



# EMPLOYMENT TRIBUNALS

**Claimant:** Ms C Morris

**Respondent:** The Endeavour Learning Trust

**Heard at:** Manchester

**On:** 14 and 15 November 2019  
03 January 2020  
(in Chambers)

**Before:** Employment Judge Warren

## REPRESENTATION:

**Claimant:** Mr D J Mawdsley of Counsel

**Respondent:** Mr J Jenkins of Counsel

# JUDGMENT

The judgment of the Tribunal is that the claimant resigned, she was not unfairly constructively dismissed.

# REASONS

## Background

**EJ Warren regrets the delay in preparing and signing this judgement and apologises personally to all of the parties involved.**

1. By an ET1 presented to the Tribunal on 10 April 2019 the claimant, Ms Colette Morris, alleged that she had been unfairly constructively dismissed by her then employer, The Endeavour Learning Trust.

## The Issues

2. The issues were agreed at the outset of the case as being:

- (1) Whether the respondent committed a fundamental breach of the claimant's contract of employment such as to justify her resignation;

(2) Whether the claimant resigned prior to affirming the breach.

3. The allegations of breaches relied upon by the claimant are set out in her original grounds of complaint (page 34 paragraph 22), with the exception of (1). The remaining allegations are as follows:

- (a) that the respondent underpaid the claimant by wrongly safeguarding her TLR;
- (b) that the respondent forced the claimant to accept additional responsibilities falling outside of her pay and conditions;
- (c) that the respondent failed to abide by the provisions of the STPCD;
- (d) that the respondent raised concerns without foundation regarding the claimant's professionalism;
- (e) that the respondent pursued a course of action intending to force her resignation.

4. In the claimant's written submission there is an additional allegation that the respondent misled the claimant by informing her that she was in receipt of a protected TLR when in fact she was not, and she was in receipt of a retention and recruitment allowance instead. This alleged breach did not appear at the outset of the case to be an issue, but it was dealt with in the evidence. In the circumstances, as both parties make reference to the same in their closing submissions, I have dealt with it in this Judgment.

### **The Evidence**

5. There were witness statements and cross examination of the following: Ms C Morris (the claimant), and Mrs Lesley Gwinnett, Joanna Bacon and Emma Blackhurst on behalf of the respondent. I have been asked by the claimant to consider Mrs Gwinnett to be less than credible in relation to the way in which she handled the issue of the extended TLR/recruitment allowance issue. The reality is that I found Mrs Gwinnett to be entirely credible and frank in her evidence even to her own disadvantage. This will be dealt with further in the findings.

6. There was an agreed bundle of documents. References to pages and paragraphs within this Judgment relate to that bundle.

7. I have applied the evidential test, the balance of probabilities and taken into account that the burden of proof lies with the claimant to prove a fundamental as opposed to a minor breach of contract by the respondent.

### **The Facts**

8. Having considered all of the evidence and weighed up its credibility, taking into account both the oral evidence and written evidence of the witnesses, and the documents provided in the bundle, I have made the following findings of fact.

9. The claimant was employed at Tarleton Academy in Lancashire from 1 September 2003 to 4 April 2019. At the point of her resignation she was the Head of Modern Foreign Languages. She worked a four day week. The school at which she was employed had been the subject of more than one TUPE transfer in her time. It had, over the years, been called Burscough Priory Science College, but converted to an academy on 1 September 2018 and was at that stage one of three academies operated by the respondent, The Endeavour Learning Trust.

10. Four years after her initial appointment in 2003, on 1 September 2007, the claimant was awarded a TLR payment (Teaching and Learning Responsibility payment) to reflect the fact that she was subject leader of modern foreign languages. This additional payment of £5,778 per annum reflected the additional responsibilities she was now involved with.

11. On 1 September 2015 the school was restructured. A faculty system was introduced. The claimant remained a subject leader of modern foreign languages but her Modern Foreign Language Department became part of the Humanities Faculty which had its own Head in the form of Kate Alcock.

12. The claimant was no longer subject to the higher level of TLR but in accordance with the School Teachers Pay and Conditions document ("STPCD") her additional payment was safeguarded for a period of three years. It was therefore due to reduce on 1 September 2018.

