



# EMPLOYMENT TRIBUNALS

**Claimant:** Dawn Mcnee

**Respondent:** Whitakers Estate Agents Limited

**Heard:** by CVP in the North East Region

**On:** 11 and 12 July 2024

**Before:** Employment Judge Ayre

## Representation

**Claimant:** In person

**Respondent:** Mr A Whitaker, director

**JUDGMENT** having been sent to the parties on 16 July 2024 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunal Rules of Procedure 2013, the following reasons are provided:

# REASONS

## Background

1. The claimant was employed by the respondent from 1 September 2020 until 28 August 2023 as a Senior Sales Valuer. On 23 August 2023 the claimant issued a claim in the Employment Tribunal following a period of early conciliation that started on 3 August 2023 and ended on 7 August 2023.
2. The claim initially included complaints of unfair dismissal, for disability discrimination and for unpaid commission and bonuses. The respondent defends the claim.

3. A Preliminary Hearing took place before Employment Judge Rostant on 4 January 2024. At that hearing:
  1. The claimant withdrew her complaint of disability discrimination and a Judgment was issued dismissing that claim;
  2. There was a discussion of the claims that the claimant is bringing, and it was clarified that the claims are for constructive unfair dismissal and unauthorised deduction from wages; and
  3. The case was listed for final hearing and Case Management Orders were made.

### **The hearing**

4. There was an agreed bundle of documents running to 102 pages.
5. I heard evidence from the claimant and, on behalf of the respondent, from :
  1. Andrew Whitaker, Director;
  2. Louise Mennell, Sutton Branch Manager; and
  3. Kate Douthwaite, Area Sales Manager.
6. The claimant had prepared a witness statement for a former employee of the respondent, Abbie Butler. Ms Butler was not present at the hearing. I read Ms Butler's witness statement, which related entirely to the way in which she was treated by the respondent. Ms Butler's employment appears to have terminated in January 2023, some six months before the events giving rise to this claim. I explained to the claimant that it was a matter for her which witnesses to call, and that I would not prevent her from calling Ms Butler, but that it appeared to me that the evidence of Ms Butler was not relevant to the issues that the Tribunal would have to decide in this case. The claimant decided not to call Ms Butler.

### **The issues**

7. The issues that fell to be determined at the hearing were as follows:

#### Unfair dismissal

8. Was the claimant dismissed?
  1. Did the respondent do the following things:

1. Did Ms Mennell make an untrue and derogatory statement about the claimant to the rest of the office team at the Sutton branch in the claimant's hearing?
  2. Did Mr Whittaker write to the claimant asserting that he assumed she had resigned?
  3. Temporarily remove the claimant's access to emails?
  4. Require the claimant to return to work at the Sutton branch?
  5. Ask the claimant to apologise to the office team, but not require Ms Mennell to apologise?
  6. Fail to investigate or resolve the claimant's complaint about Ms Mennell?
  7. Badly handle a meeting on 24 July 2023, when the claimant says Mr Whitaker raised his voice, refused to permit the claimant to record the meeting, advised the claimant that she would be expected to share her work with a colleague, and ask the claimant to leave?
  8. Did Mr Whitaker send an email to the claimant saying she was not in the right frame of mind to fulfil her duties?
  9. Did Mr Whitaker fail to contact the claimant for 4 days?
2. Did that breach the implied term of trust and confidence? Specifically
1. Did the respondent behave in a way that was calculated or likely to destroy or seriously damage the trust and confidence between the claimant and the respondent; and
  2. Did it have reasonable and proper cause for doing so?
  3. Did the claimant resign in response to the breach? Was the breach of contract a reason for the claimant's resignation?
  4. Did the claimant affirm the contract before resigning? Did the claimant's words or actions show that she chose to keep the contract alive even after the breach?
9. If the claimant was dismissed, what was the reason for the dismissal / breach of contract?

10. Was it a potentially fair reason?
11. Did the respondent act reasonably in all the circumstances in treating it as a sufficient reason to dismiss the claimant?

Remedy for unfair dismissal

12. In light of my conclusions on the substantive unfair dismissal claim, it was not necessary to make any findings in relation to remedy.

Unauthorised deductions from wages

13. Did the respondent make unauthorised deductions from the claimant's wages by failing to pay her bonus and commission owing on termination of her employment?
14. If so, how much was deducted?

