EMPLOYMENT TRIBUNALS

Claimant: **Mrs Katie Swain**

Respondent : **Interserve Learning & Employment (Services) Limited**

Heard at: **Sheffield** **On:** **19 and 20 April 2018**
2 July 2018

Before: **Employment Judge Brain**

Representation

Claimant: Mr N Bidnell-Edwards, Counsel
Respondent: Mr A Roberts, Counsel

RESERVED JUDGMENT

The Judgment of the Employment Tribunal is that the claimant's complaint of constructive unfair dismissal fails and is dismissed.

REASONS

1. After hearing the evidence and following the conclusion of each party's case the Tribunal reserved Judgment. These are the reasons for the Judgment that I have reached.

2. The claimant presented her claim form on 20 December 2017. She has brought a complaint of constructive unfair dismissal.

3. Her case is that the respondent (without reasonable and proper cause) acted in a manner calculated or likely to destroy or seriously damage mutual trust and confidence. In the statement of case (at pages 13 to 20 of the bundle) the claimant pleads (at paragraph 8) that the factors that led to her loss of trust and confidence are those set out at paragraphs 9 to 36 of the statement of case. This was, essentially, a factual and chronological narrative of the claimant's case.

4. It is perhaps unfortunate that this case did not benefit from a private preliminary hearing before an Employment Judge prior to the final hearing. Had such a preliminary hearing been held, it is possible that the issues in the case could have been more clearly defined. As it was, each party presented to the Tribunal a list of issues.

5. There was some common ground in the two lists. In particular, it appears to be agreed that the claimant's contention is that the respondent breached the implied term of trust and confidence as follows:-

    5.1. By allocating to the claimant an excessive caseload both prior to and following the departure of a member of staff (Emma Sheldrick) in June 2017.

    5.2. By forcing the claimant to carry out assessing work.

    5.3. By lacking consideration for the claimant's welfare in requesting that she obtain approval for time off in lieu ('TOIL') in June 2017 and/or by requesting that she take TOIL on a different date.

    5.4. By sending to her insulting emails (being those identified in paragraphs 15 to 23 of the statement of case).

    5.5. By sending to the claimant a patronising and blunt email as pleaded in paragraph 26 of the statement of case.

6. Each of the list of issues has within it the following generalised allegations:-

    6.1. That the respondent ignored the claimant and/or failed to provide her with sufficient support in the relevant circumstances; and

    6.2. Pressured and bullied the claimant into accepting an increased case load.

7. In discussions at the outset of the hearing, Mr Roberts submitted that in reality the claimant's case concerned the five specific allegations set out at paragraph 5 above and that the two generalised allegations at paragraph 6 were effectively no more than a summary of those five specific allegations. Mr Bidnell-Edwards submitted that this was an incorrect approach as the Tribunal must focus on looking at the conduct of the employer as a whole in order to ascertain whether, viewed objectively, that conduct shows an intention no longer to be bound by the implied term of trust and confidence.

8. By way of background, and reading from paragraph 5 of the respondent's grounds of resistance, the respondent *"provides skills, education and employment support to teenagers and adults from all walks of life."* The business is sub-divided into different sectors managed by a head of sector. The claimant worked for the respondent in the hair and beauty sector.

9. The claimant commenced employment with the respondent on 5 March 2012. She worked as an internal verifier. Her contract of employment is at pages 56 to 68. According to the claimant's personal profile at pages 53 to 55 of the bundle, in that role she "[managed] the quality, sampling portfolios, delivering CPD and carrying out all graded observations." She was promoted to the position of area manager with effect from 9 November 2015. Her line manager and head of sector for the hair and beauty sector at that time was Amber Massey. Amber Massey went on maternity leave with the effect from

3 October 2016. Stephanie Smith became head of the health and beauty sector and the claimant's line manager at around the same time.

10. The heads of sector are managed by the operations director. At all material times, this position was held by Emma Smith-Brindley.

11. The Tribunal heard evidence from the claimant. The respondent called evidence from Stephanie Smith and Emma Smith-Brindley.

12. The job description for the area manager role is at pages 70 to 73 of the bundle. The purpose of the role is said to be, "to manage an effective, high performing high achieving learner achievement team (LAT), who deliver the highest standard of teaching and learning in order to achieve the key goals and objectives in line with the organisational strategy of Interserve Learning & Employment. The key priorities are to manage the delivery within the LAT in order to maintain a high quality of delivery including a great experience for the employer, the learner and our staff." There are then set out a number of the key performance indicators (KPIs). Further particulars are given about the responsibility of managing the performance of the LAT. These particulars include the successful management of a team of 10 to 12 trainee assessors (TAs). A number of other objectives are then set out which include "budget forecasting and profit and loss responsibility" and the undertaking of monthly one-to-ones with the TAs. The area managers (whom I will now call 'AMs' for short) have to attend monthly AM team meetings and monthly one-to-one meetings with their head of sector. A flexible attitude and an ability to adapt to changing demands and conditions were noted as essential skills and competencies.

13. Mrs Smith gave uncontroversial evidence at paragraph 4 of her witness statement that, "Part of the AM role was to manage the taking of new learners. New learners could be generated by the TAs from existing salons they work with, or could be generated by the sales team and would then need to be allocated by the AM to an appropriate TA in their team having regard to postcode and capacity. It was necessary to maintain a pipeline of learners as learners continually completed their courses at different times during the year. If new learners were not taken on, then the caseloads decreased as learners completed."

14. The claimant was the AM for the West Midlands team when her appointment took effect in November 2015. The letter of appointment confirming a variation of her contract upon this appointment is at page 69. The terms of the contract of employment remained unchanged (but for her job role and salary). Thus, amongst other things, she was bound by the term that her *'role profile may from time to time be reasonably amended by the Company, having regard to [her] skills and experience."* The claimant was not contractually entitled to TOIL *'unless in exceptional circumstances and agreed in advance by your line manager.'* On 12 March 2017 she also became AM for the South team. The claimant gave unchallenged evidence in paragraph 32 of her witness statement that her team covered a wide geographical area "from Shropshire/Ironbridge covering all the way to Margate".

15. At paragraphs 10 to 14 of her statement of case, the claimant refers to 'one-to-one action plans' with Stephanie Smith held between February and May 2017. I understand this to be the respondent's name for the regular one-to-one meetings held by the heads of sector with the AMs. The conduct of these one-

to-ones is pleaded as amongst the factors which led to the claimant's loss of trust and confidence.

16. The February one-to-one action plan is at pages 128 to 133. The following were drawn to my attention:

    16.1. That the claimant's target case load was 212. Her actual case load was 243. It was hoped that this would "level out over the next couple of months" following the return to work from maternity leave of an absent TA.

    16.2. The number of missed visits with learners and learner retention was not in accordance with the KPIs in the job description. Mrs Smith acknowledged that the claimant was "over caseload". However the claimant was encouraged to "strive to get as close to this target as possible."

    16.3. Mrs Smith acknowledged that the claimant had been working "incredibly hard over the last few months whilst the team have been over caseload".

    16.4. The claimant thanked Mrs Smith for her positive feedback.

17. In cross-examination, it was clarified with the claimant that the expression "caseload" in the context of an AM's one-to-one was to the number of learners within the area. The claimant fairly acknowledged that, by reference to the job description at page 70, a full time AM may have a caseload as high as 384 learners. That figure was calculated by reference to the requirement to manage a team of up to 12 TAs each of whom, if working full time, may have 32 learners. The claimant acknowledged that she never managed as many as 12 TAs.

18. The next one-to-one action plan took place on 29 March 2017 (pages 135 to 140). The following issues were highlighted to the Tribunal arising from this meeting:

    18.1. The number of missed visits in the LAT had increased to 19%.

    18.2. Concern was expressed that TAs were failing to meet their KPIs.

    18.3. Mrs Smith said that she was "a little shocked" when completing the review to discover "how much is outstanding from Katie's team. There is a clear lack of performance management throughout the sector at the moment and this is being reflected in KPIs not being met and overall under performance in the LAT – this needs to be managed tighter and TAs need to understand that this is unacceptable."

    18.4. The claimant said that she was also disappointed. She attributed this to carrying the highest caseload and also having taken on the South region coupled with the departure of some of the TAs. The claimant said in her witness statement (at paragraph 6) that, "My targets would only be achievable once the team had been replaced with new members and this was anticipated to happen in the following months by April and June 2017 (pages 141 - 150 of the bundle). I simply felt as though I was being set up to fail."

18.5. Mrs Smith put the claimant on to a performance improvement plan which is at pages 141 to 150.

19. The template form of the plan provides columns for the objective to be achieved, the expected outcome/measure, the support needed and the target/review date and comments as to progress.

20. The performance improvement plan was reviewed over Skype on 24 April 2017 (pages 149 and 150). Mrs Smith recognised that the claimant was being proactive in engaging with learners. However, Mrs Smith expressed concern about some areas including the need to set "smart targets with TAs." It was agreed that the plan would be reviewed again on 4 May 2017.

21. The April one-to-one is at pages 151 to 153. The following issues are of note:-

21.1. A number of targets had still not been met.

21.2. Mrs Smith acknowledged that the claimant's difficulties had been compounded by the departure of a TA.

21.3. Mrs Smith also acknowledged that the claimant was visiting learners to help out the TAs which was impacting upon her own job role. Mrs Smith stressed that the claimant needed to get her TAs to take ownership for a lot of the actions rather than trying to do them herself.

21.4. The claimant observed that she was "having issues with the South ladies presently as they are kicking back on the caseload they have inherited, however there were only seven learners and they have achievers and leavers to come off their caseload so this hasn't had a massive impact on their workload." The claimant also observed that she was travelling which took up a lot of her time and was going to use Skype in future for some of the one-to-ones she had to conduct.

22. The next one-to-one action plan took place in May 2017 (pages 157 to 161). The following points were highlighted:-

22.1. Mrs Smith told the claimant that her priorities were to clear unfunded cases. (This was a reference to those learners who had not completed their course within 12 months and for which accordingly the respondent was receiving no further payments). Mrs Smith said that "adverts have now gone out for freelance TAs" in order to help the claimant with her workload.

