



**EMPLOYMENT TRIBUNALS (SCOTLAND)**

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**Case No: 4104266/2020**

**Held remotely via CVP on 18, 19, 20 and 21 January 2022**

**Employment Judge C McManus**

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**Ms Laura Bell**

**Claimant  
Represented by:  
Mr Stephen Smith  
Solicitor**

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**Northwood Central Limited**

**Respondent  
Represented by:  
Mr Fraser Tait  
Solicitor**

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**JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

The Judgment of the Tribunal is that

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- the claimant's claim for constructive dismissal under Section 95(1)(c) of the Employment Rights Act 1996 is successful and the claimant is entitled to an unfair dismissal award of £1223.28 and a compensatory award of £7067.84 and the respondent is ordered to pay to the claimant the total sum of £8291.12 (EIGHT THOUSAND TWO HUNDRED AND NINETY ONE POUNDS AND TWELVE PENCE).
- The claimant's claim for unlawful deductions from wages is unsuccessful and is dismissed.

## REASONS

### Introduction

1. The claimant brought claims for constructive unfair dismissal under section 5 95(1)(c) of the Employment Rights Act 1996 and unlawful deduction from wages under section 13 of the Employment Rights Act 1996. The basis of the claims was set out in a paper apart to the ET1 (the Statement of Claim). It was alleged that, on the basis of the various matters set out in the Statement of Claim, the respondent acted in breach of the implied term of trust and 10 confidence, so entitling the claimant to resign. That Statement included matters which the claimant's representative was no longer insisting on by the stage of submissions, being alleged failure to pay the National Minimum Wage ('NMW') and making a number of unlawful deductions from wages. The claimant's representative confirmed at the outset of these proceedings 15 that no separate claim under the NMR Regulations was being made. Subsequent to a revised Schedule of Loss being requested, the claimant's representative's position was that the only unlawful deduction was in respect on one day's holiday (Christmas Day 2019). In these preliminary discussions, the claimant's representative confirmed that the purported breach of contract 20 was said to have occurred on a cumulative basis, with the 'last straw' being the respondent's disclosure to other employees of confidential information on the reason for the claimant's ill health absence, and the claimant becoming aware of that.
2. The defence to the claims was set out in the ET3 and a paper apart. The 25 respondent's position as set out there was to deny the claims in respect of the various matters set out by the claimant in the Statement of Claim.
3. It was confirmed in preliminary discussions at the outset of these proceedings that the respondent does not argue that if the claimant was dismissed, then that dismissal was a fair dismissal.

4. Documents relied on by parties were included in a Joint Bundle, with page numbers from 1 - 230, plus additional documents presented digitally and during the course of the hearing. Documents are referred to in this decision by reference to the page number in that Joint Bundle (JB1 - JB230). Not all of the documents were referred to in evidence. I only took into account those documents to which I was directed in evidence.
5. This Final Hearing took place remotely via CVP, taking into account restrictions arising from the Covid 19 pandemic, the then current state of that pandemic and the Road Map issued jointly by the President of the Employment Tribunals in England and Wales and in Scotland.
6. Evidence was heard on oath or affirmation from all witnesses. The claimant's case was presented first. Evidence was heard from the claimant and Rose Patrick (the claimant's mother, who had also worked for the respondent). For the respondent, evidence was heard from Anne Johnstone only. It had been initially intended to also call Jim McHugh, and possibly other witnesses, but on the conclusion of Anne Johnstone's evidence the respondent's representative informed that no other witnesses would be called for the respondent. Anne Johnstone was present throughout the claimant's evidence, under direction that she must not discuss the evidence with any other witness in this case.
7. The evidence was concluded on 21 January 2022. It was agreed that both parties' representatives would prepare and exchange written submissions, with each representative's final submission, including comment on the other's position, to be sent to the Tribunal office by 5pm on 26 January 2022. That was done and those written submissions are referred to in this Judgment.

#### Issues for Determination

8. The issues for determination are as follows:-
- (i) Did the respondent conduct itself without reasonable or proper cause in a manner calculated to or likely to destroy or

seriously damage the relationship of trust and confidence between the parties?

(ii) Did the claimant resign in response to that conduct or for some other reason?

5 (iii) If there was any such breach, did the claimant affirm the breach of contract by delaying to resign?

(iv) Is the claimant entitled to any award, and if so to what extent?

### Findings in Fact

10 9. The following material facts were admitted or found by the Tribunal to be proven :-

10. The respondent is a property letting company which makes residential properties available for sale or rent. The claimant began working for the respondent on 11 November 2019, when her employment transferred from  
15 "The Key Place" letting agents. That transfer was a relevant transfer under the Transfer of Undertakings (Protection of Employment) Regulations 2013. The claimant was employed as a Property Letting Agent, with dates of continuous employment being from August 2012 until 5 April 2020. Both the Key Place and the respondent acted as agents for private landlords with  
20 residential properties.

11. Anne Johnstone and Jim McHugh are Directors of the respondent and are married to each other. They both work in the respondent business and operate as Directors of the respondent's franchise business. The overarching company to the respondent's franchise business does not  
25 provide any HR support. Anne Johnstone and Jim McHugh instructed a local HR company, Greg Melville, to assist them with the transfer process. An individual from Greg Melville accompanied the respondent to the 'one to one' meetings they had with each of the employees transferring their employment to the respondent from The Key Place. Immediately prior to the transfer, the

respondent had two employees working in their business, in addition to Anne Johnstone and Jim McHugh. These employees were Nicola Donnelly and Lisa Allen. Another employee had left shortly before the transfer date and had not been replaced. In the discussions prior to the transfer, Anne Johnstone and Jim McHugh understood from the seller that The Key Place business was overstaffed. For that reason, they decided not to replace their employee who had left. At the time of the transfer, the respondent took over management of 220 properties from The Key Place. Prior to the transfer, the respondent was managing 280 properties.

10 12. The claimant was paid on an monthly basis. After the transfer, the claimant continued to work 16 hours a week, although the times when that work was carried out changed. The claimant's terms and conditions of employment with the Key Place is at JB134 - 141. The claimant agreed to changed terms and conditions with the respondent, as set out in the contact of employment at JB28 - 38. Both contracts refer to rate of pay on an annual basis, with no mention of hourly rate. From 11 November 2020, the claimant worked an alternating shift pattern, working 15 hours one week, followed by a week working 17.5 hours (Mondays and Wednesdays 9am - 5.50 pm and alternate Saturdays 9.30am to 12 noon). The claimant was not aware that there would be any consequent effect on her monthly wage.

13. When the claimant began with The Key Place, her role involved carrying out property inspections, inventories and viewings, liaising with tenants, landlords and contractors and compiling and sending inspection reports, answering phones and general office/admin work. During her employment at the Key Place, the claimant had had two periods of maternity leave. Immediately prior to each of those periods, the claimant had trained the individual who had covered her role during her maternity leave. On both occasions, an important part of that training was that the person being trained shadowed the claimant in her role for a period, until that person became confident and competent in doing the duties required. When doing this training, the claimant recognised that people learn at differing paces. On her return from her first maternity leave period, the claimant's role was changed so that she concentrated on

carrying out property inspections and property viewings. Other employees of the Key Place then concentrated on certain other tasks, such as dealing with landlords, rent, contracts and instructing higher cost maintenance work. Cover was provided by the employees when required, e.g. during absences.

5 When working for The Key Place, the way in which inspections were done had developed from using paper sheets to using an iPad with an app called TIM. That app allowed photographs of the property to be taken on an iPad and information text could be typed while at the property. The app allowed these photographs and text to then be uploaded into the report format, where

10 editing the necessary text could then be done using a PC. The report, including photographs and details of the condition of the property and any required maintenance work, was then sent to the landlord of the property. Maintenance work to a certain cost level was instructed by the claimant. These inspection reports were carried out on a regular basis for the properties

15 managed by The Key People. As property letting agents, the respondent also carried out inspections on properties managed by them and provided reports on those inspections to the landlords.