**Findings of fact**

15. The claimant was employed by the respondent as a Senior Residential Sales Valuer. Her employment began on 1 September 2020 and she worked in the respondent's Sutton office. She reported to the Branch Manager, Louise Mennell, who was responsible for residential sales. The claimant was a valued member of staff who, until 15 June 2023, had a good working relationship with Ms Mennell. Ms Mennell reported to Kate Douthwaite, Area Sales Manager, who is not based in the Sutton branch.
16. The claimant worked in an office upstairs in the Sutton branch. Ms Mennell and the other members of the team, Andrea and Karen, were based downstairs. There is no door on the claimant's office, and sometimes conversations that take place in her office can be overheard by those working downstairs.
17. On 14 June 2023 Kate Douthwaite, Area Sales Manager, visited the Sutton office, and met with the claimant. The claimant told Ms Douthwaite that she wanted to reduce her working hours from 5 days a week to 4 days a week, and Ms Douthwaite said that she would speak to the director Mr Whitaker and then get back to the claimant.
18. During the conversation the claimant made a derogatory comment about some of her colleagues in the Sutton office, stating in relation to those who worked downstairs "I don't know what they do down there". Ms Douthwaite did not discuss the content of her conversation with the claimant with Louise Mennell.

19. The following morning the claimant attended work as normal and went upstairs into her office. Whilst there she heard colleagues downstairs speaking to each other. She described them as 'whispering' about her. She did not hear what they were saying so did not know what they were talking about. She assumed that they were talking about her.
20. Louise Mennell was downstairs at the time and involved in the conversation with Andrea and Karen. Ms Mennell's evidence, which I accept, was that the three of them were not discussing the claimant, but rather were discussing the fact that Andrea had come into the office on a day that she should not have been working, to finish up some work, and that as a result she should not have any telephone calls directed to her. Ms Mennell's evidence on this issue was clear. She was part of the conversation and had a good recollection of it. I prefer her evidence on this issue to that of the claimant, who was not part of the conversation and admitted that she had not heard what was said, but rather had made an assumption.
21. Whilst this conversation was taking place the claimant came downstairs and asked if she and Ms Mennell could get things clear and in the open. She commented that there was 'clearly an elephant in the room'. This took Ms Mennell by surprise because the conversation that had been taking place prior to the claimant's arrival was about Andrea and not about the claimant. Ms Mennell asked the claimant whether she wanted to discuss things privately in the office, but then both the claimant and Ms Mennell continued the conversation downstairs, in the presence of the other members of staff.
22. There is a conflict of evidence as to what was said during the conversation. The claimant's evidence was that Ms Mennell said that the claimant had said 'the phones don't ring and the girls are lazy'. She believed that Kate Douthwaite had told Ms Mennell that the claimant had made that comment during their conversation the previous day. Ms Mennell denied making that comment. Her evidence is corroborated by that of Ms Douthwaite, who said that the claimant had not told her 'the phones don't ring and the girls are lazy' when they met the previous day, and also that she had not told Ms Mennell what she and the claimant had discussed. Mr Whitaker told the Tribunal that he had asked Andrea and Rachel if they heard Ms Mennell make the comment and they said that they had not.
23. On balance I prefer the respondent's evidence and find that Ms Mennell did not say that the claimant had said 'the phones don't ring and the girls are lazy'. What is clear however is that the conversation between Ms Mennell and the claimant became heated at that point. At the end of the conversation the claimant asked if anyone wanted a drink, and then went back upstairs into her office.
24. Shortly afterwards however the claimant told Ms Mennell that she was going home because her head was 'in the wrong place'. The claimant left the office at approximately 10 am on 15 June 2023 and did not return. When she got home she

sent 3 messages to Kate Douthwaite, who was on leave that day. In the messages she wrote:

“Sorry to bother you on your day off, I’ve just left the office, as I heard whispers, downstairs, so went down and said let’s clear the air, and get out of the way any feedback from yesterday and your visit, I asked Lou, do you want to go upstairs or stay here, she said whatever, so we started chatting which got a bit heated and Lou commented, ‘well you told Kate, the girls are lazy and the phones are quiet’ Lou told them yesterday obviously, after you’d left. Why would she tell them that? It’s now created an awful environment. Anyway, stressed is an understatement, I’ll be in touch...

I’m disappointed that a conversation that we had in confidence that contained sensitive information was repeated to Louise without consideration of the environment that it could cause and the impacts that it could have on me. Louise unprofessionally decided to tell the office that I have said that they are ‘lazy and the phones don’t ring’, however I don’t feel it was appropriate for Louise to have been told this information in this way initially, and my feedback could have been provided to her more appropriately and sensitively. This situation has caused a very uncomfortable work environment for me, on top of the additional responsibilities due to the under resourcing in the office.