13. In May 2018 the claimant had a meeting with the incoming Executive Head at the school, Lesley Gwinnett in preparation for the school becoming an academy, and stated that if her TLR payment was reduced (as it was due to) in September 2018, the claimant would resign. Mrs Gwinnett, who was completely new to the school, had real concerns about losing her Head of Modern Language Teaching during this transition year. There was a shortage of experienced modern language teachers, and at the time of her meeting with the claimant, because of the timing of recruitment and appointment of new teachers, she had but nine days in which to advertise, interview and recruit for a September start. She knew that was not feasible and did not want to commence the first academy year without an experienced Head of Department for Modern Languages. She knew that she could not find funds to extend the TLR payment which, under the teachers' terms and conditions, was strictly for three years only. However, as the school was changing status and becoming an academy, she did have a fund for the retention and recruitment of teaching staff. She decided to use some of that fund in effect to top the claimant's TLR back up to the position it had been in, and in doing so to extend the TLR payment for one more year. This was to ensure the claimant stayed for the first year of the academy.

14. Over the previous three years the claimant had been working under the faculty system. She had firmly disagreed that the Modern Languages Department ought to be incorporated into the Humanities Faculty. She felt very strongly that Modern Languages should be a faculty in its own right, and that she should be the Head of it. It is fair to say that the upper management team of the school did not agree with her at the time and that the new incoming management team had not formed a view. In the immediate future, therefore, the Modern Languages Department was to remain within the Humanities Faculty.

15. Following complaints made by the claimant about Kate Alcock, and other issues raised, Kate Alcock stood down temporarily as Head of Faculty before the start of the 2018 academic year.

16. In December 2018 the claimant was invited to a meeting with the Assistant Head Teacher (Emma Blackhurst) and Jo Bacon, the respondent's Director of Standards. They offered her the chance to become Head of the Humanities Faculty on an interim basis to replace Kate Alcock. During that meeting they also mentioned matters which had caused them concern. The first of those matters was the way in which the claimant had signed off emails sent to colleagues, which had suggested a lack of respect or flippancy of which they did not approve (for instance, signing an email "bewildered of room 9" or "permanently confused"), both of which occurred in July 2018. They had received criticism from a particular pupil that she had placed him under too much pressure to succeed. Finally the claimant had notified the parents and pupils of her year groups that she and her teaching staff could be contacted in any break, including lunchtime, if any parent had concerns. The respondent felt that this showed a lack of understanding of their commitment to teaching staff that they should be given proper breaks.

17. Both parties agree that the claimant took these criticisms badly, referring to them in her evidence as being some form of disciplinary action. It was not seen as such by the school or the management team, who merely raised them as part of the conversation in which they were really wanting to persuade her to become the Head of Faculty on an interim basis. It was clear from that that they had absolute faith in her commitment and abilities as a teacher and as a manager, and they felt it simply appropriate to raise matters which had come to their attention. The claimant believes that these were actions being taken against her to persuade her to resign. She described it as suffering the most devastating setback and loss of confidence, in a later meeting with Mrs Gwinnett.

18. The claimant asked for time to think about the offer of the interim headship. On 10 January 2019 she again met with Emma Blackhurst and indicated that she did not want to take the job as Head of the Humanities Faculty. Ms Blackhurst then asked the claimant to take on additional responsibilities, as she was in receipt of an extended TLR. Some of the elements she was being asked to undertake were part of the Head of Faculty role but not the whole role. The claimant understood that whilst she was on an extended TLR, under the teachers' terms and conditions she could be asked to undertake other work. Ms Blackhurst was particularly keen, because on the extended payment that the claimant was receiving, she was actually earning more than the Head of Faculty. Ms Blackhurst felt it appropriate therefore that she should take on additional responsibilities.

19. However, over this period it became clear that in fact the claimant was not on an extended TLR, as no such thing existed. Her TLR had expired at the end of August 2018. In September 2018 she received a retention and recruitment allowance to the value of the TLR so that her income did not change. This was not made clear to the claimant at the time and in fairness in cross examination she admitted that she was not particularly interested – as long as her income remained the same it would not have bothered her as to where this money came from.