14. The methods, systems and procedures used by the respondent in relation to managing properties were significantly different from those used in The Key

20 Place. Following the transfer to the respondent's business, those who had been employees of The Key Place were expected to adopt the respondents' methods, systems and procedures. The document at JB183 shows some of the differences. That document was not shared with the claimant during the course of her employment with the respondent. During the week commencing

25 11 November 2019, the claimant received some training on the new procedures and systems by the respondent's employees Nicola Donnelly and Lisa Allen. Lisa Allen told the claimant how to input information into the systems used by the respondent when carrying out inspections and preparing inspection reports. The systems required more steps than the claimant had

30 used when preparing inspection reports at The Key Place. There was no use of an iPad or app. The claimant and Nicola Donnelly carried out four property inspections (in one day). Each showed the other the systems used by them in carrying out the inspection and producing the resultant report from the

landlord. The claimant understood that that was with a view to a choice being made, and the best system being used going forward. The claimant was experienced in, and comfortable with the process of carrying out an inspection, although the tools used were different and there were some differences to how the inspections were carried out. The system used by the respondent to prepare the reports for the landlords following the inspection was significantly different to that used by The Key People and was not straightforward. The claimant was not comfortable in her knowledge of the systems and processes used by the respondent when preparing inspection reports. Nicola Donnelly showed the claimant the process by working through it with her in respect of one inspection. The claimant took handwritten notes (JB143 - 151). Nicola Donnelly spoke quickly and the claimant had difficulty in ensuring that her notes kept up with what was being said. The claimant wrote out those notes again to tidy them up because they had been written so quickly. The claimant expected to have a period of shadowing Nicola Donnelly, to ensure that she was confident and competent in working with the respondent's systems and processes before being expected to work alone. That is the training process which was applied by the claimant when training those who had covered for her in her two maternity leave periods when working at The Key Place. The claimant was not provided with such a shadowing period. The claimant was expected to be able to carry out inspections and prepare reports using the respondent's systems and procedures. Lisa Allen showed the claimant how to book appointments using the respondent's systems. The process used was a more lengthy process than had been used at The Key Place. It involved accessing and using a number of IT software systems used by the respondent. The claimant's working pattern meant that some tasks would not be repeated on a regular basis, which had an impact on the claimant's learning in respect of how those tasks were carried out in the respondent's business. Inspections are not carried out on a daily basis.

15. The period following the transfer was a busy time for the respondent. The number of properties managed by them had almost doubled. The information relating to the properties transferred from The Key Place to the respondent

required to be manually inputted into the respondent's IT systems. That inputting process was done by the two employees who had been employed by the respondent prior to the transfer (Nicola Donnelly and Lisa Allen). Those employees were carrying out that process as well as training the employees who had transferred from The Key Place and duties in respect of the day to day business of the respondent. This impacted on the time spent by them training those employees who had transferred. Anne Johnstone knew in December 2019 that the employees who had transferred over from the Key Place were unhappy and felt that they were not wanted by the respondent.

16. The document at JB184 - JBB188 is a training plan for the claimant in respect of the week's 1 - 4 following the transfer, with handwritten inserts by Nicola Donnelly. A copy of that training plan, with other handwritten insertions (by Lisa Allen) is at JB154 - JB158. This training plan and the handwritten insertions on each version were used by the respondent but were not shared with or shown to the claimant during the course of her employment with the respondent. There was no depth to the training given on many of the topics set out in the training plan. In respect of a significant number of these topics, the claimant was only told the information once, with no written procedure to refer to and no opportunity for supported consolidation of the information. There was no discussion with the claimant on behalf of the respondent that training was expected to continue on a long term basis. The content of that training plan record was not discussed with the claimant and the claimant was not asked to sign her agreement to the accuracy of that record. At JB158 there is a handwritten entry dated 18 November 2019 stating, "*went over again with LB after catch up ....as viewings not booked correctly*". That entry has written beside it "*concern*" and an asterisk. That date was the start of the claimant's second week working with the respondent's procedures. At JB184 there is an entry in respect of training of the claimant carried out on 18 January 2020, as follows:-



*“ND 18/1/20 went through inventory training on ipad for Union Street TBA on Monday (20/1/20). LB done inventories before said similar to KP APP. Feels fine / confident ”*

5 That entry refers to a Nicola Donnelly ('ND') having shown the claimant ('LB') how inventories were taken in the respondent's business, and the claimant being comfortable with that aspect. It refers to that training having been done on 18 January 2020 and being in relation to work to be carried out by the claimant on the following Monday, 20 January 2020. In early February 2020, Anne Johnstone gathered various documents about the claimant and io prepared a record of her position in respect of work done by the claimant (JB1 52). In respect of work done by the claimant on 18/1/20, Anne Johnstone wrote *“done fuck air*. Anne Johnstone did not check whether any training had been carried out with the claimant on 18 January 2020, e.g. as recorded in JB184.

15 17. When working for The Key Place the claimant had used her own car to travel to properties for inspections. The respondent required that a vehicle supplied by the respondent be used for such visits. On the transfer, the claimant was asked to produce her driving licence to Anne Johnstone. The claimant noticed that her driving licence did not have up to date details in respect of her 20 surname, her current address and photograph. The claimant gathered the necessary supportive documents. It took her a few weeks to do so. She submitted the information through a Post Office checking service. The information originally submitted was incorrect and the papers were sent back. The application had to be re-submitted. During this period the claimant did 25 not carry out her normal duties in respect of inspections because Anne Johnstone required sight of her driving licence for insurance purposes and she had not had sight of the driving licence before it was sent to DVLA. The claimant offered to use her own vehicle to carry out inspections but was told that a company vehicle had to be used. The claimant understood that during 30 the period when she could not carry out inspections she would be training on the other elements of the business, so that her role could be expanded to full time in due course. The claimant became frustrated because she did not

consider that she was being given sufficient training, either on the systems used in the inspection process or on any other elements of the business. The other employees who had transferred from The Key People also believed that they were not being provided with sufficient training.

5 18. Anne Johnstone was frustrated about the length of the period of time that the claimant had not produced her driving licence to her. At some time during the week beginning 16th December 2019, Anne Johnstone called the claimant to her office, intimating that there was someone on the phone who wanted to speak to her. The claimant thought this was unusual as she had not heard the  
10 phone ring. The claimant asked who it was and by way of answer, Anne Johnstone gestured to the claimant, encouraging her to speak on the phone. Anne Johnstone stood behind the claimant, as the claimant asked to whom she was speaking. The phone was on speakerphone. The call was with the DVLA. The call handler advised that she was having difficulty hearing and  
15 asked the claimant to take her off speakerphone. Anne Johnstone said "*she should hear you just fine on speakerphone.*" The claimant felt very uncomfortable. She felt Anne Johnstone's behaviour to be intrusive. The claimant was advised in the call that she would receive her driving licence in 3-5 days, which she confirmed to Anne Johnstone.

20 19. In early December 2019, while she was at work the claimant received a phone call to her mobile phone from her son's school. The claimant answered her phone and walked into the staff kitchen. Jim McHugh followed her there. The claimant was told that her son was unwell and should be collected from school. Jim McHugh said to the claimant "*that's not good*". The tone used  
25 by Jim McHugh indicated his annoyance. He asked if the claimant always had her mobile phone at her desk. The claimant replied that she had her phone in her bag for emergencies. Jim McHugh walked away. The claimant felt unsupported and pressured to remain in the workplace. Because of Jim McHugh's reaction to that phone call, the claimant contacted the school and  
30 asked for her son to be returned to class rather than be collected and taken home. She explained that she had '*just started a new job*' and asked them to see if her son settled. Her son was aged 5 at that time. The claimant also

arranged for the school to use the respondent's office number, rather than her mobile number, to contact her in an emergency. The claimant had answered her phone because she knew that only the school or nursery would contact her on her mobile phone while she was working. The claimant's son stayed in school that day and then went to after school club. The claimant left work at 5.30pm as normal.

20. At lunchtime on 16 December 2019, the claimant received a call at the respondent's office from her son's school informing her that her son had vomited and so required to be collected. That school's policy is that a child is not allowed back at school for 48 hours after having vomited. The claimant is a single parent and had no option other than to leave work to collect her child from school. The claimant was anxious about speaking to Jim McHugh about that, because of Jim McHugh's attitude towards the phone call she had received from the school earlier that month. The claimant instead spoke to Anne Johnstone. Anne Johnstone said to the claimant *'well you won't get paid for this afternoon'* In subsequent emails (JB52 - JB54) the claimant sought to arrange that she come into work later the next day, once someone else was available to care for her child, to allow the claimant to come to work. Anne Johnstone's position in that email correspondence was *"I think its best that you take tomorrow off as an unpaid day off"*. In the claimant's reply she said *"Unfortunately I can't afford to take the day off tomorrow. So do I have the option of coming in? As it's no different in coming in after a doctor or dentist appointment surely? I can be in for 10.30am as I've managed to get a babysitter. I don't understand why it wouldn't work? Could you explain? I'm not able to take anymore unpaid leave especially when I have arranged for a babysitter. So if it's ok I'd rather come in as it's only an hour and a half less rather than a full day."* Anne Johnstone replied *"I would prefer you took the day off. Your earlier email confirmed that you would come in at approximately 11am and that I'm afraid is not good enough for the business. It may also be the case that you would have to leave again."* The claimant replied *'I will be in the office all day tomorrow as Charlie is with family. So there is no risk I will be called away any more than there is for other working mothers in our office. I have made the effort and I am not one for taking time off unless*

absolutely necessary. I am unsure that I can be made to take unpaid leave if I am fit and able to attend work? If I am wrong then please chat with me tomorrow when I arrive and explain this to me fully before I seek further advice. There is no reason why I should be off all day when I have made the effort to come back and my son is with his grandmother. These things happen and I have taken the appropriate measure to assure I can attend work albeit a little later than usual. As far as I am aware I can only be asked to take unpaid leave if there is not enough work, which there is. Happy to discuss further tomorrow" At 9.13 am the following day Anne Johnstone sent an email to the claimant saying "You confirmed you would be in all day today. Could you clarify what time you will be in as the normal start time is 9am". The claimant replied '7 am aware of the office start times. I confirmed I shall be in all day after dropping my son at her grandmother's, as there is no undue risk of me leaving after a few hours as you suggested. I am dropping him off now and heading straight in" The claimant worked that day from 10.20 to 5.30pm (with an hour for lunch). The claimant believed that another colleague had been permitted by Anne Johnstone to vary her normal working hours to attend an event at her child's school. The claimant felt unvalued by the respondent. Deduction was made from the claimant's pay in respect of her leaving early on 16 December to collect her child from school. The claimant was not informed when that deduction would be made.