Unsure how to progress now until I have a response”

25. Louise Mennell made Mr Whitaker aware that there had been a disagreement in the office and that the claimant had left. Ms Mennell did not know whether the claimant intended to return to work and it was agreed that Ms Mennell would try and contact the claimant by telephone. Later that day Ms Mennell rang the claimant but the claimant did not answer the telephone. She told the Tribunal that this was because she was too upset to speak to Ms Mennell.

26. The claimant did not return to work the next day either. So, at 9.25 that day (16 June 2023) Andrew Whitaker sent a letter by email to the claimant. In the letter he wrote:

“I understand that you left the office before start of business yesterday after a discussion with Louise and have not attended today. Louise has tried to contact you but you have not responded. I have also not heard from you and Kate is on holiday.

If I do not hear from you by 5.30 today then I will have to assume that you have resigned your position with the company with effect from 14.6.2023.

If this is the case I will then need you to contact someone within the business to return company belongings such as camera equipment and digital measures, confirm any final commission due and holidays that are either due or overpaid as applicable.”

27. At the time he sent this letter, Mr Whitaker did not know about the claimant’s messages to Kate Douthwaite.

28. Mr Whitaker also temporarily suspended the claimant's access to the respondent's email and IT systems. This was a precautionary measure, as he had been told that the claimant had told a colleague that she would be moving to work for a competitor estate agent and was concerned to protect the respondent's business. The claimant is in fact now working for the competitor, having joined them approximately a month after she left the respondent.
29. After receiving Mr Whitaker's letter, the claimant sent him a text message saying that she would forward the messages she had sent to Ms Douthwaite, and that she was not aware that Ms Douthwaite was on leave. She told Mr Whitaker that she was happy to have a chat with him but was not comfortable going into the office. Mr Whitaker asked the claimant to call him, which she did.
30. During the conversation the claimant told Mr Whitaker that she wanted to move to work in a different branch run by the respondent, on Holderness Road. This was an extreme reaction to what was just one altercation the previous day, although it was clear from the comments the claimant made to Kate Douthwaite on 14 June that, even prior to the altercation, she had little respect for her colleagues in the Sutton branch. Mr Whitaker expressed his reservations about the possible move and suggested that there should be a meeting as soon as possible between him, the claimant, Ms Mennell and Ms Douthwaite to try and get to the bottom of the situation, as the claimant's version of events was different to what Ms Mennell had told him.
31. The claimant was asked by Mr Whitaker to return to work in the Sutton branch that day and agreed to do so. Mr Whitaker was concerned that the situation would only get worse if the claimant didn't come back to work. He was also aware that Ms Mennell was due to start a period of holiday later that day, and that the claimant worked upstairs whilst Ms Mennell worked downstairs so there would be limited contact between them.
32. The claimant returned to work in the Sutton branch around lunchtime on 16 June. She discovered that her email and systems access had been removed. She spoke to the respondent's IT department who, with Mr Whitaker's authorisation, quickly restored her access so that the claimant could resume working. The reason the claimant's IT access had been suspended was to protect the respondent's business because Mr Whitaker believed that the claimant may be about to leave and join a competitor.
33. On the afternoon of 16 June the claimant sent an email to Mr Whitaker in which she said that she had now returned to work at Sutton under protest until a resolution could be found. She said that her offer of re-locating to Holderness Road was open and asked why her email and IT access had been removed. Mr Whitaker responded promptly explaining why access had been removed and that he would do the same thing to protect the business with any member of staff in the same circumstances.

34. A meeting was arranged at the Sutton office for 27 June, when Ms Mennell and Ms Douthwaite had returned from holiday. The meeting took place in the claimant's office upstairs whilst other members of staff were working downstairs. Present at the meeting were the claimant, Mr Whitaker, Ms Douthwaite and Ms Mennell. The purpose of the meeting was to try and find a solution to the concerns that the claimant had raised in her text messages to Ms Douthwaite.
35. During the meeting the claimant repeated the allegations made in her messages to Kate Douthwaite about what she said Louise Mennell had said to her on 15 June. Ms Mennell strongly denied making that comment, and Kate Douthwaite also said that she had not told Ms Mennell that the claimant had made the disputed comment. Mr Whitaker spoke to other members of staff who had been present on the day and they said that they had not heard Ms Mennell make the alleged comment.
36. During the course of the meeting the claimant criticised other members of the team, commenting that Rachel was awkward and wouldn't do what the claimant asked her to do, and that Andrea was not a team player. Unfortunately, Rachel and Andrea were downstairs and overheard those comments being made. They were very upset by them.
37. In response to those comments in the meeting the claimant was told to focus on her core role of valuations, and that if members of the team were not carrying out their duties properly, that was for Ms Mennell or Ms Douthwaite to address. The meeting ended on a positive note, and it appeared that a line had been drawn under events of the last few days.
38. The following day, 28 June, Andrea and Rachel told Louise Mennell that they had overheard what the claimant had said about them the previous day and were very upset about it. Andrea said she was considering raising a grievance against the claimant. The respondent considered, reasonably, that these complaints could not be ignored.
39. Ms Douthwaite called Ms Mennell on 28 June to see how things were going in the branch. Ms Mennell told Ms Douthwaite that Andrea and Rachel were not happy and that Andrea was considering raising a grievance against the claimant.
40. Ms Douthwaite came into the Sutton office on 28 June to try and alleviate the animosity within the office. She spoke with the claimant and explained that other members of the team were upset by what they had overheard. She did not tell the claimant to apologise to them but asked her if she thought it would be appropriate to apologise. The claimant replied that she would apologise to the team for what they had overheard, but not for telling the truth.
41. Ms Douthwaite did not ask Ms Mennell to apologise because there was nothing for her to apologise for. Ms Mennell had not made any comments that had upset other members of staff.



