvey imagined this could only be on the client's instructions.

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77. In relation to the meetings in August 2016, Mr Gemmell accepted he had not used the word confidential at the first meeting. It could not therefore be said that the claimant was breaching confidence. In addition, neither Mr Gemmell nor Mr Divers mentioned the word bullying. It could not be said that the claimant was doing anything wrong in sending text messages, even if this could be deemed unwise. It was not the case that the claimant accepted at the meeting of 18 August 2016 that she agreed to try again with Mr Divers. To cast the evidence in that way was to miscast it.

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78. Taking into account the chain of events, and the incidents on the 18th and 19 August 2016, the claimant was entitled to resign, the respondents having breached the implied term of mutual trust and confidence.

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79. If the Tribunal finds there is a dismissal, then it should not conclude that there was a dismissal for a fair reason. In relation to the March incident there had been no proper investigation. It was accepted by the respondents that they had not obtained written witness statement evidence, until November 2016 well after the event.

Respondents` Submissions

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80. Mr Howson for the respondents made submissions on the credibility of the witnesses, asking the Tribunal to prefer the evidence of the respondent's witnesses over that of the claimant.

81. The claimant had displayed an attitude in giving evidence which supported Mr Gemmell's evidence that she would never apologise, and she could not accept that she was wrong, even when matters which were patently incorrect were put to her, and she was asked if these were a mistake.

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82. Mr Howson submitted the claimant then had acted entirely inconsistently with this in texting work colleagues about her conversation with Mr Gemmell. The test was whether the respondent's actions were without proper cause. Mr Gemmell had proper cause to raise the matters which he did with the claimant at the meeting of 19 August 2016. He was entitled to conclude that the claimant had not been truthful about the incident in March 2016 as she had given a variety of versions of the same event, and he was entitled to put to her what he did at the meeting of 19 August 2016.

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83. Mr Howson submitted that the claimant had not been constructively dismissed. In the event that she had been dismissed, the dismissal was for a fair reason, which was misconduct in texting colleagues as she had done after the meeting of 18 August 2016, and her misallocation of work on 21 March 2016.

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84. If the claimant had not sent the text messages then the meeting of 19 August 2016 would not have occurred. The Tribunal should set contribution at 100%, or at least a minimum of 50%.

25 **Consideration**

85. Section **94** of ERA creates the right not to be unfairly dismissed. It is said that the claimant was dismissed in terms of Section **95(1)(c)** of ERA, which provides that an employee is dismissed by his employer if the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employers conduct.

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86. In order to succeed in the complaint of constructive dismissal the employee must establish:-

5 (1) That there was a fundamental breach of contract on the part of the employer.

(2) That the employer`s breach caused the employee to resign.

10 (3) The employee did not delay too long before resigning, thus affirming the contract and losing the right to claim constructive dismissal.

87. The contract term which is said to have been breached is the implied term of mutual trust and confidence. The issue for the Tribunal is to consider whether that term of the claimant`s contract had been breached, and if so whether she resigned in response to that breach.

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88. There will be a fundamental breach of contract if the employer, without reasonable or proper cause, conducts itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between the parties. It is not necessary to show that the employer intended a repudiation of the contract; the Tribunal`s function is to look at the employer`s conduct as a whole and determine whether its effect, judged reasonably and sensibly, is such that the employee cannot be expected to put up with it.

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89. With this guidance in mind the Tribunal considered the facts which it had found in this case.

90. The claimant relies on continuing breaches of contract, culminating in a last straw. Those continuing breaches were firstly said to have been that she had endured a long period of verbal abuse from Mr Divers.

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91. The Tribunal was satisfied that Mr Divers had gone into the claimant's office in or around January 2016, and had an argument with the claimant about the allocation of work. It was satisfied this argument was likely to have been heated one.

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92. The respondents however dealt with that situation when it was brought to their attention by the claimant. Mr Gemmell spoke to Mr Divers, and put to him what the claimant had alleged against him, which he denied in part. Mr Gemmell, however, told Mr Divers he was not to go into the radio office again and speak to the claimant and if he had any disputes in relation to work issues, Mr Divers was to go through either Mr Gemmell, or Angela Gemmell. He reported this back to the claimant, also telling her that work issues were to be reported to him or Angela Gemmell.

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15 93. The claimant was aware that Mr Divers had been told not to go back into her office. Furthermore he did not do so. The claimant's complaint in January was therefore dealt with not unreasonably by the respondents.

94. Thereafter, in the period from January to August 2016 it was the claimant's position that she was subjected to constant verbal harassment at the instance of Mr Divers, and that she regularly reported this to Mr Gemmell, who did nothing about it. For the reasons given above, the Tribunal was not satisfied that this was the case.