21. On 18 December 2019, the respondent held the first of two "one to one" meetings with the claimant. In each of these meetings, the claimant brought up the issues that she later relied on in her resignation letter. The claimant told Anne Johnstone about her concerns regarding her lack of training and the treatment she received following a request for time off to care for her son. The claimant left each of these meetings very upset. She received negative feedback from Anne Johnstone. The claimant's position was that she felt that she needed more specific, structured training on the respondent's processes. When raising her concerns about lack of training, Anne Johnstone's position was that what the claimant was saying was not true. There was no reassurance given to the claimant that there was a long term training plan for her. There was no recognition given to the claimant that the systems and

processes used by the respondent were significantly different and would take time to learn. There was no suggestion of any shadowing period being allowed. The claimant felt unvalued and that her concerns were belittled. Anne Johnstone's position to the claimant was that the claimant had had "plenty of training". She said that the feedback she had received was that the claimant was "very slow" at her work. The claimant replied saying that she was not a slow person and generally picked things up quickly, but she felt that all the staff needed more training. Anne Johnstone mocked the claimant in her response and suggested training on how to use a phone. Anne Johnstone's attitude towards the claimant at this meeting undermined the claimant's confidence. The claimant had not previously received any criticism about the speed or quality of her work. The claimant was upset when leaving Anne Johnstone's office. She sat at her desk then burst into tears. There was no recognition of her state of upset from Anne Johnstone or Jim McHugh.

22. The second one to one meeting between the claimant and Anne Johnstone was scheduled to take place at 4pm on 27 January 2020. On 24 January the claimant sent an email to Anne Johnstone (JB56) where she set out the issues she wished to discuss at this meeting. These were stated as:-

- *"A lack of appropriate training being given during our transition from The Key Place to North wood (which I highlighted to you and Jim at our previous meeting in December)*
- *An inconsistency in the little training that was given depending on which member of staff was pointed to show me*
- *Clear singling out of myself (and other Key Place staff) where answering the phone is concerned*
- *A telephone call that was made by Anne to the DVLA concerning myself but was made without my consent and was made in private whilst I was in fact in the office at the time.*
- *The way the situation was dealt with regarding me having to leave work to pick up my ill son from school last month (and the*

subsequent emails sent saying I should take my next shift off unpaid as it was not 'helpful to the business' even though I had made arrangements meaning I would only be a little late in starting). The issue I feel was brushed under the carpet at the last meeting and down played, even though another member of staff was allowed to come into work later due to personal reasons, said employee was also allowed to work her hours up, this was not given to me as an option. ”

23. A few days previously, the claimant's mother, who then also worked for the respondent, had been suspended by the respondent. The claimant had gone into the office on a day which was not a scheduled work day for her. She had collected some of her mother's belongings from the desk which her mother had used. The claimant was asked how her mother was. The claimant was upset about the situation. She said *"It's a fucking disgrace how she's been treated"*. The claimant understood that she had a right to come into the office to collect her mother's belongings. Anne Johnstone sought HR advice from Greg Melville about the situation. She was told to have a meeting with the claimant. No email correspondence was sent to the claimant to indicate that there was any issue with her having come in to the office to collect things for her mother. When the claimant arrived at work on 27 January 2020, a temporary member of staff was sitting at the desk normally used by the claimant. Jim McHugh was sitting at a desk. There were two desks free: one of which was the desk which had been used by the claimant's mother. The claimant was directed by Jim McHugh to sit at her mother's desk. The claimant felt that was unnecessary and insensitive in the circumstances of her mother's suspension. The claimant was given no explanation for being asked to move, or why she was requested to sit at her mother's desk rather than the other free desk. Shortly after she arrived at work, Anne Johnstone called to the claimant *'77/Just have that meeting with you now Laura'*. She asked the claimant to come into her office to have the one to one meeting then, rather than at 4pm, as had been arranged.

24. At the one to one meeting on 27 January 2020 the claimant sought to discuss the issues set out in her email to Anne Johnstone of 24 January (JB56). The claimant's position in respect of training was that she was a competent, quick learner but that she didn't think she had been shown enough and because she was part time that impacted on the frequency of her repeating new tasks. She asked for more training. Anne Johnstone said *you've had enough training* and that the feedback was that the claimant was *'very slow'* and *'not picking things up properly'*. The claimant sought to discuss all of the issues set out in her email of 24 January. Anne Johnstone's position was to deny that things had occurred as presented by the claimant. She said that Jim McHugh did not do what was alleged by the claimant. Anne Johnstone's consistent position to the claimant at this meeting was *'that's not true'* or *'that didn't happen'*. The claimant knew that Anne Johnstone was in her office with the door closed when she had received the call on her mobile phone from her child's school and so could not have known for sure whether Jim acted as alleged by the claimant re that call. There was no indication to the claimant that there was an intention to resolve the situation. The claimant did not use abusive language toward Anne Johnstone. After the meeting the claimant sat at her desk and was crying inconsolably. Jim McHugh was sitting at the desk opposite the claimant. He took no steps to recognise the extreme state of distress which the claimant was in. Another employee who had transferred to the respondent from The Key Place came over to the claimant and gave her a hug. That was in recognition of the claimant's state of extreme distress. She sympathised with the claimant about the behaviour shown towards her by Anne Johnstone and Jim McHugh. That employee later resigned from her employment with the respondent. Anne Johnstone understood that part of the reason why that employee resigned was because of the respondent's treatment of the claimant. The claimant was very upset and asked Jim McHugh if she could take the rest of the day as a holiday. Jim McHugh said that he didn't know and would need to speak to Anne Johnstone. The claimant left work because of her extreme state of upset following the meeting. She understood that Jim McHugh was going to ask Anne Johnstone if she could have that day as a holiday. The claimant did not hear from Anne

Johnstone in respect of that. That was the last day when the claimant attended work for the respondent. The claimant tried to contact Anne Johnstone by phone to inform her that she was unfit for work. The claimant attended her GP and was certified as being unfit for work due to stress at work / work related stress from 30 January 2020 until 3 April 2020 (JB163 - 165).

25. On 31 January 2020, the claimant's sister went to the respondent's premises with the claimant's fit note in an envelope. She handed this to Vikki McKenna because she was told that Anne Johnstone was in a meeting. Vikki McKenna gave the fit note to Anne Johnstone. The claimant sent a text message to Vikki McKenna on 31 January asking for confirmation that Anne Johnstone had received her fit note (sick line). Vikki McKenna replied by text on 1 February 2020 *"Sorry Hun, just seeing this the now. Aye, I handed the letter over to her yesterday."* The claimant replied *"Thanks hun. Did she tell us why I was off sick?"*. Vikki McKenna replied *"Yeah she said yesterday morning that you and Ann were both off with work related stress"*. The claimant replied *"Ok hen thanks, I didn't want anyone to tynow, she shouldn't have said the reason. Obviously Id have told you but not comfortable with everyone knowing"* The claimant was upset that this information had been disclosed by Anne Johnstone to the rest of the staff. She felt that she could not return to work in a place where everyone knew that she had been off with work related stress.

26. The claimant had email correspondence with Anne Johnstone following 27 January 2020 (JB57 - JB85). There is no mention in the emails sent by Anne Johnstone to the claimant after 27 January 2020 of any inappropriate behaviour by the claimant towards her at the meeting on 27 January, or when the claimant came to remove her mother's items. The claimant asked for and received a copy of her contract and the employee handbook. The claimant emailed copies of her incapacity certification (fit notes). She advised that she would be unfit for her notice period. She queried her entitlement to holidays, the payments made to her and her entitlement to SSP.