22.2. The claimant complained that she was "starting to pull my hair out now". She complained of finding the position to be depressing "constantly being on the other end of the phone dealing with complaints and not growing the team!" She went on to say that, "I have agreed to complete the London learners however I would like to stress that my partner is in the middle of intensive ops and radiotherapy at the minute and as much as I will gladly always, *always* assess to keep the team afloat I don't want to be away from home too much as he needs care due to the severity and the skin graphs *[sic].* I also have two daughters at home which I need to be there for so yes as much as I don't mind I don't want to be assessing for the next three to four months as I feel that this then

has an impact on time to manage the team effectively and complete reports, spreadsheets, the learners are all three and a half hours away which is another seven hours taken out of my week without the visit time on top."

22.3. Mrs Smith encouraged the claimant to "keep focusing on your KPIs and managing the TAs performance".

23. Mrs Smith acknowledged, in paragraph 11 of her witness statement (dealing with the April one-to-one), that the claimant was getting behind with her AM responsibilities because she was visiting learners to assist the TAs with assessing. In paragraph 12 of her witness statement she drew the Tribunal's attention to the fact that the claimant had said (at the May 2017 one-to-one) that she was very happy to assess to help to keep the team afloat. Mrs Smith said that, "I consider this shows that the claimant felt she had the skills and capabilities to assess".

24. In its grounds of resistance, the respondent produced a table (at paragraph 18) showing the number of learners *per* AM in the hair and beauty sector at various times. As at 23 May 2017, the table shows the claimant to have 256 learners. This is the third highest of the six AMs there listed. The claimant said, in paragraph 38 of her witness statement, that the figures attributed to her in the table were incorrect. However, she did not say what she considered the correct figure to be. That said she goes on in paragraph 39 of her witness statement to say that the table which the respondent contended showed her to have a mid-range size team was only part of the picture. This was because her part-time TAs had an excessive caseload. She attributed this as the reason for the departure of a number of members of her team during the four months following Mrs Smith taking over the role of head of sector. *[I do not see how table at paragraph 18 in the notice appearance justifies the assertion at paragraph 19 that the claimant had a 'mid range sized team' as it simply shows the number of learners and not the number of TAs in the claimant's teams and the other teams for comparison].*

25. In the same section of the grounds of resistance (at paragraph 21) there is set out a table showing the number of learners per TA in the claimant's team as at May 2017. Although not employed as a TA, the claimant is there listed as having two learners (being the two who lived in London referred to in the May one-to-one). The claimant accepts, in paragraph 40 of her witness statement, that in May 2017 she "did only have two learners however these were nowhere near where I lived and were in London. It took me five hours by train and then had to walk to get to these salons which included an overnight stay."

26. It is clear from the one-to-ones that I have seen and also from the respondent's pleaded case that it was recognised that there were problems within the claimant's team caused by the departures of TAs. In paragraph 25 of the grounds of resistance the respondent says that, "When a TA leaves they typically have a caseload of learners. Normal practice is to firstly try and re-distribute the learners between other TAs within the team. If this cannot be done due to distance and capacity then if the AM is from the hairdressing industry then they would support the caseload. This would be a short term measure whilst recruiting takes place for the TA that has left or alternative arrangements can be made. If there was still a problem then learners would be allocated to TAs in other teams although care is taken to choose TAs who are

geographically as close as possible to learners so as to support the welfare of staff (reduce travel) and to reduce expenses. As a very very last resort then learners are allocated to quality assurers."

27. The claimant took issue with paragraph 25 of the grounds of resistance. She said (in paragraph 44 of her witness statement) that "AMs should never assess as they haven't been part of any standardisation process and this is a requirement from the awarding body". The claimant had in fact commented upon this earlier in her witness statement (at paragraph 37). In answer to the respondent's contention (at paragraph 16 of the grounds of resistance) that the claimant had maintained her technical hairdressing skills such as to enable her to deliver an NVQ to the respondent's learners, she said, "I did carry out my practical skills as a hairdresser but this does not give someone the skills to deliver an NVQ with no standardisation, which I had never had and again the awarding body would not allow this and the respondent is fully aware of this. Especially as I hadn't even delivered or seen the new frameworks which were updated in 2015." The claimant gives similar evidence in paragraph 33 of her witness statement. She said that she had never held the role of TA with the respondent. Whilst she had helped out "the very odd time in the three years prior to me becoming an AM" she said that the qualifications were new and she had not been a part of any standardisation. She did not know the new NVQs and what was needed for the delivery of them. She also mentioned that Jeanette Haigh, who is or was the quality assurance manager working in the hair and beauty sector, had said that it was not appropriate for anyone working within the quality assurance side of the business or acting as an internal verifier to undertake assessment of the learners by reason of the potential for conflicts of interest.

28. Following the one-to-one action plan of May 2017 an incident took place on 13 June 2017. The claimant takes up the story in paragraph 10 of her witness statement. She says, "On 13 June 2017 Stephanie Smith informed me that their colleague, Emma Sheldrick had left the respondent's business with immediate effect. This left a caseload of 40 to be re-distributed and allocated to the remaining members of my team. Stephanie Smith re-distributed the 40 cases which meant that I was expected to increase my caseload by another 10. I was already under pressure to meet my existing targets. However my caseload had now been increased further in addition to my other responsibilities as an area manager (pages 178 to 185 of the bundle)."

29. The claimant was unhappy about this development. She says at paragraph 11 of her witness statement that:-

> "I informed Stephanie Smith on the same day that I was simply unable to increase my caseload. I expressed my concerns that I was struggling to complete my tasks as an area manager. I felt overburdened as I had to travel a lot in order to manage my work but this meant that I did not have enough time to carry out my own one-to-one team meetings. I stated that I felt as thought I was already not carrying out my work properly and was instead, "just getting by assessing" and this was made worse by the fact that I did not feel as though I had been given the sufficient training (page 179 of the bundle). *[This is a reference to an email from the claimant to Stephanie Smith of 13 June 2017 (13:33) about this development].* I explained that I was not familiar with the new standard and guidelines or the procedures but I also did not have the time to

physically go through this training alone. I added that I was happy to meet with Stephanie in order to discuss this further."

30. The claimant says in paragraph 12 of her witness statement that Mrs Smith, "responded to my email within 10 minutes (page 179 of the bundle) to confirm that the situation would only be until August 2017 however "there is no other alternative?" Also Stephanie advised me that I would be supported with regards to my area manager role in order to allow me to focus more on my caseload. However I was asking for help and support which the respondent was failing to adequately support." She goes on in paragraph 13 to say that, "I was unhappy with this response. I had been not expected to have a caseload at all, as this is not my job role. Further, at no point had I attended any form of standardisation meetings nor did I know anything regarding the assessment processes in order to manage the caseload, as these were new qualifications which I had never assessed before. I expressed that I felt as though I was struggling and was "all over the place and giving up my own time to do this" (page 179 of the bundle). I stated that I was not prepared to assess any learners at the time due to the sheer amount of travelling this involved and also due to my lack of training and knowledge."

31. The claimant says that Mrs Smith responded to suggest that she and the claimant should have a conversation about the claimant's concerns. She says that Mrs Smith repeated that the situation would only pertain for a period of three months. Mrs Smith said that she herself had been in the claimant's position in having two roles to fulfil but that she (Mrs Smith) would take care of the claimant's area manager responsibilities to enable the claimant to concentrate upon her caseload and carry out the role as a TA. The claimant refers to page 178 of the bundle where we find Mrs Smith's email to this effect (timed at 13:59). The claimant's reply is upon the same page timed at 14:02 the same day to the effect that she would call Mrs Smith upon her departure from the salon she was working in at the time.

32. For her part, Mrs Smith's evidence is that Emma Sheldrick was a TA in the claimant's team who attended a disciplinary hearing on 12 June 2017 and was dismissed "for malpractice". Mrs Smith contacted the claimant at 17:35 on 12 June by way of Facebook Messenger asking the claimant to ring Mrs Smith to discuss matters first thing the next day. (The claimant was on annual leave on 12 June 2017). We can see from the copy of the Facebook message at page 176 that Mrs Smith did indeed message the claimant at 17:35 on 12 June 2017. The message reads, "Hi chick. Give me a ring first thing please it is about Emma Sheldrick's meeting today xx". The claimant in fact replied at 17:47 on 12 June to say "give me 2 minutes xx". There is then another message from the claimant to Mrs Smith which says "goes straight to voicemail xx". Mrs Smith then responded at 18:05 to say "I'm off phone now xx".

33. It appears to be common ground that Mrs Smith and the claimant in fact did speak on the evening of 12 June (by reference to paragraph 51 of the claimant's witness statement). Mrs Smith, in my judgment reasonably, says (at paragraph 14 of her witness statement) that she understood from the Facebook exchanges that the claimant was happy to have a short conversation with her that evening notwithstanding that the claimant was on annual leave. This then led to the correspondence and communication on 13 June 2017 to which I have already referred at paragraphs 28 to 31 of these reasons.

34. In addition to the departure of Emma Sheldrick, another two TAs left the claimant's team in June 2017. Mrs Smith says that she supported the claimant by allocating 19 of the learners being supervised by those three TAs to the South Yorkshire team and the East Midlands team. Mrs Smith sent an email to all area managers inviting one of them to take on "one last learner from her team" (page 173). Mrs Smith says that this is normally a responsibility that would fall to an AM and by doing this she considered that she was being supportive of the claimant by going beyond what would be expected of a head of sector.

35. The claimant took issue with the respondent's pleaded case that only one additional learner was assigned to the claimant on 9 June 2017 and then a further one additional learner on 30 June 2017 from those learners being handled by the TAs that had left the claimant's team between March and June 2017. The claimant says that paragraph 24 of the grounds of resistance to this effect is incorrect as there were other learners. Unfortunately, she does not say how many additional learners she says that she was assessing. It has to be said that it is not easy to piece together the information provided by either party upon the issue of the number of additional learners acquired by the claimant by reason of TA departures between March and June 2017. It appears to be the respondent's case that the claimant was supervising two learners as at May 2017 (by reference to paragraph 21 of the ET3- presumably the two in London), another two in June 2017 (by reference to paragraph 24) together with the 10 learners acquired following Emma Sheldrick's departure (paragraph 38 of the ET3). This makes a total of 14 learners in all.