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25 95. There was evidence, both from the claimant and Mr Gemmell, that the claimant's job would inevitably involve confrontation from time to time with taxi drivers. They both recognised that it was part and parcel of the job. While the Tribunal had no doubt that Mr Divers and the claimant did not like each other, and continued not to like each other through this period, it did not conclude Mr Divers regularly harassed the claimant during this period. Similarly, it did not conclude that the claimant regularly reported these instances of harassment to Mr Gemmell, who did nothing about it. If anything, the Tribunal formed the impression it was Mr Divers, rather than

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the claimant who more frequently complained to Mr Gemmell about the claimant, rather than the other way around. The Tribunal is fortified in its conclusions in that the claimant at no time lodged a grievance, or put complaints in writing to Mr Gemmell, which she might have been expected to do, had the abuse from Mr Divers been as serious, and constant, as she suggested in her evidence in chief.

96. The Tribunal then considered the events of 18 and 19 August 2016.

97. For the reasons given above, the Tribunal concluded that the claimant was advised by Mr Gemmell that Mr Divers had complained about her withholding work, but that he (Mr Divers) wanted all of this to stop and for them to resolve matters. The Tribunal was also satisfied that at the conclusion of that meeting Mr Gemmell understood the claimant to have agreed to attempt to start again, or wipe the slate clean, as he said in evidence.

98. Against that background, the Tribunal then considered what occurred on 19th August 2016. For the reasons given in the Note on Evidence, the Tribunal was not persuaded that Mr Gemmell shouted and bawled at her, but it did conclude that he was angry and told her that he was not at all pleased about her sending the text messages and because of her attitude he could no longer trust her.

99. It was also satisfied that Mr Gemmell told her that he had found out what she had told him earlier to be untrue, and when the claimant asked him was he calling her a liar, he responded by saying that was her word.

100. These statements on the part of Mr Gemmell clearly raised serious issues, and the Tribunal considered whether this conduct on his part amounted to the employer, without reasonable or proper cause, acting in a manner which was likely to breach the implied term of mutual trust and confidence.

101. In considering this question the Tribunal considered it appropriate to take into account the context and background against which the statements were made. These statements were not made in a vacuum. They were made against a background of Mr Gemmell having spoken to the claimant the day before, with a view to getting the claimant and Mr Divers to try again in terms of their working relationship, and the claimant having agreed to attempt to do so.

102. While Mr Gemmell did not tell the claimant that the conversation of the 18th with her was confidential, it was not unreasonable for him to form the view, as he did, that the claimant's text messages sent to work colleagues were inconsistent with what he had discussed with the claimant the day before, and were designed, or at least likely, as he put it, "*to stir things up*" between the claimant and Mr Divers. The Tribunal was satisfied that it was this which caused Mr Gemmell to state to the claimant that he was not pleased with her in her and because of her attitude he could not trust her, and that he had reasonable cause to express that view in light of the inconsistency between what had been discussed about moving matters on at the meeting on the 18th, and the claimant's texts of the same date.

103. Mr Gemmell also raised the incident in March, involving the passenger Mr Alford. This was a matter which he had investigated but which he had not canvassed with the claimant, and did not canvas with her in the course of any formal disciplinary procedures. The Tribunal was satisfied it was not Mr Gemmell's intention to discipline the claimant for the incident in March 2016. Had he wished to do this then procedures could have been instigated at a much earlier stage. Mr Gemmell decided as he said, not to use the information, but to allow matters to settle down. Mr Gemmell did, however, refer to this information in the course of the meeting on 19 August 2016, and he told the claimant that he found out what she had said to him about the incident was not true.

104. Mr Gemmell's had information which suggested to him that the claimant had not been truthful about the March 2016 incident. Set in the context of any disciplinary procedure however it would be unreasonable for him to reach the conclusion that what the claimant said was untrue, until such times as
5 the claimant was given an opportunity to comment on it.

105. Did Mr Gemmell's comment to the claimant to the effect that he had found what she had told him earlier to be untrue, amounted to a fundamental breach of the implied term of mutual trust and confidence? Again, the
10 Tribunal considered it had to take into account the context in which this statement was made, and the overall picture painted by the meeting of 19 August 2016. Although Mr Gemmell put this to the claimant, it was not suggested by him that it formed, or was going to form, the basis of any disciplinary action against her. When she said to him that she would then
15 have to leave, he immediately assured her that that was not the case, and told her all she had to do was settle down and settle her differences with Mr Divers and move on.

106. Looked at as a whole, Mr Gemmell's conduct in advising the claimant that
20 he was not pleased and had lost trust in her because of her response in sending text messages after the meeting on 18 August 2016, and that he that he had found out that what she had told him in March 2016 to be untrue, but at the same time assuring her that she did not have to leave her employment, and all she had to do was settle down and settle her
25 differences with Mr Divers, was not, judged against an objective standard, unreasonable conduct, which went to the root of the contract of employment, thus amounting to a fundamental breach of contract, which justified the claimant resigning.

107. In these circumstances there was no dismissal under Section **95(1)(c)** and the claim is dismissed.

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Employment Judge: Laura Doherty
Date of Judgment: 17 March 2017
Entered in register: 20 March 2017
and copied to parties

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