27. The claimant felt that the employment relationship had broken down and that she could not return to her employment with the respondent. She did not want to leave the job she had been doing for a long time. As a single mother, and also a tenant of the respondent, she was worried about being unable to pay her rent. Once she had heard that Anne Johnstone had disclosed the reason for her absence, the claimant felt that she could not return to work. The claimant felt vulnerable and had not wanted the reason for her absence to be known. She was concerned that everyone in the office knew her personal medical information. At that stage she had not disclosed this information to friends and wanted to keep it private. She was suffering from stress and anxiety and felt that she could not deal with the situation at work. She was crying a lot. She was receiving support from her GP. She did not feel fit to find another job. She was very anxious whenever she received a communication from Anne Johnstone. The claimant resigned from her employment with the respondent by email to Anne Johnstone dated 5 March 2020 (JB65- JB66). In that email, the claimant stated:-

*"I am writing to you to formally hand In my resignation from my position of property letting agent. This has been an extremely difficult time for me and I am deeply saddened that after 9 happy years at The Key Place that I now feel the need to do this 4 months after transferring to Northwood.*

*You had written to me the other day asking me to explain my reasons in email for being off due to stress and anxiety caused at work. It is these very reasons that have made me feel I now need to resign from my job and they are outlined below:*

- I feel that the transition from The Key Place to Northwood has not been geared towards helping us settle in to work to our best ability. The main reason I feel for this is lack of adequate training which I brought to you as an issue twice. Both times I was told you disagreed and we had had "plenty of training". You also said that you felt I was slow at my work which I do not believe to be the case and has never been an issue brought to me in any other*

5 job I have had previously. I said that I felt we needed more specific structured training in the way you like things done at Northwood, as you made it clear we were not to continue doing our work by The Key Place methods, which were different. Again I was told simply that you disagreed and there was no further discussion or support offered.

- 10 • When my child was sick at school and the school called me at the office I was anxious about telling you and Jim that I had to leave, as a few weeks earlier when my son was ill I told Jim and his response was not supportive or concerned, he was clearly annoyed (I ended up asking the school to send my son back to class and see if he settled rather than leave due to Jim's reaction). I decided to tell you this time hoping for a better response however you were not very pleased either, only focused on the fact that I would not be paid for the rest of the day which was not my concern as my child was ill. The emails following you are very well aware of and I felt you tried to bully me into taking my next shift off, which I had made arrangements for my son to be cared for so I could be in at work as early as possible, this was a clear singling out of myself, as I know a couple of days before another member of staff was allowed to come in late due to commitments with her child.

- 25 • Both one to one meetings, the one on the 18th December 2019 and the one on the 27th January 2020 had me leave in tears. In these meetings I brought up a number of issues, the main ones being training and the issue with my son being off school ill. I felt these meetings were poorly handled by yourself, the first meeting you laughed and sniggered at me while I was talking about issues of concern. There was a lot of denial and brushing off of issues I raised and I was simply told "that's not true" to everything I brought forward to you. The second meeting was so bad that I ended up having a breakdown at my desk and unable to continue

*with my work. I have been off work with stress and anxiety due to work since that meeting. Neither of these meetings were constructive and no positive feedback was given, only negative, there was no support offered.*

5 • *The day I left work unwell, 27th January 2020 was a few days after my mum was suspended from work, that day you decided to sit me at my mum's desk, knowing the sensitivity of the situation, this I felt was very insensitive and quite calculating given the fact you had sat another colleague at my desk and there*  
10 *was one other free desk due to a member of staff being off unwell. I cannot think of any plausible reason for this decision.*

• *Many comments have been made by Jim to myself and other Key Place staff which have been belittling and showing a clear separation between Key Place and Northwood staff, an "us and them" situation if you like. In other words we were not seen as*  
15 *part of the Northwood team.*

• *You disclosed to my work colleagues the reason I was signed off work sick, my friend and colleague Vicki McKenna informed me of this. This is confidential information and I did not want my work*  
20 *colleagues to know the reason for my absence. This was done without my consent.*

*These last few weeks I have been trying to build my confidence back up and bring my anxiety levels down but unfortunately the way things have been handled at the treatment I have had since transferring to your*  
25 *company has made this impossible. The relationship between myself, you and Jim I feel cannot be rectified due to the things I have outlined in this email. There are many more specific incidences which I have noted down but these are encapsulated in the aforementioned.*

*I understand the notice period required is one month therefore my*  
30 *employment will end on 5 April 2020. Please can you reply to my email*

*sent to you on Tuesday 3rd March regarding a breakdown of my holidays and pay to date.*

*Can I please be assured that this email will be kept confidential as the issue with my reason for being off work ill was not treated with such confidentiality and this concerns me.*

*Regards. ”*

28. Anne Johnstone replied to this email by her email to the claimant sent on 6 March 2020 (JB66 - 67). In her reply Anne Johnstone did not seek to provide any reassurance to the claimant. Anne Johnstone did not seek to resolve the situation. She did not indicate any concern or regret about the situation. She did not recognise or comment on the reasons for the claimant's absence and her ill health. Anne Johnstone did not contradict or dispute anything set out by the claimant and relied on in her email of resignation. Anne Johnstone did not set out any contrary position to what was set out in that resignation email. Anne Johnstone did not set out that the claimant had acted in any way inappropriately. Anne Johnstone's reply was as follows:-

*“Many thanks for your email confirming you wish to tender your resignation. As you feel this is the best course of action for you I am pleased to accept your resignation.*

*Your current fit note will expire in 2 weeks time and at that point you may have another fit note or will be able to return to work for the remainder of your notice period. If a further fit note is given to you please pass it onto me and I will pass it to the accountants for processing. If you are returning to work please let me know and I will make necessary preparations.*

*With regards to the points you have raised in your email I would invite you in for a meeting to discuss the issues you have raised. I am happy to have a meeting with you and if you let me know dates and suitable times for you to come in and meet with me I can organise that.*

*In terms of the holiday information query I will look out Robert's information and pass it on to you. I went over it with you at the time Robert passed it to me in December but I am quite happy to go over it again. I know you mentioned that Robert had also been in touch with you regarding the Key Place information having been incorrect and you had no more days to take in 2019 and any further time off would need to be on an unpaid basis.*

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*As usual if any errors have been made then clearly they will be rectified. I think we went through it quite thoroughly at the time and Robert appeared to have all the correct information.*

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*Please let me know if you need anything from me in the interim.*

*Best regards."*

29. Given that Anne Johnstone had accepted the claimant's resignation, the reason for the proposed meeting with the claimant was not clear. Further email correspondence between Anne Johnstone and the claimant followed. The claimant continued to seek information in respect of payments made to her. These emails are at JB67 - JB85. These emails included communication from the claimant on 9 March 2020 that she would visit her doctor before the expiry of her then current sick note and inform Anne Johnstone. In that email the claimant stated :-

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*"With regards to a meeting with you, I think we both know - as I have made it clear to you over the phone and in email - that meetings I have had with yourself have been one of the main causes for my stress and anxiety caused at work and a factor in why I now feel forced to resign from a Job I have been in for 9 years, so as a result I do not think talking to you about these issues now (after attempting to talk about them in previous one to ones and having them issues brushed aside by yourself) would be of benefit to me and my health. I will take these issues elsewhere and seek proper advice."*

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30. In Anne Johnstone's reply to the claimant on 9 March 2020 her she provided some information with regard to the claimant's holiday entitlement, including the following:-

5                   *"The additional day holiday deducted last month was for Wednesday 25<sup>th</sup> December as it was omitted from the information below and, as noted above, from Robert's information you were in a minus situation leaving the Key Place and any time off taken for the rest of the year (including public holidays) would have to be unpaid leave or time accrued from 11<sup>th</sup> November - end December working for me. I believe*  
10                   *Robert updated you on your individual situation but I did not get a copy of his contact with you on that subject. He just updated me with your relevant minus number. "*

31. At 4pm on 3 April 2020, the claimant sent an email to Anne Johnstone (JB72) with attached formal letter of grievance, including a list of events which the  
15                   claimant stated in her email she '*would like investigated*'<sup>1</sup>. At that time email correspondence between the claimant and Anne Johnson was ongoing in respect of payments. The claimant's monthly income had varied since her employment transferred to the respondent. The claimant was seeking information from Anne Johnson on the basis for deductions made and the  
20                   calculations of various payments made to her, including in respect of Statutory Sick Pay ('SSP'). On 6 April the claimant sent an email to Anne Johnstone with an attached second formal letter of grievance, setting out issues with regard to the financial situation in respect of payments made from the respondent to the claimant, and payments alleged by her to be due from them.