36. As I said at paragraph 29, in the email of 13 June 2017 the claimant raises a complaint with Mrs Smith (at page 179) that she has 12 learners and that "12 is far too much". She said that she was "just getting by assessing" and didn't have the time to "go through this training to house these learners." The respondent pleads that the claimant acquired an additional learner on 30 June 2017 which appears to give the claimant 13 learners at that point. The claimant indicated in evidence given in cross examination that she had 14 learners: she said, "before the 10 *[from Emma Sheldrick]* I was seeing four." Whatever the precise number the parties are in the same 'ballpark' as to the number of learners that the claimant acquired

37. Mrs Smith's evidence (at paragraph 18 of her witness statement) is that the 10 learners allocated to the claimant following Emma Sheldrick's departure were based in the West Midlands area and therefore within a reasonable travel distance of the claimant's home. She also says (at paragraph 18 of her witness statement) that the claimant did not have a full caseload of learners, as others had between 35 and 40. She goes on to say that, "it was common practice in the business that when TAs left if their learners could not be accommodated by other TAs then if the AM was from the hairdressing industry (as the claimant was) then they would support the caseload as a short term measure". She also said that she planned to take on some of the claimant's AM responsibilities.

38. In paragraph 19 of her witness statement Mrs Smith expressed surprise that the claimant was of the view that she did not have the capability to assess. Mrs Smith says that, "given the claimant's strong CV, that she had been a QA with the company until October 2015, that the quality team had judged her competent to assess, that she already had two learners (page 179 of the Tribunal bundle) and that the claimant herself had documented less than a

month earlier that she would always gladly assess to assist the team (page 161 of the Tribunal bundle), I was surprised to receive these comments. I believe the claimant not only had the skills to assess but she had proved that she could assess as she was already doing it (pages 179 and 191 of the bundle). The claimant also mentioned that she did not feel that she could assess learners and complete her AM responsibilities."

39. As I said at paragraph 30, page 179 contains an email from Mrs Smith to the claimant of 13 June 2017 (13:41). Here, Mrs Smith informed the claimant that the situation was not ideal but was only for a period of two months until August 2017. Mrs Smith considered that she had "stretched your TAs as far as possible and have requested support from quality so there is no other alternative?" She concluded, "I am more than happy to discuss this with you later if you give me a ring but unfortunately this is our only option now Katie" *[emphasis added].* In response to a further protest about the situation from the claimant in an email of the same date (13:48) (in which the claimant said that she "can't facilitate 12 learners I just can't, I feel I am all over the place, and giving up my own time to do this") Mrs Smith said (at 13:59) (at page 178 of the Tribunal bundle), "Trust me, I understand how frustrating this is as I spent my first three months as an AM doing both roles but as I said, sometimes it is our only option for the good of the LAT. Quality are not to act as TAs". Mrs Smith acknowledged that the claimant was "all over the place" at the moment and that this was "because you are trying to accommodate both roles but as I have said, you will not have the AM pressure for the next two months as myself and the others can take care of that for you. All of these learners are closer to you than your one in London so there will not be the same volume of travel involved. If you can come up with another solution then I am happy to talk this through with you but using quality for anything additional to what I have suggested is not possible."

40. Mrs Smith explained in evidence her reluctance to enlist the further help of Laura Jones who was a quality assurer. This had been suggested by the claimant in her email to Mrs Smith of 13 June 2017 (13:48). Mrs Smith said in paragraph 21 of her witness statement that "this was not appropriate because quality assurers are not to act as TAs because a quality assurer cannot quality assure a learner's portfolio if they have had anything to do with assessing it and therefore the learner would need to have been allocated to another of our small number of quality assurers. I felt that the quality team were already being helpful and I didn't want to push things too much by asking for additional resource. I also gave the claimant the opportunity to suggest an alternative solution to re-allocating the 10 learners to her". Mrs Smith says in paragraph 22 of her witness statement that she empathised with the claimant and said that she had found herself in the same position (as indeed she had said in the email of 13 June 2017 (13:59). Mrs Smith mentioned that since February 2018, when she reverted to her position of area manager following Amber Massey's return from maternity leave, she has had to take on learners in order to support the wider team.

41. As we have seen, in the email from Mrs Smith to the claimant of 13 June 2017 (13:59) Mrs Smith had suggested that they have a discussion about matters. At 14:02 the same day the claimant said that she would telephone Mrs Smith when she had left the salon in which she was working. Mrs Smith was happy with this suggestion. (I refer to the chain of emails at page 178).

42. There then followed another email of the same day from Mrs Smith to the claimant (page 192). This email was timed at 18:52. It concerned the issue of TOIL. Mrs Smith said to the claimant that, "I thought we agreed on the phone you would cancel your TOIL as it hadn't been approved prior to be entered in your diary and this is a priority learner? You never rung me when you finished either Katie – I thought you wanted to have a chat?"

43. The issue of TOIL had in fact been raised by the claimant on 13 June 2017 (at 18:37- page 192). The claimant had said to Mrs Smith, "I can't do this learner *[scheduled for Friday 16 June 2017 in Rugeley, Staffordshire between 10.30 and 15.30]* I need to finish at lunch. I'll look at another TA taking it".

44. In response to Mrs Smith's expression of concern in the email at 18:52, the claimant replied (page 191), "I have called the learner and she has three colour corrections in which means I wouldn't get home until way after 6 – more likely 7 on a Friday as other side of Birmingham, I'm putting in enough hours Steph and about ready to break. I don't want to assess these learners but far too upset to discuss this tonight to be told I still have to facilitate them, I don't feel this is equality and other AMs aren't ever expected to do this, I am working on Sunday *[18 June]* and would have thought it more than reasonable to have my time on Friday *[16 June],* I always give over and above and at this present moment I feel I am doing more than most, on probably less pay too. I'm also away tomorrow from home, I need to re-look at what I want to do now Steph as I am so miserable and stressed. This has just topped me over the edge with it all."

45. In reply, Mrs Smith said (page 191, email timed at 19:18), "I appreciate you are upset however this needs to be addressed as it is not going to go away and therefore I feel we need a call first thing please? I know you've put in a lot of hard work but surely you would agree that completing a priority learner should take precedence to taking hours back which could be done at a time when your team isn't in such a predicament? This is a difficult role Katie and does have its ups and downs and part of management is about sticking with it through the difficult times and pulling your team together. You also need to consider the example you are setting for your team – you are expecting them to rally round and get achievers in (probably also working out of their hours with no facilities to take TOIL back currently) but then it is ok for you to take your TOIL back. We have discussed before that there has to be give and take and that is why I have always requested that you ensure TOIL is approved before adding to your diary to avoid disappointments if this can't be facilitated". Mrs Smith assured the claimant of her support.

46. At 10:35 on 14 June 2017, the claimant emailed Mrs Smith (page 189). It appears that following a discussion with HR, the claimant was confirming that she was going to attend her GP at 2:40pm before adding that "at this moment in time I am too emotional to speak to you Steph". Mrs Smith responded at 10:46 the same day to say, "Can I ask which type of sickness this is so I can log on HR please?" The claimant complains about this email as part of her claim. She emailed HR at 11:34 to say, "Below is the email sent from Steph *[being the one timed at 10;46]* which I feel is not helping how I feel with my communication with her and support, blunt and frosty to say the least." Mrs Smith said, in evidence given under cross examination, that she had been advised by HR to reply to the claimant's email sent at 10:35 in these terms. She fairly accepted the bluntness of her email timed at 10:46 and that the tone of it could have been softened.

47. On 14 June 2017 at 23:02 the claimant emailed Mrs Smith (page 190/191). She put her side about the issue of TOIL. She maintained that, "the TOIL on Friday *[16 June 2017]* was discussed within an email and yes after discussion you asked *moving forward* to let you know prior to booking the TOIL in that I agree with you first, however, you are fully aware that this was still being taken on Friday and you never asked me to remove it but confirmed again in an email that you have no issue with me taking it. I have committed to spend time with family on that afternoon as I am once again forfeiting my Sunday to accommodate the increased learner ration due to the loss of another assessor, 24 hours after this you then booked learner appointments into my calendar to assess over *my* TOIL with no communication with me or to check this was ok, not only would I lose my TOIL but wouldn't get back to Leicester until 7pm on Friday email as I have stated in my email". The claimant mentioned that she had a sick note signing her off as unfit to work until 28 June 2017.

48. I mentioned at the outset of these reasons the lists of issues presented by the parties. The emails contended by the claimant to be insulting and/or otherwise in breach of the implied term of trust and confidence are those to which I have referred at pages 178 to 181 (around the issue of taking on the additional learners following Emma Sheldrick's departure) and 190 to 192 (around the issue of TOIL). The email said to be patronising of the claimant was that around the issue of sick leave to which I have referred at page 189.

49. On 7 August 2017 Mrs Smith emailed Mrs Smith-Brindley (page 188). She forwarded to Mrs Smith-Brindley a copy of the claimant's email of 14 June 2017 (10:35) (being the one referred to in paragraph 46 above in which she informed Mrs Smith that she was attending her GP at 2:40pm that day). Mrs Smith said to Mrs Smith-Brindley that, "This email from the Wednesday morning *[14 June]* after we were talking on the Monday night *[12 June]* and Tuesday *[13 June]* – then she wasn't willing to talk to me." The Monday, Tuesday and Wednesday in question were 12, 13 and 14 June 2017 respectively.

50. Mrs Smith says at paragraph 23 of her witness statement that she did discuss matters with the claimant on the telephone on Monday 12 and Tuesday 13 June 2017. Mrs Smith gives no particulars as to what she says was discussed in those telephone calls. Further, there is no reference in the grounds of resistance to the claimant having spoken to Mrs Smith on 12, 13 or 14 June 2017. That said, Mrs Smith's email at page 188 points to there having been at least one telephone discussion. In paragraph 53 of her witness statement, the claimant says that Mrs Smith "was at no point sympathetic over the phone, she told me I had no choice, there was no way around it and I had to do this role for three months."