42. Later that afternoon, when Ms Mennell had left the office, the claimant telephoned her. During the call the claimant became very angry and swore. She accused Ms Mennell of 'throwing her under a bus'. The claimant said that she would not be in work and that she was going off with stress. The claimant ended the conversation by putting the 'phone down on Ms Mennell. The claimant also telephoned Ms Douthwaite and said that Ms Mennell was a liar and that she had never worked with someone so vindictive. These are very strong words for an employee to use about her line manager. She also told Ms Douthwaite that she was going off work with stress.
43. The claimant sent a lengthy email to Mr Whitaker later on the afternoon of 28 June. In the email she told Mr Whitaker that she had been into the Sutton branch the previous day and been told by Ms Douthwaite that the girls in the office were upset about comments made during the meeting and asked to 'draw a line under it' and go to speak to them. She referred to Ms Mennell as acting unprofessionally and making an untrue comment and said that Ms Douthwaite was "directing the finger at the wrong person". She again mentioned a possible move to another branch. She finished the email by stating that she felt she was being victimised, was angry and upset and was now off sick with stress.
44. Mr Whitaker replied first thing the following morning. He explained that the meeting they had earlier in the week was to try and clear the air following the allegations that the claimant had made after leaving the office the previous week. He commented that Ms Douthwaite was trying her best to "keep the peace and try and restore harmony." He also told the claimant that Ms Mennell had alleged that the claimant had been extremely abusive to her on the phone the previous day.
45. Mr Whitaker explained that he could not agree to the claimant moving to Holderness Road and explained why. "It would be impossible to have a situation where the valuer and the manager / rest of the team are at loggerheads and not communicating effectively – for the business to succeed everyone needs to be pulling in the same direction and work as a team. At this time we do not have a sales presence at Holderness Road and in the current climate of rising interest rates and reduced transactions it is now off the agenda for the foreseeable future." He finished the email by suggesting that he and the claimant meet informally for a coffee to discuss a way forward.
46. The claimant was off work due to ill health until 24 July 2023 and was paid statutory sick pay. Whilst the claimant was off sick both Mr Whitaker and Ms Douthwaite met with her informally to try and find a solution to the situation. The meeting with Mr Whitaker took place on 10 July off site. During the meeting the claimant again asked if she could move to Holderness Road and Mr Whitaker explained again why this was not possible. There were no sales staff based in Holderness Road, and the rest of the team was based in the Sutton branch. Mr Whitaker considered it important for the team to be based in the same location. There was however a discussion about the claimant returning to work on a part time basis to reduce the amount of time she spent in the office.