25                   32. Anne Johnstone sought to arrange a meeting with the claimant with regard to her second grievance. The claimant's position was that she could not attend a meeting because her children required to be of school to the lockdown which was then in place because of the Covid 19 pandemic. At that time the claimant was not in a 'bubble' with any other adult and did not have anyone  
30                   who could look after her children while she attended a meeting with the respondent. The claimant had contacted ACAS with regard to the situation

the claimant's email to Anne Johnstone of 15 June 2020 (JB83) sets out her position with regard to that meeting, as follows:-

5                   *"As set out in the government guidelines, children are not set to be going back into education until August at the earliest. Therefore I will not be able to attend any such meeting until my children can be cared for, which was one of the main reasons I tried to arrange an alternative method via email, which ACAS advised me was an acceptable compromise. I did not get a response from you until after two weeks of suggesting this, so therefore I had taken advice again from ACAS*  
10                   *again on the steps forward. Please accept that as stated before, I will not be able to attend in person until the children are back at school and nursery, whether social distancing allows a meeting in your office or not is unfortunately not the only issue.*

15                   *I contacted ACAS again this morning for advice following your email and they have advised that in the current circumstances my proposal for a meeting via email is a reasonable alternative to try and resolve the issues. I accept that you said you did not want to proceed with this and ACAS will be in contact with you soon."*

20                   33. The claimant understood from ACAS that a video meeting was not suitable as she would require to be looking after her children while the meeting took place.

25                   34. In February 2020, the claimant received SSP. Two deductions were made from her pay. The first was a deduction of £114.21 which was stated to be "unpaid leave". The claimant was given no explanation as to the corresponding working day or days this deduction related to. The second deduction was for "unpaid holiday" which appeared to be for a day of leave taken by the claimant in either December 2019 or January 2020. The claimant was given no information at the time as to how those deductions had been calculated. The claimant calculated that deductions had been made at a rate  
30                   of £8.46 an hour.

35. In March 2020, the claimant received no pay. The claimant received an email from Anne Johnstone on the day she should have received her pay in which she informed her that she was no longer entitled to SSP. She informed the claimant that this was the advice given by the respondent's accountant. It was unclear to the claimant whether she had never been entitled to SSP or whether her entitlement had come to an end. The claimant was not provided with an SSP1 form to allow her to claim sickness allowance. Following reporting the matter to HMRC, it was confirmed to the claimant that she was entitled to a further £502.68 from the respondent. The claimant was later paid that sum by cheque from the respondent.

#### Relevant Law

36. Section 95(1)(c) of the Employment Rights Act 1996 ('the ERA') sets out that where the employee terminates the contract under which he is employed with or without notice in circumstances in which he is entitled to terminate without notice by reason of the employer's conduct, then that employee shall be taken as dismissed by his employer. This is known as constructive dismissal. Case law has developed in respect of constructive dismissal and which is relevant to the tribunal's determination of a claim under section 95(1)(c).

37. Following *Western Excavating (ECC) Ltd v Sharp* [1978] ICR 221, for the purposes of a claim of unfair dismissal, an employee is dismissed by his employer if the employee terminates the contract (with or without notice) in circumstances in which he is entitled to do so without notice by reason of the employer's conduct. The test of whether an employee is entitled to do so is a contractual one. There must be a breach of contract by the employer. It may be either an actual breach or an anticipatory breach. That breach must be sufficiently important or serious to justify the employee resigning, or else it must be the last in a series of incidents which justify their leaving. The employee must leave in response to the breach and not for some other, unconnected reason. In the words of Lord Denning in *Western Excavating v Sharp*:



*"The employee must make up his mind soon after the conduct of which he complains. If he continues for any length of time without leaving, he will be regarded as having elected to affirm the contract and will lose his right to treat himself as discharged. "*

5 38. The implied term of mutual trust and confidence between employer and employee was recognised as fundamental to the operation of the employment contact by the House of Lords in *Malik and another v Bank Of Credit & Commerce International SA (in compulsory liquidation)* [1998] AC 20:

10 *"There is ... no need for a tribunal in a case based on Malik to ask two separate questions - was there a breach, and if so, was it repudiatory, because if the answer to the first is yes, the second is necessarily answered too."*

15 39. The EAT stated in *Morrow v Safeway Stores Pic* [2002] IRLR 9 that a breach of that implied term will inevitably lead to the conclusion that there has been a repudiatory breach of contract (paragraph 25). This followed the approach taken by the EAT in *Woods v WM Car Services (Peterborough) Ltd* [1981] ICR 666, as later approved by the Court of Appeal in *Lewis v Motorworld Garages Ltd* [1986] ICR 157. This principle was considered further in  
20 *Ahmed v Amnesty International* [2009] ICR 1450, in which the EAT stated that:

25 *"There is ... no need for a tribunal in a case based on Malik to ask two separate questions - was there a breach, and if so, was it repudiatory, because if the answer to the first is yes, the second is necessarily answered too."*

30 40. Following *Leeds Dental Team Ltd v Rose* [2014] IRLR 8, the test of whether there has been a breach of the implied term of trust and confidence is objective. Following *Mahmud v BCCI SA* [1997] ICR 606, and *Bournemouth University Higher Education Corp v Buckland* [2009] ICR 1042 (EAT), in a claim in which the employee asserts a breach of the implied term of trust and

confidence, he must show that the employer had, without reasonable and proper cause, conducted himself in a manner calculated, or likely, to destroy or seriously damage the relationship of trust and confidence between them.

41. Following *Kaur v Leeds Teaching Hospitals NHS Trust* [2018] EWCA Civ 978, in a case involving the 'last straw', the repudiatory conduct may consist of a series of acts or incidents, some of them perhaps quite trivial, which cumulatively amount to a repudiatory breach of the implied term of trust and confidence. In such a case, the last action of the employer which leads to the employee leaving need not itself be a breach of contract; the question is, does the cumulative series of acts taken together amount to a breach of the implied term? Although the final straw may be relatively insignificant, it must not be utterly trivial: the principle that the law is not concerned with very small things (in Latin "*de minimis non curat lex*") is of general application. The issues for determination by the Tribunal in respect of claimant's claim of constructive dismissal were identified with reference to the Court of Appeal's decision in *Kaur -v- Leeds Teaching Hospitals NHS Trust* [2018] EWCA Civ 978. Both representatives were directed to address that case in their submissions. In *Kaur v Leeds Teaching Hospitals NHS Trust* [2018] EWCA Civ 978 the Court of Appeal listed five questions that the Tribunal should ask in order to determine whether an employee was constructively dismissed:

- What was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, their resignation?
- Has the employee affirmed the contract since that act?
- If not, was that act (or omission) by itself a repudiatory breach of contract?
- If not, was it nevertheless a part (applying the approach explained in *Waltham Forest v Omilaju* [2004] EWCA Civ 1493) of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a

repudiatory breach of the implied term of trust and confidence?

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

5 42. For a successful claim of constructive dismissal, there must be a causal link between the employer's breach and the employee's resignation - i.e. the employee must have resigned because of the employer's breach and not for some other reason, such as an offer of another job. It is a question of fact for the Employment Tribunal to determine what the real reason for the resignation was. To be successful in a constructive dismissal claim, the employee must establish that (i) there was a fundamental breach of contract on the part of the employer (ii) the employer's breach caused the employee to resign; and (iii) the employee did not delay too long before resigning, thus affirming the contract and losing the right to claim constructive dismissal.

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15 43. Where the Tribunal makes a finding of unfair dismissal, it can order reinstatement, or in the alternative award compensation. In this case the claimant seeks compensation. This is made up of a basic award and a compensatory award. The basic award is calculated as set out in the ERA Section 119, with reference to the employee's number of complete years of service with the employer, the gross weekly wage and the appropriate amount with reference to the employee's age. Section 227 sets out the maximum amount of a week's pay to be used in this calculation. In terms of the ERA Section 123(1) the compensatory award is such amount as the Tribunal considers just and equitable in all the circumstances, having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer.

#### **Submissions**

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30 44. There was no dispute on the relevant law, which was succinctly set out by the claimant's representative, with reference to a number of authorities, as follows:-

*Western Excavating v Sharp [1978] ICR 221*

*Kaur v Leeds Teaching Hospitals NHS Trust [2018] EWCA Civ 978*

*Waltham Forest v Omilaju [2004] EWCA Civ 1493*

*Malik v BCCI [1997] ICR 77*

5 *Morrow v Safeway Stores Pic [2002] IRLR 9*

*Woods v WM Car Services (Peterborough) Ltd [1981] ICR 666*

*Lewis v Motorworld Garages Ltd [1986] ICR 157*

*Ahmed v Amnesty International [2009] ICR 1450,*

*Chindove v William Morrisons Supermarket pic UKEAT/0201/13,*

10 46. I have set out in the Decision section whether I accepted parties' representative's positions in their respective submissions.