51. It has been difficult for the Tribunal to piece together the events round this time. However, I am satisfied on balance (particularly by reference to paragraph 53 of the claimant's witness statement and the email at page 188) that there was at least one telephone discussion between Stephanie Smith and the claimant on 12 June 2017. I am also satisfied that the tenor of the discussions was similar to that recorded in the emails around the issue of the learners. There is no reason for Mrs Smith to have taken a different line over the phone to that taken in her emails.

52. As we have seen, the issue around the TOIL (referred to at pages 190 to 192) centred upon an appointment made for the claimant to undertake an

assessment with a learner in Rugeley, Staffordshire on Friday 16 June 2017 between 10:30 and 15:30 that day. The claimant says in paragraph 55 of her witness statement that this appointment had been booked in her diary without consultation with her. The claimant expands upon this. She says that, "I also had time in lieu booked out – only half a day as I had been giving up my weekends on a Sunday to travel to London. And in that week I had my daughter, therefore I couldn't work the six days she wanted me to. I therefore emailed her back saying that I have that day off as I am travelling to London on the Sunday and her response was tough, despite the fact that I am a single mother".

53. Mrs Smith deals with the issue of the TOIL in her witness statements commencing at paragraph 25. She says, "As a business we recognise that due to the nature of their job AMs and TAs may work additional hours which is why we permit both AMs and TAs to take reasonable time off in lieu ("TOIL") if it is agreed in advance. This is usually managed locally within each team. As a manager it is important that I know when my team are working and when they are not and therefore at the team meeting in May I asked all AMs to seek approval for their TOIL from me before they put the dates in the diary. This was agreed by all AMs. I reminded the claimant of this by email on 8 June 2017 (pages 174 and 175 of the Tribunal bundle)." *[I interpose here to say this is difficult to understand as these emails are not dated 8 June 2017 but rather are dated 9 and 12 June 2017].*

54. Mrs Smith notified the claimant on 9 June 2017 (page 175) that she had noticed that she was putting a lot of TOIL in the diary. She was asked to obtain approval for the specific dates from her "as you seem to be just putting them in without discussing with me which means I have to physically check your diary to know when you are planning to be in work?" The claimant replied on 12 June 2017 (09:15) that she had booked 1½ days of TOIL. She went on to say that, "both are for losing my Sundays … as the journey is over four hours on the train which means I would arrive on the Monday after lunch, I am working six days these weeks, and giving up my two Sundays. Friday 16 June (half a day) is because I'm having to work on the 18th (Sunday) which is in my calendar booked out in red. 14 July is because I am again working on the Sunday and travelling – this is also stated in my calendar". Mrs Smith replied the same day (09:17) to say, "I'm not saying you haven't worked over Katie I am asking that you follow procedure and have your TOIL approved – not just take it as you please. Other AMs may be on leave etc so I need to know when you intend on being off work. This process was agreed by everyone only a couple of months ago so should be no surprise in ensuring this is approved before being booked." She invited the claimant to have a discussion with her. This appears to have taken place as on 13 June 2017 (18:52) at page 192 Mrs Smith says to the claimant (as we have already seen) that, "I thought we agreed on the phone you would cancel your TOIL *[for 16 June 2017]* as it hadn't been approved prior to being entered in your diary." This then led to the further exchanges at pages 190 and 191 to which I have already referred (at paragraph 47). Doubtless, the issues around the TOIL were not helped by the fact that, as is accepted by the respondent (at paragraph 47 of the grounds of resistance) it does not have a formal TOIL policy.

55. On 9 July 2017, the claimant prepared a grievance regarding the events which had taken place at work. The claimant remained signed off as unfit to return to

work at this time. Although dated 9 July 2017 the grievance appears not to have been presented until 13 July 2017 (by reference to the email at page 205). The grievance is at pages 205 to 209. Mrs Smith-Brindley says that she first became aware of the grievance on 13 July 2017 and acknowledged it on 19 July 2017 (within, she said, the timescales in the respondent's policy).

56. I shall not set out the contents of the grievance in detail. In summary, the claimant sets out the history of matters. She complained in particular about having felt pressured and bullied into accepting an increasing caseload and the effective change of her job role.

57. The claimant says that she remained off sick from work until the date of her resignation on 14 July 2017. She complained that she had received no response regarding her grievance. She therefore resigned her position by tendering the letter of resignation that we see at page 218. This is in fact dated 13 July 2017 (20:26). The claimant says:-

> "I am writing to inform you that I am resigning from my position of area manager with immediate effect. Please accept this as my formal letter of resignation and a termination of our contract. I feel that I am being left with no choice but to resign in light of my recent experiences regarding a fundamental breach of contract.
>
> I consider this to be a fundamental/unreasonable breach of the contract on your part. I appreciate the time and energy which ILE have invested in training me and I believe that the skills I have gained will serve me well in the future. I will do my very best to ensure a smooth transition upon my departure and make sure that all the details/information is left available to the person who takes up my position following my departure.
>
> I will be grateful if you could acknowledge this letter at the earliest available opportunity.
>
> If you would like me to attend an exit interview then please let me know so that I can make arrangements to do so".

58. The letter of resignation was acknowledged on 21 July 2017. It was confirmed the last day of the claimant's employment would be 11 August 2017 (pages 252 and 253 of the bundle). The claimant agreed to work her notice period for financial reasons. The claimant was in fact fit to return to work with effect from 14 July 2017. She asked that upon her return to work she has no form of contact with Mrs Smith (page 223).

59. Notwithstanding that request she in fact underwent a return to work interview with Mrs Smith on 17 July 2017 (pages 241 to 244). The claimant's account at paragraph 31 of her witness statement is that Mrs Smith told her that she would receive a telephone call from another head of sector who would be carrying out an investigation regarding an allegation of mileage fraud. It appears that it was agreed that the claimant had over claimed mileage expenses and that the modest sum involved of £141.20 would be repaid by her by way of deduction from her final salary slip. The respondent determined that further disciplinary action was unnecessary. No such action was taken against the claimant during the currency of her contract of employment with the respondent. I was told at the outset by Mr Roberts that no point was being taken by the respondent about the mileage claim issue.

60. Mrs Smith-Brindley conducted an exit interview with the claimant which took place on 20 July 2017 (pages 250 to 251). The claimant expressed the opinion that Mrs Smith had "ground her down". The claimant also apologised for sending an email to all of the AMs informing them that she had handed in her notice.

61. As to the progress of the grievance, this was formally acknowledged by Emma Smith-Brindley on 19 July 2017 (pages 248 and 249). She gave evidence that she had asked HR to ascertain from the claimant her desired outcome and the claimant had responded listing a further series of complaints. (I refer to pages 210 and 223).

62. The grievance hearing took place on 1 August 2017. Mrs Smith-Brindley then conducted a number of investigatory interviews. She compiled a grievance outcome letter which was sent to the claimant on 14 August 2017 (pages 310 to 315). She upheld two of the claimant's grievances and did not uphold the other nine. It is not necessary to recite the outcome in these reasons. In evidence given under cross examination she said that she had not found that Mrs Smith had failed to support the claimant. She denied, when it was put to her by Mr Bidnell-Edwards, that upholding the grievance would reflect badly upon the support that she had given to Mrs Smith when acting up in Amber Massey's role.

63. The following evidence emerged from the cross-examination of the claimant by Mr Roberts:-

    63.1. With reference to the claimant becoming AM for the South team, the respondent had pleaded (at paragraph 13 of the grounds of resistance) that this followed upon the respondent having made some redundancies in the AM team in January 2017. The claimant said in paragraph 36 of her witness statement that she asked for the form to apply for voluntary redundancy but was "sweet talked" by Mrs Smith and Mrs Brindley-Smith in to taking on the South area. The claimant denied that she was attracted so to do by the fact that her daughter was at Southampton University and in fact only spent two nights in Southampton over the ensuing six months. The claimant said in evidence under cross-examination that Mrs Smith and Mrs Smith-Brindley had torn up the redundancy form that had been completed by the claimant and that they had done this in front of her. It was suggested that the claimant was embellishing her account and that there was no reference to a form having been torn up in her presence in the body of her witness statement. Mrs Smith, in evidence given in supplementary questioning, said that the form had not been ripped up. Mrs Smith-Brindley gave an account corroborative of Mrs Smith and said, as had Mrs Smith, that she had not sought to "sweet talk" the claimant into staying.

    63.2. With reference to the February one-to-one action plan (at pages 128 to 133) the claimant acknowledged that Mrs Smith had reduced if not eliminated altogether the number of new starters. This had the effect of helping by not increasing the claimant's workload. The claimant maintained that nonetheless the TAs were still obliged to hit a target of generating two new starters

each month themselves. She fairly acknowledged that the taking on of new starters generated by the sales team had ceased and that this was a supportive measure.

63.3. The claimant acknowledged that "on paper" Mrs Smith had appeared supportive in the February one-to-one action plan. She acknowledged that she had not said in her printed witness statement that she had commented as the time that Mrs Smith was being two-faced and that she had complained to HR about her.

63.4. The claimant disputed that it was recognised in the March 2017 one-to-one action plan that she was working under capacity. It was suggested to her by Mr Roberts that she was managing a team of nine TAs by that month (being six full time and three part time TAs). The claimant considered that the true figure was either six or seven altogether and she said that that in any event the TAs themselves were over capacity and she was having to cover around half of the country having taken on the South region in addition to the West Midlands region.

63.5. It was suggested that the claimant had misquoted what Mrs Smith had said to her in the March one-to-one action plan by reason of the omission of the word *"little"* from her citation in paragraph 6 of her witness statement: that Mrs Smith was *"shocked … regarding how much is outstanding from Katie's team."* It was suggested that the omission of the qualifying word *"little"* serves to alter the whole tenor of Stephanie Smith's remark. The claimant considered that Mr Roberts was "splitting hairs".

63.6. It was suggested by Mr Roberts that in the March one-to-one action plan Mrs Smith's concern was not so much the claimant meeting her own KPIs but rather that the TAs were not meeting theirs and thus the KPI issue was around the claimant's performance management of the TAs. The claimant said in response that Mrs Smith had instructed her not to undertake performance management of the TAs as it was impossible for them to meet their KPIs. Mr Roberts suggested that this evidence was not in her witness statement and at no stage had Mrs Smith said that the claimant should not performance manage the TAs and indeed in the May one-to-one action plan she had been encouraged so to do. Notwithstanding the absence of such evidence in her printed statement, the claimant maintained that Mrs Smith had instructed her not to undertake performance management of her TAs by putting them on to an action plan.