47. After the meeting on 10 July the claimant sent an email to Mr Whitaker saying that she would be open to a return to work and reducing her hours. Mr Whitaker replied asking if she was open to returning to the Sutton Road branch because of his concerns about her working from Holderness Road.
48. Ms Douthwaite met with the claimant off site on 18 July. The claimant wanted to return to work in the Holderness Road office and Ms Douthwaite reiterated that this was not possible. The claimant said that she had sought advice from ACAS and that if there was no alternative to working in Sutton she may resign.
49. On 21 July however the claimant sent an email to Mr Whitaker and Ms Douthwaite saying that she would return to work the following week in the Sutton office.
50. The claimant returned to work on 24 July. Ms Douthwaite arranged to meet with her and asked Mr Whitaker to be present also. The claimant asked if she could record the meeting, and Mr Whitaker said that she could not. There is, in my view, nothing untoward or inappropriate in this. The recording of workplace meetings is the exception not the rule and there is no right for employees to record meetings.
51. The purpose of the meeting was to establish whether the claimant was OK, and to try and put the events of the past few weeks behind everybody and move forward. The claimant was asked if she was happy to return to work and if everything was OK, and she said that it was.
52. The claimant then raised the fact that whilst she had been off sick, a former employee of the business, Michael Matthews, had returned to work at the Sutton branch. Mr Matthews had originally joined the business six months previously but had left after 3 months.
53. Whilst the claimant was off sick Mr Whitaker had decided to ask Mr Matthews to return, and he agreed to do so. The reason Mr Matthews was asked to return was that the office was very busy at the time. The claimant had asked to reduce her working days from 5 days to 4 days a week, and additional resource was needed. The plan was that Mr Matthews would do a dual role, focussing mainly on viewings, but also doing some valuations.
54. The claimant did not want Mr Matthews to do any valuations at all and said that she would not accept it. She was concerned that the valuations were 'hers' and that there may be a reduction in her commission payments if Mr Matthews also did valuations. Mr Douthwaite and Mr Whitaker attempted to reassure the claimant that she would still do most of the valuations and that Mr Matthews would only do 20%. She was also told that this was in line with the fact that the claimant had asked to reduce her hours by 20% from full time to 80%, which the respondent agreed to.
55. The claimant refused to accept that Mr Matthews would do any valuations, and the meeting reached an impasse. Both the claimant and Mr Whitaker became heated

and raised their voices. Ms Douthwaite said that she did not know where they could go from here. Mr Whitaker suggested that the claimant go home on full pay until they could come to a solution. The claimant was angry and upset in the meeting and he thought that she was not in the right frame of mind to continue at work, where she may have contact with clients, whilst she was so upset.

56. The claimant alleged that Mr Whitaker shouted at her during the meeting. Mr Whitaker denied that, although he accepted that he had raised his voice. I accept Mr Whitaker's evidence. I find that he did raise his voice in the meeting but did not shout at the claimant and did not, as she alleges, tell her repeatedly to leave, to go. Neither Mr Whitaker nor Ms Douthwaite wanted the claimant to leave. She was a valued member of staff.
57. After the meeting the claimant sent a text message to Ms Mennell which she began with the words "What a knob", referring to Mr Whitaker, the director of the company.
58. The morning after the meeting had taken place, Mr Whitaker wrote to the claimant. He began the email by stating that the main purpose of the meeting had been for he and Ms Douthwaite to check on the claimant's wellbeing. He confirmed that the claimant's role remained unchanged, namely as a residential sales valuer, and that the respondent agreed to her request to reduce her working hours. He explained that the respondent had employed someone else in a hybrid role to help with viewings and valuations as additional resource was needed.
59. Mr Whitaker referred in the email to the claimant categorically stating in the meeting that she had the sole right to do as many valuations as she could and to her being unwilling to accept any sharing of valuations. He commented that "Whilst the intention would be for you to do the majority of the sales valuations, we do not accept that you can dictate to the business who does valuation appointments, nor that you have any exclusivity" and that the claimant had refused to accept this. He then referred to the derogatory text message the claimant had sent and asked for the claimant's comments on it.
60. The claimant replied to this email on 26 Jul. Her email was a lengthy one and Mr Whitaker wanted to take some time to reply properly. In the email the claimant referred to having raised a grievance, to being "victimised and maliciously attacked" by Louise Mennell and to the refusal to allow her to work in another branch. She suggested that Mr Whitaker had made it clear that he no longer wanted the claimant as an employee and that she felt intimidated, bullied and victimised.
61. Mr Whitaker drafted a reply to the claimant's email which he sent to her by email on 28 July. Before he sent the reply, the claimant resigned from her employment by letter sent to Mr Whitaker and Ms Douthwaite on 28 July. In her email the claimant wrote that she felt that she had no alternative to resigning due to bullying and harassment, victimisation, and changes to her working conditions. She also wrote "I believe the employment relationship has irrevocably broken down" and "I consider

your conduct to be a fundamental breach of the employment contract and consequently, I believe that my resignation constitutes constructive dismissal”.