#### **Observations on evidence**

15 47. It was notable that Anne Johnstone's position in her evidence was not entirely consistent either with the position set out in the ET1 defence or with the documentary evidence which was before me, and that much of her position in her evidence had not been put in cross examination to the claimant or Rose Patrick. It was very significant that Anne Johnstone accepted that it was the position of the claimant and the three other employees who had transferred that they had not received enough training and that she accepted that another  
20 employee who had transferred had resigned because of the way the claimant had been treated on 27 January 2020. It was also significant that Anne Richardson's evidence was that Nicola Donnelly and Lisa Allen were very busy after the transfer, manually entering the details of The Key People's properties into the respondent's systems as well as dealing with the  
25 properties and training those who had transferred. Anne Johnstone's evidence confirmed the claimant's position that Lisa Allen was very quick when going through training (Anne Johnstone's evidence being that she

would go over it again if asked). Anne Johnstone's evidence on the training required for the role and the training given to the claimant was particularly inconsistent. She described training as *'very very important, as being on a continuing basis and that a new start would be trained for 'two or three years'.*

5 Her evidence was that *'staff need to be really really well trained. There's all sorts of legislation. They need to be comfortable in what they are doing.'* When it was put to her that the staff would *'need to have confidence in what they were doing'*, her reply was *'totally'*. There was no documentary evidence of supportive ongoing training. Anne Johnstone accepted that there

10 were significant differences between the way systems worked in The Key People and with the respondent. Anne Johnstone did not dispute that the claimant felt that she did not have sufficient training. Her evidence was *"Laura would say that she wasn't being training properly. I would say what do you feel lacking in. I wouldn't get specific answers."* That position was

15 inconsistent with the documentary evidence and inconsistent with Anne Johnstone's position that training was ongoing. Anne Johnstone accepted that the claimant did not have sight of the training plan (JB154). Her position on that was *"I didn't particularly feel there was a need. Maybe there was."* Anne Johnstone accepted that all of the employees who transferred from The

20 Key Place had issues with the training. Her evidence was *"Laura couldn't articulate what was not working well for her. The others said the same."* And *"They were generally unhappy with the change. If they articulated what it was...all they would say was Northwood systems and Northwood ways."* That was inconsistent with her evidence that *"Training was not finished.*

25 *There was no time limits or restrictions on that. Until they were comfortable and we were comfortable"*. There was no evidence of any reassurance given to the claimant that training was ongoing or that she wouldn't be expected to carry out tasks if she was not comfortable with the procedures used. Anne Johnstone's position in her evidence that an extended period of shadowing

30 was available was inconsistent with the evidence that the claimant was expected to do inspection work herself. Anne Johnstone's position in her email at JB52 is consistent with the claimant's position that she was expected to do inspections herself (and therefore drive herself there). That was

inconsistent with Anne Johnstone's evidence that the claimant was *'doing fill in jobs until she got her licence back.'* The claimant was frustrated as she understood that she would be doing more than inspection work and she felt that while she was waiting on her driving licence coming back she should be being trained on tasks involved in other duties. Anne Johnstone's evidence was that *'there was always a plan for Laura'*. At best, there was a lack of communication with the claimant about this. There was no evidence of any reassurance having been given to the claimant with regard to training being an ongoing process and the length of time she would be expected to take before being competent at doing tasks alone. Criticism was made of the claimant in respect of the delay in obtaining her renewed driving licence, despite it being Anne Johnstone's position that the claimant would be shadowing someone for *'as long as it takes'*. If the claimant was shadowing someone there would be no need for her to drive. Anne Johnstone accepted that if the claimant was shadowing someone else then that other person could drive to the inspections. There was no evidence to support Anne Johnstone's position in evidence that the claimant could have had an extended period of shadowing. The documentary evidence was to the contrary. That position was also inconsistent with Anne Johnstone's evidence that *'We brought over people with years and years of experience. They were learning new checklists and things but there was quite a lot they could do on their own.'* It was significant that under cross examination Anne Johnstone accepted that from December 2019 she was aware that the employees who had transferred from The Key Place were unhappy and felt that they were not wanted by the respondent. Her evidence was that that *'seemed to be something that they thought'*. Her position that she *"tried to say 'what do we need to do'"* was not put to the claimant or to Rose Patrick. It was also significant that Anne Johnstone accepted that the period after the transfer was a very busy time in the respondent's business. Her evidence was that it was *'an incredibly busy time'* and *"it was a very busy office. There was a lot to do."* It was significant that the notes at JB176 were consistent with the claimant's position in evidence. Anne Johnstone's evidence that at the time there were few

opportunities for property inspections to be carried out was not put to the claimant.

48. Anne Johnstone did not appear to be empathetic to the claimant's position as a single mother. Her evidence was that it was *'always a big deal for Laura to get childcare'* and that the claimant was *'always jnsisting she couldn't get childcare'*. Anne Johnstone's position in evidence was not consistent with the contemporaneous email correspondences. Her position in evidence was that the claimant had initially proposed that she would not be in the office until after 12 on the day when her child required to be absent from school after being sick (JB52 - 53). Anne Johnstone's position that the claimant didn't have holidays to take, had asked for unpaid time off in the past and said she didn't mind if unpaid, was not put to the claimant.

49. Anne Johnstone's evidence on the claimant was significant. She said *"She was always saying 'you can't do that', I'm going to take advice. To be honest I would just gloss over that."* When it was put to her under cross examination that the claimant was *'arguing her point'*, she replied *"Very much so. I would say unreasonably arguing her point. It was obviously how she felt at the time."* That position was not supported by the contemporaneous email correspondence (e.g. JB52 - 57). Her evidence that she was *'concerned about how to get the situation turned round and Laura to stay. It didn't seem to matter whatever I did. It didn't seem to be the right thing'* was inconsistent with the contemporaneous documentary evidence and was not put to the claimant. Anne Johnstone's evidence on the meetings with the claimant were significant. She was unwilling to make concessions with regard to those meetings. She refused to accept that the claimant had left the first meeting *'in tears'*, her position being that the claimant had *'burst into tears'* when at her desk, but that the claimant had been *'angry and frustrated'*, rather than upset, at the meeting. There was no dispute that by the time of the second one to one meeting on 27 January the relationship had broken down. There was no explanation as to why there had been no attempt to get the claimant to withdraw her resignation. Anne Johnstone's evidence on what had occurred at the meeting with the claimant on 27 January was that the claimant

had sworn at her and called her names. It was striking that that detail was not put to the claimant in cross examination. It was significant that Anne Johnstone accepted that another former employee who had transferred from The Key Place resigned because she was unhappy about the way the claimant was treated on 27 January.

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50. With regard to what was relied on by the claimant as being the 'last straw' (disclosure of confidential medical information), the text messages between the claimant and Vikki McKenna were significant. Anne Johnstone's position on these was that she '*questioned the veracity of the text messages*' and that there had been general chat among the employees about the reason for the claimant's absence. Neither of these positions had been put to either the claimant or Rose Patrick. Although it was Anne Johnstone's evidence that others in the office were discussing the claimant's absence and that the reason she was off was widely known, that position was not put in cross examination to either the claimant or Rose Patrick. It was noted that when giving her evidence, Anne Johnstone volunteered some private information about another employee, which was not necessary to answer the question asked of her. Anne Johnstone also volunteered evidence on what had been on the claimant's absence record with The Key Place. Both of those instances were indicative of Anne Johnstone's lack of recognition of medical matters being confidential. It was Anne Johnstone's evidence that when the claimant's sick note was given to her by Vicki McKenna it was not in an envelope. That evidence is not necessarily inconsistent with the claimant's position that it was in an envelope when handed in, particularly where it was Anne Johnstone's evidence that she did not open the mail. For all these reasons, and because of my conclusions on the claimant's credibility, I accepted the claimant's reliance on Anne Johnstone having disclosed confidential medical information about the claimant.

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51. The claimant sought to answer questions as best she could. She was not evasive, cautious or guarded in giving her evidence. She withstood robust cross examination, saying she could not recall if that was the situation, but being entirely consistent throughout her evidence in respect of her



5 understanding of the position, events, and the way she had felt. It was significant that her evidence was consistent with the contemporaneous documentary evidence (e.g. the text messages with Vikki McKenna). Her evidence was also consistent with her mother's evidence (aside from it being Rose Patrick's evidence that the Christmas Day holiday came out of the holiday entitlement). I considered it to be significant the claimant and Rose Patrick were consistent with each other in their evidence as to the mental health effects on the claimant and on the level of contact between them during the Covid lockdown restrictions. The claimant was credible and plausible in her position. With regard to the changes in work, and the handwritten comments on the training plan re her being confident, she said *"I was confident in my area of work. I've done inspections for years. I was confident in doing inspections. I can't be confident on a procedure I was shown once .....I was willing to learn."* And (in relation to her meeting with Anne Johnstone) *"I simply asked how to do a job. It was a new system and a new role. I wanted to do the job and learn these things."* She was plausible in her position re the email correspondence after she had to leave work when her son was unwell. She said *I felt uneasy about the message. I felt the tone - I had anxiety going into work. I thought why am I being treated like this when I'm making the effort to come into work. I was anxious. It was not a nice feeling.* "The claimant's evidence that she was told that it *'wasn't in the best interests of the business'* for her to come into work later was not exactly what was stated by Anne Johnstone in her emails to the claimant (JB52 - 54). I took into consideration that the tone of the email communication was in line with that understanding and that the claimant was anxious about the situation.