63.7. It was suggested to the claimant by Mr Roberts that she was suitably qualified and had the skill set to assess the learners. We have seen that Mrs Smith-Brindley says at page 53 of her witness statement that Jeanette Haigh, quality assurance manager had confirmed that the claimant was suitably qualified. This the claimant disputed. She maintained that she had discussed the matter herself with Jeanette Haigh to that effect. Mr Roberts drew her attention to Emma Smith-Brindley's interview with Jeanette

Haigh (as part of the grievance investigation) at page 293. There, Jeanette Haigh said that "Katie has contacted me probably two to three times since June, she has contacted me to say it is unfair she has been assessing and I advised that she needed to discuss this with Steph". It was suggested by Mr Roberts that the claimant simply did not want to do the assessing as opposed to being unqualified to undertake it. The claimant said that she would have done the assessing had she been capable and qualified. Mr Roberts suggested that the claimant knew full well that she was sufficiently familiar with the relevant standards to enable her to assess by reference to her remark in the email of 13 June 2017 at page 179 to the effect that she did not know the standard *"enough".* The claimant said, "no I knew the old but not the new standards". She explained that she had not raised such concerns before 13 June 2017 because those learners who she was assessing prior to that date were doing so pursuant to the old standards whereas those that she was taking on following Emma Sheldrick's departure were working to the new standards. She qualified her observations in paragraph 44 of her printed witness statement to the effect that AMs should "never assess" with the comment that they should not do so if they have not been through the relevant standardisation. It was suggested that she could have familiarised herself with the relevant standards. This the claimant disputed. She said, "no, you have to do 30 hours CPD".

63.8. The claimant was questioned further as to what had changed that prevented her from being able to undertake the assessment of learners. She said in reply that there had been a change introduced in June or July 2015. Mr Roberts suggested this was at odds with the claimant having worked as an internal verifier with the respondent until November 2015. The claimant then suggested that the relevant standardisation or qualification change had occurred in 2016 and said that she had undertaken no CPD over the past seven years. Mr Roberts put to her that there was no requirement upon the part of the awarding organisation (being the Vocational Training Charitable Trust) to undertake 30 hours of CPD per year and that assessing skills can be acquired either by undertaking CPD or through the acquisition of relevant vocational experience. The claimant maintained that it was a requirement to undertake 30 hours of CPD per year.

63.9. At the commencement of the second day of the hearing, Mr Bidnell-Edwards accepted (on the claimant's behalf) that a new qualification system was implemented with effect from 1 May 2015 and that that was intended to be implemented upon the respondent's systems by 11 September 2015. These concessions were qualified by the observation that the claimant was unable to confirm that there had been implementation by the respondent and the maintenance by the claimant of her position that there had been a second change in 2016. Mr Roberts suggested to the claimant that prior to those concessions having been made she had not suggested that there were two sets of changes to the relevant qualifications. Rather, the claimant had

initially suggested that the one change had occurred in 2015 before changing her account upon it having been pointed out that she was still an internal verifier until November of that year. The claimant confessed that she may have become confused and she was not involved with the standards or the management of them. Mr Roberts put it to the claimant that she was trying to row back after having realised a weakness in her case upon this issue should there have been a standardisation change in 2015. In any event, said the claimant, she had not received any form of internal training upon the new systems after 1 May 2015.

63.10. At the outset of the second day of the hearing, the respondent made reference to having obtained overnight a copy of the minutes of a meeting held in September 2015 and attended by the claimant making reference to the new standards and the implementation of them by November 2015. The claimant's case, as pleaded in paragraph 18 of her statement of case was that, "at no point had she attended any form of standardisation meetings regarding the assessment processes in order to manage the caseload as these were new qualifications which the claimant had never assessed before." The claimant said that that document (which was not in fact produced for the benefit of the Tribunal but which had been seen by the claimant) made no reference to the issue of training. The respondent also produced evidence of the claimant's attendance at a CPD event held in March 2017. The claimant accepted her attendance at the event and that she had not raised as an issue that she had not undertaken 30 hours of CPD at the material time. She maintained her position that she lacked the requisite knowledge of the relevant standards for her to undertake the assessments.

63.11. It was accepted by the claimant that in the event of TAs leaving resulting in the team being short handed it was usual for AMs to "*muck in"* (as it was put by Mr Roberts). The claimant did not take issue with the evidence given by Mrs Smith in paragraph 29 of her witness statement to that effect and where she gives a number of examples of this having occurred in the recent past.

63.12. The claimant acknowledged that Mrs Smith did offer to take away from her some of her AM duties. Whilst so acknowledging, the claimant maintained that Mrs Smith wanted her to undertake the TA role and that she (the claimant) had not expected her role to be changed to one of an assessor. The claimant acknowledged that there was no salary reduction but maintained that in reality she was being treated as an assessor having undertaken assessment work for three months prior to Emma Sheldrick's departure. As the claimant put it, the respondent "wouldn't change the job title but did change the job role". She refuted Mr Roberts' charge that she was being inflexible by saying that for three or four months she had been working in excess of 60 hours per week (including working on Sundays).

63.13. The claimant again maintained that on paper Mrs Smith was presenting a different façade to that which she encountered when

dealing with her in person. This was raised when Mr Roberts took her to the exchange of emails at page 179 and suggested that Mrs Smith's tone was pleasant. The claimant said that this was in contrast with her having sworn in the telephone conversations around this time. During the telephone discussion about taking on the additional learners from Emma Sheldrick, the claimant said that Mrs Smith had said to her that it was "tough shit you've got to do it" and would frequently litter conversations with the expression 'for fuck's sake.'

63.14. The claimant maintained that the 10 learners to be allocated to her were not in fact located in the West Midlands but were spread out around the country. Again, on the morning of the second day of the hearing, the respondent said that documentary evidence had now been obtained to demonstrate that all but one of the 10 were based in the West Midlands. Again, that document was not produced for the benefit of the Tribunal, the respondent choosing not to rely upon it. The claimant gave as the source of her belief that they were located in different parts of the country a spreadsheet that she had been handed by the respondent. It was pointed out by Mr Roberts that there was no reference to this issue in her witness statement.

63.15. It was suggested to the claimant that she had no contractual entitlement to TOIL. The claimant maintained that she was so entitled in circumstances of travelling on a Sunday in order to be ready to undertake work the following Monday. The Tribunal notes the contractual provision at page 57 of the bundle which provides that an employee may with the prior approval of a line manager be permitted to take time off in lieu but that there is no entitlement to receive any additional remuneration or time off for work outside normal business hours save in exceptional circumstances and where agreed in advance. The claimant acknowledged that TOIL could be taken where there had been advance approval by her line manager. With reference to the issue around the TOIL to be taken on Friday 16 June 2017, she accepted that she had not suggested in the email of 13 June 2017 (19:00) (at pages 191 and 192) that Mrs Smith had given advance approval. The claimant said that she had not made this suggestion at the time because she was "too stressed". She did however maintain that Mrs Smith knew that she was going to be taking that afternoon off because she was going to be undertaking half a days work (by way of travel) on Sunday 18 June. This had been pointed out to Mrs Smith on 12 June 2017 (at page 174). The claimant said in evidence under cross-examination that, "every Thursday I send a diary with my report and she knew I was having the Thursday and Friday off because I was working on Sunday".

63.16. It was suggested to the claimant that there was nothing within the emails at pages 178 to 181 which could be described as insulting. The claimant maintained that Mrs Smith's comment on 13 June

2017 (13:41) that there was no option but for her to take on the additional learners from Emma Sheldrick was pressurising.

63.17. The claimant was asked why she found Stephanie Smith's email of 14 June 2017 (10:46) around her sickness to be patronising. The claimant said that she found the email unsupportive. Mr Roberts suggested that she was reading into that email something that was not in fact there.

63.18. During the early part of his cross-examination of the claimant upon the second day of the hearing, Mr Roberts reverted to the issue of TOIL. It was suggested to the claimant that the Sunday in question which she intended to take off as TOIL was 11 June 2017. With this the claimant agreed. As the claimant was on annual leave on 12 June 2017, it was suggested by Mr Roberts therefore that the evidence that the claimant had given that she needed the TOIL on Friday 16 June as otherwise she would be working a six day week must be untrue. I observed that when I questioned the claimant towards the end of the first day of the hearing I formed the impression that she was referring to TOIL to be taken on Friday 16 June as she was anticipating working on Sunday 18 June. That the claimant was referring to Sunday 18 June is plain from the email that she sent to Mrs Smith on 12 June (page 174). I accept that the claimant had become confused over dates and there is no substance to Mr Roberts' suggestion that the claimant had misled the respondent (and the Tribunal) around having to work a six day week (including Sunday 11 June and Monday 12 June when she was on annual leave).

63.19. The claimant accepted that she had not raised an issue about Mrs Smith contacting her on 12 June 2017 (being a day of annual leave). The claimant said that she was "not like that" but took the view at the time that the matter could have waited until she returned to work on 13 June. The claimant accepted that the messages shown at page 176 appear friendly. She then made reference to another chain of text messages. These were not produced for the benefit of the Tribunal.

63.20. Upon the question of Mrs Smith's support, the claimant was questioned as to the evidence she gave in paragraph 24 of her printed witness statement. There, she made reference to Mrs Smith having brought to an end the performance improvement plan commencing at page 141. The claimant suggested that this was inappropriate given that it was meant to be a tool for support. She said that the proposed follow up actions in the plan had not been undertaken by Mrs Smith and the plan was then effectively simply dropped. The claimant acknowledged that Mrs Smith was supportive in advertising for freelance TAs but maintained that that was the only support that was offered to her. The claimant refuted Mrs Smith's suggestion of the support recorded in the March 2017 one-to-one action plan and while acknowledging the re-allocation of learners following the departure of three TAs in June she observed that she was on sick leave at the time.