62. Mr Whitaker acknowledged receipt of the claimant's notice and put her on garden leave during her notice period. The claimant's employment terminated one month later on 28 August 2023.
63. It is clear that by the time the claimant's employment ended the relationship between the claimant and her colleagues had broken down. This was however predominantly due to the actions of the claimant, beginning with criticising her colleagues in the office, and then demanding a move to Holderness Road and her reaction to the respondent recruiting Mr Matthews. Mr Whitaker and Ms Douthwaite took considerable steps to try and resolve the situation and did not want the claimant to leave.
64. Whilst she was employed by the respondent the claimant was paid a salary of £24,000 a year, £2,000 a month gross. She was also entitled to commission of £25 on every valuation that she did which resulted in a sale. The commission was paid when the house was sold and the respondent received payment from the solicitors, which could be some time after the valuation had taken place.
65. The claimant also participated in the respondent's quarterly bonus scheme, under which members of the team were paid a bonus if they met their targets.
66. In June 2023 the claimant was paid basic pay of £2,000 gross, commission of £451.41 and expenses of £93.19. After the deduction of tax, national insurance and pension contributions, the net payment to the claimant was £2,018.33. This sum was paid to the claimant on 30 June.
67. In July 2023 the claimant was paid £553.95 gross basic pay, commission of £129.46 and expenses of £76.54. She also received SSP. There was an adjustment of £184.65 that was made in respect of salary that the claimant had been paid in June, for days that she had been off work sick. Payroll had already been processed in June when the claimant began her sickness absence on 28 June, so she had been paid her full pay for June.
68. The respondent's policy is to pay SSP only in respect of periods of sickness absence, so the claimant had been overpaid in June. The overpayment was recovered from July's payment, and on 31 July the net sum of £885.61 was paid to the claimant.
69. The claimant was entitled to £475 commission in July 2023. She was also entitled in August to a quarterly bonus of £26.64. This gave a total bonus and commission entitlement of £501.64. The claimant was however only paid £129.46, leaving a short fall of 372.18

70. The respondent was unable to explain clearly to the Tribunal why the commission and bonus had been withheld, other than to say that it was on the advice of their accountants that commission and bonus should be prorated. The claimant was however employed for the whole of the month of July. It was not clear to the Tribunal why bonus and commission should be withheld merely because an employee was off sick for part of a month, having already earned the bonus and commission.
71. The claimant was employed until 28 August when her notice expired. She was paid salary of £1753.89 gross, commission of £379.44 in August, and a deduction was made from her salary in respect of holiday that had been taken in excess of her entitlement. The net payment she received on 31 August 2023 was £1,582.73.

## The Law

### Constructive dismissal

72. Where an employee resigns, as the claimant in this case did, she can still claim unfair dismissal if she can establish that her resignation falls within section 95(1)(c) of the Employment Rights Act 1996, which provides that:
- “(1) For the purposes of this Part an employee is dismissed by his employer if....
- (c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer’s conduct.”
73. The questions that the Tribunal needs to consider in a constructive dismissal claim are:
1. Was there a fundamental or repudiatory breach of contract;
  2. Did the employee resign in response to that breach (and not for some other reason); and
  3. Did the employee wait too long before resigning, such that she can be said to have waived any breaches of contract and affirmed the contract?
74. Both parties to an employment contract have an implied duty to conduct themselves in such a manner as to preserve trust and confidence in the relationship between the parties. (Malik v Bank of Credit and Commerce International SA (in compulsory liquidation) [1997] ICR 606). This duty is fundamental to the employment relationship and any breach of it will amount to a repudiatory breach of the employment contract. Where the claimant alleges that the respondent breached the implied term of trust and confidence, the Tribunal must consider:

1. Did the respondent behave in a way that was calculated or likely to destroy or seriously damage the trust and confidence between the claimant and the respondent; and
  2. Did the respondent have reasonable and proper cause for doing so;
75. The law does not impose an obligation to behave reasonably, so unreasonable behaviour by an employer does not necessarily give rise to a constructive dismissal (Western Excavating (ECC) Ltd v Sharp [1978] ICR 221 and Bournemouth University Higher Education Corporation v Buckland [2010] ICR 908). The question is whether “the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract”, as Lord Denning wrote in Western Excavating.

#### Unauthorised deductions from wages

76. Section 13 of the Employment Rights Act 1996 states that:

“(1) An employer shall not make a deduction from wages of a worker employed by him unless –

- (a) The deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker’s contract, or
- (b) The worker has previously signified in writing his agreement or consent to the making of the deduction...

(3) Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions) the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker’s wages on that occasion.”

77. Section 23 of the Employment Rights Act 1996 gives workers the right to bring complaints of unlawful deduction from wages to the Employment Tribunal. The time limit for bringing such claims is contained within Sections 23(2), (3) and (4) which provide as follows:

## **Conclusions**

### Constructive dismissal

78. In support of her claim for constructive dismissal, the claimant relies upon nine alleged breaches of the implied duty of trust and confidence by the respondent. I have begun my considerations by considering each of the alleged breaches.