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52. I placed great significance on the claimant's letter of resignation and Anne Johnstone's reply to that. The terms of that email and the issues relied on in there in respect of the claimant's resignation were entirely consistent with the claimant's position in her evidence. The terms of Anne Johnstone's emailed reply were very significant in a number of respects: there was no attempt to resolve the situation or attempt to get the claimant to retract her resignation; Anne Johnstone stated that she was *'pleased'* to accept the claimant's resignation; there was no attempt to provide any reassurance to the claimant

in respect of training provision (despite it being Anne Johnstone's position in evidence that she agreed that the procedures and systems used by the respondent were significantly different to those used by the Key Place and that training would be long term and ongoing); Anne Johnstone did not indicate any concern or regret about the situation; she did not recognise the reasons for the claimant's absence and her ill health; she did not contradict or dispute anything set out by the claimant and relied on in her email of resignation. The lack of any contradiction to the claimant's position in her resignation email was very significant given that it was Anne Johnstone's position in her evidence that she had not said to the claimant that she had had '*plenty of training*', that she had not been unhappy about the claimant leaving to collect her ill child from school, that the claimant had not been directed to sit at a her mother's desk, that there was not a difference in treatment between the previous Key Place employees and the respondent's employees and that she had not disclosed any health information, rather this had been generally discussed in the office prior to the sick note being received. I considered it to be very significant that Anne Johnstone's position in evidence on all of these matters relied on by the claimant was not consistent with her reply to the claimant's resignation letter. If the position had been as described by Anne Johnstone in her evidence, I would have expected that to be reflected in her reply to the resignation letter. It was Anne Johnstone's evidence that the claimant had been abusive towards her at the meeting on 27 January. I did not accept that that had happened because it was inconsistent with the contemporaneous documentary evidence. I considered it likely that if the claimant had acted in the way described by Anne Johnstone in her evidence, that would at least have been mentioned in her subsequent email correspondence with the claimant. On the contrary, it was significant that the claimant's position was consistent with the issues she listed in her email to Anne Johnstone sent on 24 January. In preparation for the meeting on 27 January (JB56).

53. I considered what Anne Johnstone wrote in JB152 in respect of what she believed to have been done by the claimant to be entirely inappropriate in the business context and inaccurate with regard to other records of what had

been done by the claimant on that date (JB184) That written comment was indicative of Anne Johnstone's view of the claimant. Anne Johnstone described that comment as "*Not my finest hour* and said "*Maybe I should have checked the other records.*" Her position was that that date was a Saturday, that training would not normally have been done on a Saturday and that she had heard the claimant chatting. Given that that position was not put to the claimant, that there was no other indication of the claimant wasting time at work and that there was no other documentary evidence consistent with Anne Johnstone's position, I did not accept Anne Johnstone's position on this.

54. For all these reasons, and because of the consistency in the claimant's position, against the inconsistencies in the respondent's position and in Anne Johnstone's evidence, where there was a conflict in evidence I accepted the position of the claimant. I accepted the evidence of the claimant and Rose Patrick as credible and reliable. I did not accept the respondent's representative's reliance on Rose Patrick also having a claim before the Tribunal against the respondent, particularly in circumstances where Anne Johnstone accepted that all of the employees who had transferred from the Key People were unhappy about the level of training given to them by the respondent. I was addressed by the representatives in respect of Rose Patrick's claim against the respondent being a separate claim, which, in all the circumstances, had not been considered by them to be suitable to be conjoined with this claim.

### Decision

#### *Unlawful Deduction from Wages*

55. By the stage of the close of these proceedings, the only unlawful deduction relied upon was in respect of a deduction made for holiday pay in respect of Christmas Day 2019.

56. In circumstances where Rose Patrick had agreed with the respondent's position that the Christmas- Day holiday required to be deducted from

individual annual entitlement, and where there was no conclusive or agreed evidence on the amount of holidays accrued by the claimant, either before or after the transfer date, I did not accept that the claimant had proven that an unlawful deduction had been made in respect of this holiday. I accepted the respondent's representative's submission that the claimant did not dispute she had used up her annual leave for 2019 by the time of the transfer.

57. The claimant's claim for unlawful deductions from wages is therefore unsuccessful and is dismissed.

*Constructive Dismissal*

58. The first issue for my determination was

(i) *Did the respondent conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between the parties?*

59. I considered the principles in *Western Excavating (ECO) Ltd -v- Sharp* [1978] ICR 221; [1978] QB 761 and whether (per paragraph 2 in Wright)

(v) *'there has been a breach of contract by the employer that the breach is fundamental or is, as it has been put more recently, a breach which indicates that the employer altogether abandons and refuses to perform its side of the contract, that the employee has resigned in response to the breach and that before doing so she has not acted so as to affirm the contract, notwithstanding the breach.'*<sup>1</sup>

60. In this fact sensitive case, the correct approach was to apply the test in *Malik v BCCI* [1997] ICR 606 per Lord Steyn at paragraph 56, where the obligation is expressed as being "the employer shall not without reasonable and proper cause conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between employer and employee".

61 . For the reasons set out above, I accepted the claimant's version of events against that of Anne Johnstone. I made findings in fact based on my assessment of the evidence before me and the credibility and reliability of witnesses. On the findings in fact, the respondent did conduct itself in a manner likely to destroy or seriously damage the relationship of trust and confidence between the parties. The findings in fact supported there being a common thread of conduct on the part of the respondent likely to destroy or seriously damage the relationship of trust and confidence between the parties. The claimant has proven, on the balance of probabilities that the conduct that she relied on having occurred did occur.

62. I did not accept the respondent's representative's submission that the respondent tried to investigate the claimant's two grievances but that the claimant had failed to engage in the process. The respondent did not take reasonable steps to seek to resolve the situation. They accepted the claimant's resignation without any attempt to seek resolution of her issues. I did not accept the respondent's representative's submission that by failing to submit grievances until her contract had terminated, the claimant fatally denied the respondent an opportunity to deal with her grievances. On the findings in fact made, and given the Anne Johnstone's responses to the grievances and the failure to seek any resolution, I concluded that had the claimant submitted her grievances earlier that would have made no difference to the outcome. In the facts and circumstances of this case, I did not accept the respondents' representative's submission that the claimant had failed to give the respondent opportunity to deal with matters prior to her resignation. There was no dispute that the respondent was aware of the claimant's issues prior to the claimant's resignation, as discussed at the one to one meetings. It was significant that those issues had been set out by the claimant in her email to Anne Johnstone of 24 January (JB56). The respondent therefore had the opportunity to resolve those issues and did not do so. Under cross examination Anne Johnstone did not dispute that the relationship had broken down. On my findings in fact, Anne Johnstone's conduct towards the claimant was part of a course of conduct which breached the implied term of trust and confidence.

63. I preferred the evidence of the claimant to that of Anne Johnstone in respect of the disclosure of medical information, for reasons set out above in respect of credibility and consistency, I accepted the claimant's position that the claimant learning of that disclosure was the 'last straw'. I accepted that, taken  
5 on a cumulative basis, the incidents relied upon by the claimant constitute a repudiatory breach of the contract, while noting that the claimant learned of that disclosure on 1 February 2020. I did not accept the respondent's representative's submission that there was no repudiatory breach by the respondent.

10 64. I did not accept the respondent's representative's submission that the claimant did not resign within a sufficient time to allow her to rely on the breach and resign her position. I accepted the claimant's representative's reliance on *Chindove v William Morrisons Supermarket* *pic* UKEAT/0201/13, where the EAT (Justice Langstaff) had commented on Lord Denning's  
15 comments on affirmation in *Western Excavating v Sharp* (quoted above), in particular:-

25. *"This may have been interpreted as meaning that the passage of time in itself is sufficient for the employee to lose any right to resign. If so, the question might arise what length of time is  
20 sufficient? The lay members tell me that there may be an idea in circulation that four weeks is the watershed date. We wish to emphasise that the matter is not one of time in isolation. , The principle is whether the employee has demonstrated that he has made the choice. He will do so by conduct; generally by  
25 continuing to work in the job from which he need not, if he accepted the employer's repudiation as discharging him from his obligations, have had to do.*

26. *"He may affirm a continuation of the contract in other ways: by what he says, by what he does, by communications which  
30 show that he intends the contract to continue. But the issue is essentially one of conduct and not of time. The reference to time*

is because if, in the usual case, the employee is at work, then by continuing to work for a time longer than the time within which he might reasonably be expected to exercise his right, he is demonstrating by his conduct that he does not wish to do so. But there is no automatic time; all depends upon the context. Part of that context is the employee's position. As Jacob LJ observed in the case of *Buckland v Bournemouth University Higher Education Corporation* [2010] EWCA Civ 121, deciding to resign is for many, if not most, employees a serious matter. It will require them to give up a job which may provide them with their income, their families with support, and be a source of status to him in his community. His mortgage, his regular expenses, may depend upon it and his economic opportunities for work elsewhere may be slim. There may, on the other hand, be employees who are far less constrained, people who can quite easily obtain employment elsewhere, to whom those considerations do not apply with the same force. It would be entirely unsurprising if the first took much longer to decide on such a dramatic life change as leaving employment which had been occupied for some eight or nine or ten years than it would be in the latter case, particularly if the employment were of much shorter duration. In other words, it all depends upon the context and not upon any strict time test.