63.21. Mr Roberts took the claimant to a further example of Mrs Smith's support (on the respondent's case) being the email of 8 June 2017 seeking the re-allocation of the additional learner to which I referred earlier. I refer to page 173. The claimant said that this occurred upon the day of the last AM meeting which the claimant had attended. The claimant said that she had to be comforted by Amber Massey as she had broken down during the course of the meeting and that she (Amber Massey) had asked Mrs Smith how it was that matters had got so bad. The claimant had referred to this incident in her witness statement at paragraph 73. The claimant suggested in evidence under cross-examination that Amber Massey had told Mrs Smith what needed to be done to remedy the situation. Mr Roberts pointed out that mention of Amber Massey's suggestion to Stephanie Smith did not feature in this part of the printed witness statement. The claimant pointed out that the steps undertaken by Mrs Smith referred to at paragraph 16 of her witness statement (regarding the allocation of Emma Sheldrick's learners at pages 178 to 181 of the bundle) had occurred after the AM meeting of 8 June 2017. Nonetheless, the claimant was still expected to take on 10 of Emma Sheldrick's learners.

63.22. Mr Roberts then questioned the claimant as to her reasons for leaving the employment of the respondent. It was suggested to her that she was contemplating leaving in January 2017 at the time of the redundancy exercise. The claimant accepted this to be the case. Mr Roberts then suggested that the claimant was contemplating setting up her own business. There is material at the end of the bundle to demonstrate that the claimant is running a freelance hairdressing business trading under the style '*Hair by Katie Wright'.* We can see from her personal profile at pages 53 to 55 that she has got a number of hairdressing and barbering qualifications. She said that she was working as a mobile hairdresser earning little more than £50 per week. Mr Roberts observed that the claimant had not given disclosure of her bank statements and other financial information which may have demonstrated a substantial income and the motivation for the claimant leaving the respondent's employment. The claimant said that she was not earning a significant amount from the hairdressing business and had applied for upwards of 35 jobs. She said that she is financially distressed and was facing eviction from her home. Mr Roberts suggested that an adverse inference should be drawn from the claimant's failure to disclose any documents regarding her business notwithstanding the obligation of disclosure upon her about which she had been reminded on the second day of the hearing. Towards the end of the third day of the hearing, it was apparent that the claimant had some undisclosed documents with her. No application was made by the claimant to adduce them.

64. The following evidence emerged from the cross-examination of Mrs Smith:-

64.1. The appointment of the claimant to the position of AM with effect from 9 November 2015 was a promotion.

64.2. Mrs Smith accepted that the period from around February 2017 was not an easy time for the respondent given the amount of staff turnover.

64.3. Mrs Smith accepted that she had no previous experience relevant to the head of sector role when she provided maternity leave cover for Amber Massey. She denied that there was a communication problem between her and her members of staff. She fairly accepted that there was criticism of her communication skills by Cheryl Turner (the AM for the Newcastle region) when Ms Turner was interviewed by Mrs Smith-Brindley as part of the grievance investigation (pages 297 and 298).

64.4. It was suggested to Mrs Smith that other AMs had observed that the claimant had appeared stressed in AM team meetings. Debi Hanson had made such an observation to Emma Smith-Brindley when she was interviewed as part of the grievance investigation (pages 295 and 296). Mrs Smith fairly accepted that she herself had observed that the claimant had appeared stressed at times. She had not sought to obtain any advice from HR about this.

64.5. With reference to the February 2017 one-to-one action plan at page 128, Mrs Smith acknowledged that the claimant's high caseload would impact upon her ability to manage her TAs and as a consequence the TAs would not meet their own targets. Mrs Smith accepted this to be an issue that was out of the claimant's control. She also fairly acknowledged that the claimant had been working very hard for several months at around this time. In those circumstances, it was suggested to Mrs Smith by Mr Bidnell-Edwards that it was surprising that she expressed shock at the next one-to-one action plan meeting held in March 2017. Mrs Smith justified her position. She said that the claimant had informed her in February 2017 that matters were under control and further Mrs Smith had observed at the February 2017 one-to-one that the claimant had "a big challenge ahead" by reference to trying to bridge geographical gap between the two regions that she was now managing.

64.6. Mrs Smith acknowledged the claimant's observations about losing members from her team when this issue was discussed at the March 2017 one-to-one action plan. Mrs Smith acknowledged there to be an issue. She acknowledged that by April 2017 the claimant was undertaking work that should have been undertaken by the TAs.

64.7. By the time of the May 2017 one-to-one action plan it was observed that Mrs Smith was looking at spreading the caseload in the claimant's teams around other teams. Mrs Smith fairly accepted this to be indicative of problems. The May 2017 one-to-one action plan was the last one that the claimant undertook by reason of her sickness absence the following month.

64.8. Mrs Smith said that she had ended the performance improvement plan by reason of the claimant's concerns that it may lead on to more formal performance management. Mrs Smith accepted that this reasoning for bringing the performance improvement plan to an end was not documented by her. Further, when interviewed by Emma Smith-Brindley in connection with the claimant's grievance (pages 299 to 302) she had given a different motivation for bringing the support plan to an end. Here she said that claimant "didn't feel the actions were all achievable as she had just picked up some learners, we did review this and a couple of the actions were removed. Then at the following meeting due to KS picking some other learners up I decided it would be better to remove the support plan as KS was doing her AM role and had picked up a few learners, so we agreed it would be removed so she could focus on getting the team back on track". When this passage was drawn to her attention by Mr Bidnell-Edwards, Mrs Smith said that the claimant was panicking about the prospect of being performance managed and that she had told the claimant over the telephone that she would remove the support plan as a supportive measure. "I removed the support plan because the claimant was getting herself flustered" was how Mrs Smith put it. Mrs Smith acknowledged that the support plan had therefore been a failure.

64.9. Mrs Smith was taken to the claimant's grievance (pages 206 to 209) and in particular the reference at the bottom of page 207 to an AM meeting held on 1 June 2017. There the claimant said that she had become tearful and upset in front of Mrs Smith. Mrs Smith fairly accepted this to be the case. Mrs Smith accepted that Amber Massey had gone to comfort the claimant. There was no reference to this AM meeting in Mrs Smith's witness statement. (I observe that there is no reference to it in the claimant's witness statement either; the reference at paragraph 73 is to an AM meeting held on 8 June 2017).

64.10. With reference to 8 June 2017 meeting, Mrs Smith denied that Amber Massey had suggested that Mrs Smith email the claimant in order to support her. Mrs Smith said that Amber Massey had initially gone to comfort the claimant. Mrs Smith said that she then drew the meeting to an end and then she went to see how the claimant was herself. That sequence of events appears to be corroborated by Amber Massey: I refer to Emma Smith-Brindley's interview notes with Amber Massey prepared in connection with the grievance investigation (at pages 291 and 292). Amber Massey said that, contrary to the claimant's account she had not asked Mrs Smith what she had done to the claimant (either at the meeting of 8 June 2017 or at any other time).

64.11. Mrs Smith acknowledged that the claimant was not keen on undertaking assessment of learners. However, she said that other AMs (including herself) had had to do so.

64.12. Mr Bidnell-Edwards asked Mrs Smith if there was a suggestion of insincerity upon the part of the claimant when she informed Emma Smith-Brindley that the claimant appeared fine "through

emails and calls" but then goes on to say that, "when we get to team meetings she seemed to get upset in front of the others when support is already being offered and has been put into place". Mrs Smith denied that she was implying anything by this remark. It was suggested that the claimant was not "fine" even in emails. Mrs Smith responded that she detected no issue prior to 13 June 2017 but fairly acknowledged that on and after that date (in connection with the question of the re-allocation of the learners from Emma Sheldrick) she had detected an issue. She felt that the claimant was unreasonably suggesting that she had been left without support.

64.13. Mrs Smith accepted there to be no record of any meetings (other than the one-to-ones that have been referred to) but maintained that she and the claimant had spoken regularly.

64.14. Mrs Smith denied informing the claimant that she had 'no choice' but to pick up learners in the aftermath of Emma Sheldrick's departure and fairly accepted that "to some degree" it would be unreasonable to couch matters in those terms. She said that she had told the claimant that she couldn't see any other alternative. She was taken to page 301 (being the record of her discussion with Emma Smith-Brindley in connection with the claimant's grievance). There it is recorded that Mrs Smith replied in the affirmative when asked if she had told the claimant that she had no choice but to take on more learners. Mrs Smith explained that the interview had taken place when she (Mrs Smith) was abroad and she didn't have access to her emails. Mrs Smith also accepted that this conversation took place in what turned out to be the final telephone discussion that she held with the claimant prior to the claimant's ill-health absence. She fairly accepted that to take on additional learners would add to the claimant's perception of pressure being put upon her. That said, Mrs Smith said that she had invited the claimant to suggest an alternative solution to her taking on additional learners: see the email of 13 June 2017 at page 178 (cited at paragraph 39 above).

64.15. Mrs Smith accepted that it would be unreasonable to withdraw TOIL if that had been approved. She said that TOIL had not been approved for Friday 16 June 2017 as the claimant had not followed the proper procedure. It was her view that it was insufficient to simply refer to TOIL in the diary, hence her email of 9 June 2017 to the claimant at page 175. It was suggested by Mr Bidnell-Edwards that the subsequent exchanges of 12 June 2017 (at page 174) did not tell the claimant in terms that TOIL for the afternoon of 16 June 2017 was refused and that the point being taken was one of procedure only. Mrs Smith said in reply, "no, because that *[date]* was in the future. She never actually worked that Sunday" *[being a reference presumably to Sunday 18 June 2017].* She went on to say that "it would be approved so long as the Sunday was booked."

64.16. She accepted that she had booked the appointment for the claimant in Rugeley for 16 June 2017 when on notice that the

claimant wanted to take that afternoon as TOIL. Her position was that the period of TOIL was in the claimant's diary but had not been approved and that on 13 June 2017 she had told the claimant that it was being cancelled (as confirmed in the email of that day time at 18:52 cited at paragraph 42 above). This was also the stance adopted by Mrs Smith when being questioned by Emma Brindley-Smith on 7 August 2017 (page 301). Under questioning from the Employment Judge Mrs Smith said that, although not ordinarily permitted, TOIL may be booked by an employee in advance of undertaking work outside of work hours (as opposed to it being taken after having done so). Mrs Smith conceded that her emails of 13 June 2017 (after being told that the claimant was emotionally upset at 13:33 and 13;48 that day) "could have been more geared towards her welfare."