79. The first alleged breach of contract was the allegation that Ms Mennell made an untrue and derogatory statement about the claimant to the rest of the office team at

the Sutton branch in the claimant's hearing. I find, on the evidence before me, that Ms Mennell did not make such a comment. I accept the evidence of Ms Mennell that she did not make the comment. Her evidence is corroborated by the evidence of Ms Douthwaitte, and also by Mr Whitaker who said that, when he had asked the other people present on the morning of 15 June, that they had not heard Ms Mennell make that comment.

80. The second alleged breach of contract was that Mr Whitaker wrote to the claimant asserting that he assumed she had resigned? I find that Mr Whitaker did write to the claimant on 16 June stating that if he did not hear from her he would assume that she had resigned. This letter, sent on the morning of the very first day after the claimant left the office, was harsh and premature and showed no concern for the claimant's welfare. I accept however that when he wrote the letter Mr Whitaker did not know that the claimant had sent messages to Ms Douthwaite, all he knew was that she had left the office on the morning of 15 June, had not answered Ms Mennell's call, and had not turned up for work on 16 June. He also believed that she may be about to leave to join a competitor.
81. Whilst the letter is harsh, I find on balance that it does not in itself amount to a breach of the implied duty of trust and confidence in light of the context in which it was written. The claimant was, as far as Mr Whitaker believed, absent without leave on 16 June, and as soon as the claimant responded to the letter and explained her position, Mr Whitaker made it clear that he wanted her to come back to work to try and resolve matters.
82. The third alleged breach of contract is the temporary removal of the claimant's access to emails. I find that, given the context in which this happened, namely Mr Whitaker's belief that the claimant was absent without leave and may be about to join a competitor, it did not amount to a breach of contract. It was a step taken to protect the business, it was a temporary measure and it was immediately reversed when the claimant returned to work.
83. The fourth alleged breach of contract was requiring the claimant to return to work at the Sutton branch. I find that the claimant was told to return to work at the Sutton branch on 16 June and that she did so. The Sutton branch was her normal place of work. It was not unreasonable for the respondent to ask her to go back to work there following what appeared at the time, to be a minor falling out on 15 June. There was no evidence before the Tribunal to suggest that there had been any issues between the claimant and Ms Mennell prior to 15 June. Mr Whitaker knew that Ms Mennell was about to go on holiday, and that the claimant was based on a different floor to others in the office, so the contact between them could be limited. The respondent wanted the claimant to go back to work to try and resolve the situation and reasonably believed that it would be possible to do so. It also took steps to try and clear the air and improve working relationships between the claimant and her colleagues. Moreover, the claimant agreed to go back to work in Sutton on 16 June.

84. Subsequently the claimant asked to move to a different branch and was told that this would not be possible. The respondent had reasonable and proper cause for taking this approach. There was no sales team based in the branch the claimant wanted to work in, and the respondent reasonably considered that it was in the best interests of the business for the residential sales team to be based in the same office. It was not for the claimant to dictate where she would work, in circumstances where Louise Mennell had not done anything wrong. The respondent considered whether to move the claimant but had good business reasons for not doing so. It took steps to support the claimant by arranging meetings to support her returning to work in Sutton, by agreeing to reduce her working hours to four days a week and by offering to reduce them further.
85. In these circumstances it was in the Tribunal's view reasonable for the respondent to refuse the claimant's request to move branch, and indeed the claimant did choose to return to work in Sutton on 24 July.
86. The fifth alleged breach of contract was asking the claimant to apologise to the office team, and not asking Ms Mennell to do so. I find on the evidence before me that the claimant was not told to apologise but was asked if she thought that she should and she agreed. The reason for this was that the claimant had made comments which were critical of Rachel and Andrea and which they had overheard. They were clearly upset by this to the extent that Andrea was talking about putting in a grievance. The respondent owes a duty of care to all its employees, including Andrea and Rachel, and asking the claimant to take steps to rebuild relationships which she had caused to break down by her comments was an appropriate step to take.
87. It was neither unreasonable nor a breach of the implied duty of trust and confidence for Ms Douthwaite to ask the claimant to consider apologising with a view to defusing what was becoming a tense situation in the office. Ms Mennell was not asked to apologise because she had not made comments that offended Rachel and Andrea. She had nothing to apologise for.
88. The sixth alleged breach of contract was the failure to investigate or resolve the claimant's complaint about Ms Mennell. There was however no evidence before me to suggest that the claimant had made a formal complaint about Ms Mennell. She sent 3 text messages to Ms Douthwaite, and later accused Ms Mennell of lying and bullying her but did not raise a grievance.
89. The claimant did make informal complaints about Ms Mennell, and the respondent took considerable steps to try and resolve those complaints. It cannot be said that they were ignored. Mr Whitaker attended the Sutton branch and spoke to the claimant, Ms Mennell and the other staff. Several meetings were arranged to try and resolve the situation. Initially it appeared that one of those meetings, on 27 June, had worked in resolving the situation. It was only when



Rachel and Andrea complained about comments made by the claimant in that meeting that the situation deteriorated further.