27. 'An important part of the context is whether the employee was actually at work, so that it could be concluded that he was honouring his contract and continuing to do so in a way which was inconsistent with his deciding to go. Where an employee is sick and not working, that observation has nothing like the same force. We are told, and it is consistent with our papers, that the Claimant here was off sick. Six weeks for a Warehouse Operative, who had worked for eight or nine years in a steady job for a large company, is a very short time in which to infer from his conduct that he had decided not to exercise his right to go.'

I accepted the claimant's evidence that it was a big decision for her to resign, given that she is a single mother who requires to work to pay the bills, and given that she rented a flat from the respondent. I accepted her evidence that she did not wish to be a cleaner, that she had responsibilities as a single mother of three children with rent to pay, that her health was affected by the respondent's behaviour to the extent that she could no longer work for them and that her confidence was so low that she only wanted to do a job that she knew she could do and work on her own. Her position on that was not challenged. There was no suggestion that the reason the claimant had resigned was because she wanted to work self employed as a cleaner. I accepted the claimant's representative's reliance on LJ Langstaffs comments in *Chindove v William Morrisons Supermarket plc* UKEAT/0201/13. In the circumstances of this case, where the claimant had responsibilities as the sole provider for her three children, where the claimant was suffering from health problems and following her resignation she was absent from work due to ill health and where it was not contested that she had had any separate aspirations to become a self employed cleaner, I accepted that the claimant had not affirmed the breach by delaying to resign.

65. On the findings in fact, the respondent's conduct, taken on a cumulative basis, was calculated and / or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee. Taken on a cumulative basis, it was conduct which was in fundamental breach of the contract of employment. The respondent had acted in material breach of contract. The history as set out in the findings in fact constituted a material breach of contract entitling the claimant to resign. It was very significant that there was no evidence of any steps taken by the respondent to seek to maintain their employment relationship with the claimant. Anne Johnstone knew that the claimant and the other three employees whose employment had transferred to the business felt that they had not had enough training and were unhappy. She took no steps to provide any reassurance to them on training being provided and her evidence was that she expected them to identify what training they needed. The claimant's resignation was accepted



without any indication of any steps being suggested to be taken to seek to resolve the situation. On my findings in fact, the respondent's acts and failures to act were in material breach of contract, on the basis of the cumulative events and the last straw relied upon by the claimant as being a breach of the implied term of trust and confidence. The reason for the claimant resigning was that material breach of contract.

(ii) *Did the claimant resign in response to that conduct or for some other reason?*

66. In all the material facts and circumstances, I was satisfied that the reason why the claimant resigned was because of conduct by the respondent. The respondent's conduct was the effective cause of resignation. It was not suggested that there was any other cause of the claimant's resignation. With regard to the terms of sections 95(1)(c) and 136(1)(c) of the ERA, I was satisfied that there was a causal link between the employer's breach and the employee's resignation.

67. It was confirmed at the outset of proceedings that the respondent did not argue that if the claimant had been dismissed then that was a fair dismissal. There was no alternative (*esto*) argument for the respondent that the claimant was dismissed and that that dismissal was a fair dismissal. The claimant resigned. On my findings in fact, that resignation was in circumstances which amounted to a dismissal in terms of ERA section 95(1)(c).

68. The next issue identified for my determination was:-

(iii) *If the claimant was unfairly constructively dismissed to what compensation is she entitled?*

69. On the basis of my assessment of the documentary and oral evidence before me, I concluded that there was conduct by the respondent which was likely to destroy or seriously damage the relationship of confidence and trust between employer and employee, as relied upon by the claimant. For that reason, the claimant's claim for constructive dismissal succeeds. In the circumstances, the claimant is entitled to an unfair dismissal basic award and a compensatory

award. The claimant's representative's calculation of the claimant's award was based on gross weekly pay of £135.92. The claimant's gross pay is the same rate as her net pay, because of the level of the claimant's earnings. There was no dispute that the calculation of the unfair dismissal basic award to which the claimant is entitled is  $(9 \times 1 \times £135.92)$  £1223.28.

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70. The respondent's representative took no issue with the basis of the claimant's representative's quantification of the claimant's loss. There was no Polkey argument made. The claimant has suffered wage loss as a result of the respondent's material breach of contract and is entitled to be compensated based on that loss.

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71. I did not accept the respondent's representative's submissions in respect of mitigation. I did not accept that the claimant had produced little evidence of her efforts to mitigate her loss. The claimant has provided evidence of her income as a self-employed cleaner, which was not disputed, and she has given her evidence on the reasons why she sought income in that capacity. I accepted the claimant's reasons for seeking income as a self-employed cleaner. No evidence of any vacancies was put to the claimant as opportunities which she ought to have applied for.

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72. I considered whether or not to apply a deduction in terms of section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992 ('TULRA') with regard to any non-compliance with the ACAS Code of Practice on 'Disciplinary and Grievance Procedures'. I considered that in all the circumstances it was not appropriate to apply a deduction for failure to follow the grievance procedure. I accepted the claimant's position that she thought that the grievance could be lodged at any time until the expiry of her notice period. I accepted that her health affected the timing of her submission of the grievances. I considered it to be significant that there was no attempt by the respondent to seek to resolve the situation. I took into consideration the size of the respondent's undertaking and that there was no one senior to Anne Johnstone and Jim McHugh in the franchised business, and no recourse to the wider Northwood network re HR matters, and Anne Johnstone's conduct

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when the claimant had sought to raise her issues in the meetings in December 2019.

73. The claimant's representative's submission was that the appropriate period of loss was from the effective date of termination on 3 April 2020 until the end of 2022. I accepted the claimant's representative's submissions with regard to the claimant's loss to the date of the Final Hearing. These calculations took into account a government grant of £4000 paid in respect of the initial lockdown period in 2020, when the claimant could not work as a cleaner. It was not disputed that in the tax year 20/21 (52 wks, from 5 April 2020 - April 2021), the claimant's profit after deductions, including the grant of £4000, was £5850. It was appropriate for me to use that calculation because that tax year almost exactly coincided with the start of the claimant's loss period (effective date of termination of employment being 3 April 2020). The claimant's loss in that period was (93 weeks x £135.92) £12,640.56 - £5850 = £6,790.56.

74. I accepted the claimant's evidence that she worked a maximum of 16 hours a week. This was in line with her average hours of work with the respondent. The claimant's evidence was that she had plans to grow her cleaning business. That was not expanded upon and there was no timescale put to any such expansion. It was not disputed that the claimant's net earnings in her cleaning business since April 2021, based on working 16 hours a week, were £64 a week. That is a weekly net loss of (£135.92 - £64) £71.92. In the 42 week period from the end of the tax year 20/21 to the Final Hearing, that is a net wage loss of (£71.92 x 42) £3020.64.

75. I considered what was just and equitable to award the claimant under section 123 of the Employment Rights Act 1996. In the facts and circumstances, and taking into consideration that the respondent did not argue that the claimant had been fairly dismissed, no deduction was made in respect of any contributory fault by the claimant. In all the circumstances of this case, including the claimant's evidence on her health and its impact on her employability, I did not accept the respondent's representative's submission

that a total period of 12 months wage loss was appropriate. In all the circumstances, taking into account the effective date of termination of employment and that the claimant plans to grow her business, I considered it just and equitable to compensate the claimant for her wage loss to this Final Hearing and in respect of future loss for the period of 6 months from the date of the Final Hearing. On the accepted figures, that equates to a net future loss of (26 x £71.92) £1869.92. I accepted the claimant's representative submission that the claimant should be awarded £300 in respect of loss of statutory rights. On these calculations, the total compensatory award to the claimant is (£6,790.56 + £3020.64 + £1869.92 + £300) £11,981.12. The compensatory award is subject to the statutory cap of the equivalent of 52 weeks gross pay (52 x £135.92). The claimant is therefore awarded a compensatory award of £7,067.84, being capped to the statutory maximum in terms of sections 117(1) and (2) and section 123 of the Employment Rights Act 1996.

76. The total award to the claimant is £8291.12. This is comprised of an unfair dismissal basic award of £1223.28, plus a capped compensatory award of £7067.84.

77. The Recoupment Regulations do not apply to this award.

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**Employment Judge: C McManus**  
**Date of Judgment: 17 February 2022**  
**Entered in register: 22 February 2022**  
**and copied to parties**

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