64.17. Mrs Smith accepted that no TAs were 'breaking down' (as it was put by Mr Bidnell-Edwards when he suggested that only the claimant was expected to 'budge' and that hence TAs could have been asked to take on more learners). Mrs Smith said that she had stretched every resource and that her solution was to support the claimant in the performance of her managerial duties.

64.18. Mrs Smith said that she was resistant to the idea of enlisting the help of the quality assurance department for the reasons set out above at paragraph 40 and, further, that she had no line management responsibilities for Laura Jones in particular (she having been a TA in the past and thus able to help with Emma Sheldrick's learners). She felt she could not reasonably expect assistance from that quarter. She fairly accepted Mr Bidnell-Edwards' suggestion that a conflict of interest would not arise when a quality assurer take up a TA role independently of their quality assurance duties.

65. I now turn from the findings of fact to the relevant law. Section 95(1)(c) of the Employment Rights Act 1996 says that there is a dismissal when the employee terminates the contract, with or without notice, in circumstances such that he or she is entitled to terminate it without notice by reason of the employer's conduct. This is generally referred to as constructive dismissal.

66. The employer's conduct which gives rise to a constructive dismissal must involve a repudiatory breach. As Lord Denning M R put it in **Western Excavating (ECC) Limited v Sharp** [1978] ICR 221, CA, *"If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer's conduct. He is constructively dismissed".*

67. As I said earlier, in this case the repudiatory breach relied upon is the breach of the implied term of trust and confidence. That is to say, the claimant says that the respondent, without reasonable and proper cause, conducted itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between the parties.

68. In order to claim constructive dismissal the claimant must establish that there was a fundamental breach of the relevant implied term, that that breach caused her to resign and that she did not delay too long before resigning, thus affirming the contract and losing the right to claim constructive dismissal. It is sufficient for an employee who resigns his or her position and claims constructive dismissal to show that the resignation was partly in response to a fundamental breach. The correct question to ask is whether the employer's repudiatory breach has played a part in the employee's resignation.

69. Where an employer breaches the implied term of trust and confidence the breach will inevitably be fundamental. The employer's motive for the conduct causing the employee to resign is irrelevant. The test of whether there was a repudiatory breach of contract remains an objective one. While a party's intentions may be relevant that intention is to be judged objectively and from the perspective a reasonable person in the position of the innocent party.

70. Where the employee waits too long after the employer's breach of contract before resigning, he or she may be taken to have affirmed the contract and thereby lose the right to claim constructive dismissal. In the words of Lord Denning M R in **Western Excavating**, the employee *"must make up his mind soon after the conduct of which he complains: for, if he continues for any length of time without leaving, he will lose his right to treat himself as discharged".* The issue is one of conduct and not simply passage of time. What matters is whether in all the circumstances the employee's conduct has shown an intention to continue in employment rather than resign. Resigning from a job is a serious matter with potentially significant consequences for the employee. The more serious the consequences, the longer the employee may take to make such a decision. Where an employee is on sick leave at the relevant time it is not so easy to infer that he or she had decided not to exercise his or her right to resign.

71. At common law, an employee wanting to claim wrongful constructive dismissal must resign without notice. However, the situation as regards unfair constructive dismissal is different because section 95(1)(c) of the 1996 Act provides that a dismissal will take place where an employee resigns with or without notice in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct. This means that the act of giving notice cannot by itself constitute affirmation in an unfair constructive dismissal claim.

72. Many contracts of employment contain express provisions that give the employer some form of discretion to make some change to working arrangements which will affect the employee detrimentally. An implied term cannot usually override an express term. However, the implied term of trust and confidence may control the exercise of the discretion conferred by an express term. The provision in the claimant's contract of employment (at page 56) to the effect that the role held by her may from time to time be reasonably be amended by the respondent in fact expressly imposed a requirement of reasonableness upon the respondent. The general position (regardless of any contractual term) is that (in circumstances where an employer has valid commercial grounds under the stresses of the requirements of his or her business and directs an employee to transfer to other suitable work upon a purely temporary basis and with no diminution in wages) that may not constitute a breach of contract. However, it must be clear that 'temporary' means a period

that is either defined as being a short fix period or which is in its nature one of limited duration.

73. Mr Bidnell-Edwards and Mr Roberts each handed to the Tribunal very helpful written submissions. I shall not set them out in full here.

74. Mr Roberts has couched his submissions by reference to the five issues that I identified in paragraph 5 above. Mr Bidnell-Edwards couches his submissions (at paragraph 12 of them) by reference to nine matters. In reality, those nine matters constitute the five issues referred to in paragraph 5 above coupled with the generalised issues that I summarise in paragraph 6 above. I shall however deal with the matter by reference to the claimant's list of issues.

75. The first matter raised by her is that of the comment made by Mrs Smith at the one-to-one action plan that took place on 29 March 2017. The factual findings about this are at paragraph 18, 63.4 to 63.6 and 64.6 above.

76. I agree with Mr Roberts that the comment complained of (that Mrs Smith was "*shocked"* or *"a little shocked")* is a perfectly ordinary comment from a line manager. It is difficult to see how objectively (looking at it from the point of view of a reasonable person in the position of the claimant being innocent party to the contract) there can be any serious objection to Mrs Smith's comment. I fully accept that subjectively the claimant did not like the remark. I fully accept that it was a remark said in the context of the claimant having worked very hard over the several months prior to and including March 2017 and where the claimant was over caseload. The fact remains however that Mrs Smith was entitled to comment upon the features that she highlighted (and which are referred to in paragraph 18). Indeed, it would have been remiss of Mrs Smith in her capacity of acting head of sector to have omitted to make mention of them. Mrs Smith then put in hand what she thought at the time was the supportive step of a performance improvement plan. Further, Mrs Smith (as was acknowledged by the claimant: paragraph 63.6) pointed out that it was not the claimant's own KPIs that were the issue but rather that the TA's were not meeting theirs. I agree with Mr Roberts' submission that Mrs Smith's criticisms were well founded and expressed in mild terms.

77. The second issue raised (at paragraph 12(b) of Mr Bidnell-Edwards' submissions) was the issue of the aftermath following Emma Sheldrick's departure on 13 June 2017 and the distribution of additional work to the claimant where she was under significant pressure already. This is also linked with: the issue at paragraph 12(c) - that the respondent forced the claimant to carry out assessing work; and that at 12(e) –that the respondent ignored or failed to provide the claimant with sufficient support. The issues here also encompass the issue (at paragraph 12(f)) of lack of consideration for the claimant's welfare and being bullied into accepting an increased caseload (paragraph 12(i)).

78. By the time of Emma Sheldrick's departure, further water had passed under the bridge following the 29 March 2017 one-to-one. TAs had departed: (paragraph 21.2 above). The claimant had become AM for the South team in addition to the West Midlands team: (paragraph 14). The claimant had taken on two learners in London: (paragraph 22). Mrs Smith acknowledged that the claimant was getting behind with her AM responsibilities because she was visiting learners to assist the TAs with assessing: (paragraph 23).

79. The performance improvement plan was withdrawn (paragraph 63.20). Mrs Smith gave different reasons at different times for the taking of this step (see paragraph 64.8). However, I accept that the claimant was becoming concerned that the performance improvement plan may lead to capability proceedings being taken against her. I say this because the emails of 13 June 2017 betray well founded anxiety upon the part of the claimant about her position and her ability to manage her role. Therefore, I accept that the removal of the performance improvement plan was a step taken by Mrs Smith that helped to relieve the pressure upon the claimant. However, I also accept the claimant's case that Mrs Smith taking that step was a recognition of the pressure that the claimant was under.

80. In the event, of course, the claimant was never in fact allocated the 10 additional learners as proposed by Mrs Smith. However, I accept that from the prospective of a reasonable person in the claimant's position she considered Mrs Smith to be presenting her with the prospect of a significant increase in workload about which the claimant had real concerns: (see paragraphs 29 and 36).

81. I accept that the claimant reasonably understood Mrs Smith to be presenting her with a *fait accompli* to the effect that she would have to take on the additional learners. Mr Roberts sought to argue that Mrs Smith was simply making a suggestion to the claimant about the allocation of some of Emma Sheldrick's learners and inviting the claimant's suggestions. While there is some merit in that point by reference to the email of 13 June 2017 at 13.59 (cited at paragraph 39 above) that has to be seen in the context of the claimant being told by Mrs Smith that this (being the re-assignment of 10 learners to her) *"is our only option",* a sentiment expressed at 13.41 the same day. The question mark after the word *'alternative'* in the email of 13 June 2017 (13:41) is a small peg upon which to hang the heavy coat of the respondent's contention that Mrs Smith was merely consulting the claimant at this stage. Mrs Smith accepted (in Mrs Smith-Brindley's grievance investigation) that she had conveyed the message to the claimant that there was no alternative (paragraph 64.14 above) and I find this to be the reality of the situation which was presented to the claimant that day. That message was not diluted by the wording of the relevant emails. Mrs Smith's suggestion that she had mistakenly given this impression when being questioned by Mrs Smith-Brindley because she didn't have access to her work email account was difficult to understand. She would know (without a need to refer to her emails) the message that she wished to portray to the claimant and in my judgment told Mrs Smith-Brindley honestly and candidly what she had told the claimant at the material time. Her attempt to now distance herself from her own contemporaneous account was unconvincing.

82. I accept that Mrs Smith did make a significant effort to reallocate Emma Sheldrick's caseload. That is plain from the evidence at pages 179 and 180. I accept that she had good reason not to utilise the quality assurance department. Mr Roberts made a compelling submission that it would be practically very difficult to maintain *'Chinese walls'* in an effort to ensure that certain quality assurers had no involvement with certain learners under the supervision of some of the TAs. That also would be administratively difficult.

83. The claimant fairly acknowledged that the respondent did remove some of her managerial responsibilities from her. I refer to paragraph 63.12.

84. These issues at paragraph 77 above therefore essentially boil down to the following questions: was the respondent in breach of the implied term by requiring the claimant to perform a different role to that of AM and was the claimant suitably qualified to carry out that different role (of assessing the learners).