90. Whilst the claimant was off sick both Mr Whitaker and Ms Douthwaite met with the claimant off site to try and repair the relationship. Following those meetings the claimant agreed to come back to work in Sutton. Unfortunately, when she subsequently found out about Mr Matthews' appointment, she became upset again and sought to prevent the respondent from asking him to do valuations.
91. The respondent's response to the issues raised by the claimant was reasonable and did not amount to a breach of trust and confidence.
92. The seventh alleged breach of contract was that the manner in which Mr Whitaker handled a meeting on 24 July 2023, when the claimant says Mr Whitaker raised his voice, refused to permit the claimant to record the meeting, advised the claimant that she would be expected to share her work with a colleague, and asked the claimant to leave.
93. The respondent did refuse to allow the claimant to record the meeting on 24 July. This was a reasonable step to take. There is no right for employees to be allowed to record internal meetings, and such recordings are, in this Tribunal's experience, rare. There was no evidence before the Tribunal to suggest that the recording of meetings was common practice in the respondent's business, and none of the other meetings were recorded.
94. Mr Whitaker accepted that he raised his voice during the meeting, and that at the end of the meeting he asked her to leave. This was in response to the unreasonable behaviour of the claimant, who was also raising her voice and insisting that Mr Matthews should not be allowed to do any valuations at all. It was not reasonable for the claimant to try and dictate to the respondent where she should work and what other employees should be allowed to do.
95. The claimant was not told that she would have to share her work with a colleague. Mr Matthews was brought in as an additional support, mainly to do viewings rather than valuations. The claimant was told that he would do no more than 20% of the valuations, i.e. that he would pick up what the claimant would no longer be doing because she wanted to reduce her hours by 20%. Mr Matthews was not brought in as a replacement for the claimant, but as an additional member of staff who was needed partly because the claimant had asked to reduce her hours.
96. Given the unreasonable behaviour of the claimant during the meeting and the fact that the meeting became heated, it was not unreasonable of the respondent to ask the claimant to leave at the end of the meeting, to allow time for matters to calm down. There was no evidence before me of any desire to push the claimant out of

the business, but rather she was a valued employee who the respondent wanted to retain.

97. The penultimate alleged breach of contract relied upon by the claimant was an email sent by Mr Whitaker to the claimant in which he commented that the claimant was not in the right frame of mind to fulfil her duties. I find on the evidence that Mr Whitaker did make that comment, but it has to be considered in the context of the rest of the email and cannot be taken in isolation. The comment was explained in the email and followed a text message in which the claimant had referred to Mr Whitaker as a 'knob'. It is not unreasonable for the respondent, which is a small business, to question the claimant's fitness to fulfil her duties given her recent stress related illness and absence, her behaviour and her extremely rude comments about her colleagues.
98. The last allegation is that Mr Whitaker failed to contact the claimant for 4 days. The evidence before the Tribunal shows clearly that he did not. Mr Whitaker contacted the claimant by email on 25<sup>th</sup> July, she replied on 26<sup>th</sup> and he then replied on 28<sup>th</sup>, just two days later. Two days is not an unreasonably long amount of time for Mr Whitaker to take to respond to the claimant's email of 26 July. It is understandable in the circumstances that he wanted to reflect and consider a response before sending it.
99. Looking at the actions of the respondent cumulatively, and in the context of the claimant's behaviour, I find that the respondent's behaviour was not calculated or likely to destroy or seriously damage the trust and confidence between the claimant and the respondent. I also find that the respondent had reasonable and proper cause for acting in the way that it did towards the claimant.
100. The respondent did not breach the implied term of trust and confidence. The claim for constructive unfair dismissal therefore fails and is dismissed.

#### Unauthorised deduction from wages

101. I am satisfied on the evidence before me that the claimant has received all of the salary to which she was entitled. The respondent accepted that the claimant was entitled to commission and bonus of £501.64 but provided no evidence as to why she was not paid that sum, other than to say that the deduction was made on the advice of the respondent's accountant because the claimant had been off sick. There was no evidence before me as to the right of the employer to make deductions from commission and bonus due to sickness absence. I therefore find that by deducting £372.18 from the claimant's wages in August 2023 the respondent made an unauthorised deduction. The respondent is ordered to pay the sum of £372.18 to the claimant.

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Employment Judge Ayre

Date: 13 September 2024

JUDGMENT SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE

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