85. As we have seen, there was an express contractual provision entitling the respondent to change the role profile. That entitlement was qualified by the requirement of any change being one that was reasonable having regard to the claimant's skills and experience.

86. I accept that the claimant did have the necessary skills to undertake assessment work. I agree with the respondent's submissions that the claimant's evidence about this was unsatisfactory. I refer in particular to paragraphs 63.7 to 63.10. I find that the claimant did have the requisite skill and knowledge to undertake the assessing role. Firstly, she undertook that role until November 2015. Secondly, some changes to the qualifications system had taken effect prior to the claimant's change of role while she held the position of internal verifier. Furthermore, the claimant had attended a CPD event held in March 2017 after the second set of changes came into effect.

87. I am satisfied therefore that, subject to the question of whether the respondent could reasonably require it of her, doing an assessor role was within the range of her skills and experience. The claimant was not being asked to do something that she was not capable of undertaking.

88. In addition, Mrs Smith told the claimant that the situation would be temporary and would pertain only until August 2017. I refer to paragraphs 30 and 39. Further, the claimant suffered no loss of salary.

89. The claimant also recognised that in the event of TAs leaving resulting in a team being shorthanded it was usual for AMs to *"muck in".* I refer to paragraph 63.11. There was also recognition of this from the claimant in the May one-to-one action plan (paragraph 22.2).

90. In the circumstances, I conclude that Mrs Smith found herself in a very difficult position. A number of TAs had left. Matters were then greatly compounded by Emma Sheldrick's dismissal. I hold that the stress of the requirements of the respondent's business reasonably led Mrs Smith to require of the claimant that she change her role on a temporary basis with no diminution of remuneration. Mrs Smith made it clear that she considered the position to be temporary. The exigencies of business required the respondent to take this step and I find that the respondent had reasonable and proper grounds so to do and exercised its contractual right to require the claimant to undertake a different role upon that basis if that requirement was a reasonable one (which I find was the case). From the perspective of reasonable person in the position of the claimant, there would, in my judgment, be recognition of the difficulties in which the respondent found itself and the need to service the learners' requirements. After all, the provision by the respondent of skills, education and employment support to teenagers and adults from all walks of life is the respondent's *raison d'être.*

91. In the circumstances therefore I agree with Mr Roberts' submission that Mrs Smith took appropriate, proper and legitimate managerial steps to resolve a difficult situation. I accept that the claimant protested that she was under a great deal of stress. Those protestations were well founded. However, as she

says at paragraph 11 of her witness statement, this was upon the basis that she was struggling to complete her tasks as an area manager. Mrs Smith assured the claimant that she would be relieved of those responsibilities. I find therefore that Mrs Smith did have regard for the claimant's welfare by not overburdening her with managerial responsibility in addition to a heavy burden with other duties.

92. As I say, I do accept that Mrs Smith left the claimant with the clear impression that she had no choice but to comply with her managerial instruction. Mr Roberts' valiant efforts to couch Mrs Smith's correspondence as being somewhat softer and inviting the claimant to suggest alternatives do have some merit. Mrs Smith clearly invited the claimant to make suggestions but, as I say, this was in the context of the claimant reasonably and properly forming the impression that in reality there was little (if not no) choice. That does not however derogate from my finding that Mrs Smith was exercising reasonable managerial prerogative to deal with a difficult situation that had befallen the respondent.

93. The next issue referred to in paragraphs 12(d) and (f) of Mr Bidnell-Edwards' written submissions is the question of time off in lieu of notice. The claimant's case is that the respondent put pressure upon her not to take time off in lieu and lacked consideration for the claimant's welfare in requesting that she obtain approval for time off in lieu of notice in June 2017 and/or by requesting that she take TOIL on a different date.

94. The starting point is that the claimant had no contractual right to TOIL save in exceptional circumstances and as agreed in advance by her line manager. Mrs Smith accepted that it was possible for an employee to arrange TOIL in advance of work to be undertaken in the employee's own time. It was therefore possible for the claimant to have arranged to take TOIL on the afternoon of 16 June 2017 in anticipation of working on Sunday 18 June 2017.

95. Mrs Smith fairly conceded that she was aware that the claimant wanted to take TOIL on the afternoon of Friday 16 June 2017. However, knowing that was the case she booked the claimant to undertake an appointment with a learner on the afternoon of 16 June. Mrs Smith's reasoning was that the claimant had not followed the proper procedure and therefore as far as she was concerned TOIL had not in fact been booked.

96. As we have seen (at paragraphs 42 to 44) it was Mrs Smith's contention that the claimant had agreed to cancel the TOIL on the afternoon of Friday 16 June 2017. The claimant had taken a contrary view. Her email (cited at paragraph 44) is to the contrary. The claimant maintained her position that she wished to have TOIL on the afternoon of Friday 16 June in view of her commitments to travel for work purposes on Sunday 18 June. It was Mrs Smith's stance over the TOIL that *"topped me over the edge"* (to use the claimant's words).

97. Mr Roberts submitted that there was no basis for the claimant to have believed that Mrs Smith had actually agreed to the TOIL.

98. In her email 14 June 2017 (paragraph 47) the claimant maintained that Mrs Smith had *"confirmed again in an email"* that she had no issue with the claimant taking the TOIL. It is not clear to which email the claimant is referring but I presume it to be Mrs Smith's email of 9 June 2017 (at page 175: paragraph 53 above). There, it will be recalled, Mrs Smith told the claimant that, "I notice you

are putting a lot of TOIL in your diary. Whilst I don't mind you obviously taking this back can you please ensure you are getting approval for the specific dates from me as you seem to be just putting them in without discussing with me which means I have to physically check your diary to know when you are planning to be in work?"

99. It is not controversial that the claimant wanted TOIL on the afternoon of Friday 16 June 2017. It is also not controversial that the claimant maintained that request up to and including 14 June. The issue is whether or not TOIL had ever been agreed for that afternoon.

100. On balance, I find that TOIL had not been agreed. The height of the claimant's case is that she had put TOIL in her diary for the afternoon of 16 June 2017. The claimant did not take issue with the suggestion that there was a procedure to be followed and that it had to be approved by her line manager. The claimant was reminded of this procedure on 9 June 2017 (at page 175). The claimant's email of 12 June 2017 (09:15 at page 174- paragraph 53 above) is properly construed in my judgment as a request for TOIL, the claimant having been reminded of the procedure in place. Mrs Smith's reply of 12 June 2017 (09:17 at page 174- again, paragraph 53 above) cannot be construed as agreement to the claimant's request. The reference at page 192 (paragraph 53) to the claimant cancelling the TOIL thus was said by Mrs Smith in the context of her never having agreed it as the claimant had not followed the procedure.

101. Therefore, I accept the respondent's case that there was no breach of contract upon the part of the respondent in refusing the claimant's request for TOIL on the afternoon of 16 June 2017. This again was within managerial prerogative. It was not convenient for the business for the claimant to take off the afternoon of 16 June 2017. Mrs Smith therefore exercised her discretion against the claimant.

102. Subjectively, I can well understand the claimant's disappointment and the significant impact that the whole situation had upon her. However, I must look at matters objectively from the perspective of a reasonable person in the position of the claimant. Such a reasonable person would recognise that there is a procedure to be followed and that the demands of the business will dictate whether or not discretion is exercised in the employee's favour on any particular occasion. I can accept that subjectively the claimant felt under a great deal of pressure and by the evening of 13 June 2017 was experiencing significant levels of stress. I can therefore accept that Mrs Smith's refusal of TOIL and the issue around the afternoon of 16 June 2017 was from the claimant's perspective damaging of mutual trust and confidence.

103. However in my judgment the respondent had reasonable and proper cause to act as it did. Mrs Smith was entitled to take the view that the claimant had not had the TOIL approved and therefore was available for work. However disappointing that may be for the claimant, I can see no conduct upon the part of the respondent in this matter that was undertaken without reasonable and proper cause.

104. All of this being said, I do have some sympathy for the claimant. Matters were certainly not helped by the respondent having no TOIL policy. However, that does not assist the claimant in these circumstances for the reasons that I have given.

105. The next issue in Mr Bidnell-Edwards' list at paragraph 12 of his submissions is that at paragraph 12(g): were the emails sent by the respondent to the claimant (as identified in paragraphs 15 to 23 of the particulars of claim) insulting and/or otherwise such as to breach the implied term of trust and confidence. As I have said, these are the emails at pages 178 to 181 (regarding the question of the learners) and pages 190 to 192 (regarding TOIL). I have already found the emails from Mrs Smith not to have been sent without reasonable and proper cause.

106. The claimant has failed to identify any basis upon which any of those emails could be viewed as insulting. She did not, for example, say that whatever the merits or otherwise of Stephanie Smith's position upon either of these issues certain emails were insulting in nature. That contention therefore is dismissed.

107. The final issue (at paragraph 12(h) of Mr Bidnell-Edward's submissions) is that the email following the claimant's notification of her sickness absence was patronising and blunt. I refer to the findings of fact at paragraph 46.

108. Mrs Smith fairly accepted in evidence given under cross examination that the email that she sent to the claimant was blunt. I agree that it was and could have been softened by introductory words to the effect, *"sorry to hear of your illness and trust that you will get well soon"* or the like. The claimant was unable to explain how she considered that email to be patronising. In reality, her complaint was about the bluntness of tone. Subjectively, I sympathise with the claimant. One would have expected a much more sympathetic line from somebody in Mrs Smith's position. However, it is difficult to argue with Mr Roberts' submission that this was an ordinary and polite enquiry from a line manager enquiring as to the nature of the claimant's illness. While it could have been better expressed, I do not judge it, objectively, to have been seriously damaging of mutual trust and confidence.

109. In conclusion therefore I find that the respondent did not act at any stage in breach of the implied term of mutual trust and confidence. That being the case, it follows that the claimant's complaint of constructive unfair dismissal must fail. It is therefore not necessary for me to go on to conclude whether or not the claimant resigned her position with the respondent in order to pursue a business opportunity as a self-employed hairdresser and barber. The issue of affirmation also does not arise.

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Employment Judge Brain

10/08/2018

FOR EMPLOYMENT TRIBUNALS