20. However, the claimant did know that if she was on a retention and recruitment allowance she could not be asked to undertake further duties. This is part of the terms and conditions under which she worked. These are national terms and conditions contained in what is known as the Burgundy Book and its supplements. She was not even on a TLR for the previous three years. During that period she was simply on protected/safeguarded pay reflecting the TLR that she had received before that. She argued that she could not be asked to undertake additional duties either under the safeguarded TLR or the retention and recruitment allowance. Mrs Gwinnett and Ms Blackhurst admitted in cross examination that that was the case.

21. The claimant met with Mrs Gwinnett on 22 January 2019. Although a brief reference was made to the interim Head of Faculty role, the main purpose behind the discussion was the concerns that had been raised with the claimant in December 2018. She continued to discuss the fact that she was very unhappy with the concerns that had been raised, and the lack of evidence provided to her.

22. The claimant, however, did undertake elements of the interim Head of Faculty role that had been requested, in particular attending a Wednesday meeting and feeding back to the department on a Thursday morning. She understood at that stage that she had no choice in the matter, as it was part of the terms of what she believed then was her extended TLR.

23. On 25 February 2019 the claimant was signed off from work with work related stress. Two days later she resigned with notice. She asserted that there had been a series of fundamental breaches of contract by the respondent, and that she was entitled therefore to resign in response to them.

### **The Law**

24. Section 95 of the Employment Rights Act 1996 provides:

- (i) 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.

25. That situation has been referred to in numerous decisions as constructive dismissal. The authorities demonstrate that for an employee to be able to claim constructive dismissal, four conditions must be met, namely:

- (1) there must be a breach of contract by the employer. This may be an actual breach or an anticipatory breach;
- (2) the breach must be sufficiently important to justify the employee resigning or else it must be the last in a series of incidents which justify him leaving;
- (3) the employee must leave in response to the breach and not for some other unconnected reason;

- (4) the employee must not delay too long in terminating the contract in response to the employer's breach otherwise he may be deemed to have waived the breach and agreed to vary the contract.

26. The breach relied upon by the employee may be a breach of either an express or an implied term. The implied term relied upon most frequently by an employee is the implied term of trust and confidence. There is a helpful review of the law relating to the breach of this implied term contained in the decision of the Employment Appeal Tribunal in the case of **Safeway Stores PLC v Morrow [2002] IRLR 9**. That decision traces the progress of the implied term from the decision in **Western Excavating Limited v Sharp [1978] IRLR 27** to **Mahmud v BCCI [1997] ICR 606**. In the latter decision the then House of Lords expressed the term as an obligation that the employer shall not without reasonable or proper itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between the employer and employee. The term was revisited by the then House of Lords in **Johnson v Unisys [2001] IRLR 279** where Lord Millett referred to the obligation thus:

“This is usually expressed as an obligation binding on both parties not to do anything which would damage or destroy the relationship of trust and confidence which should exist between them.”

27. Further, **Safeway Stores PLC v Morrow** (cited above) is authority for the contention that in general terms a finding that there has been conduct which amounts to a breach of the implied term of trust and confidence will mean, inevitably, that there has been a fundamental or repudiatory going necessarily to the root of the contract.

28. The question in every case is whether, objectively speaking, the employer has conducted himself in a manner likely to destroy or seriously damage the relationship of confidence and trust between the employer and the employee. Furthermore, an employer can breach the implied term of trust and confidence by one act alone or by a series of acts which cumulatively amount to a repudiatory breach of contract, even if the last event in that series is not actually a breach of contract at all. The question to be asked is whether the cumulative series of acts taken together amount to a breach of the implied term.

29. The application of the law has been summarised by the Court of Appeal in **London Borough of Waltham Forest v Omilaju [2004] EWCA Civ 1493** in the Judgment of Dyson LJ, paragraph 14:

“The following basic propositions of law can be derived from the authorities:

- (1) The test for constructive dismissal is whether the employer's actions or conduct amounted to a repudiatory breach of the contract of employment (**Western Excavating Limited v Sharp [1978] 1 QB 761**);
- (2) It is an implied term of any contract of employment that 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 confidence and trust between employer and employee, for

example **Mahmud v BCCI [1977] ICR 606**. I shall refer to this as 'the implied term of trust and confidence'.

- (3) Any breach of the implied term of trust and confidence will amount to a repudiation of the contract. See, for example, per Browne-Wilkinson J in **Woods v WM Car Services (Peterborough) Ltd [1981] ICR 666**, at 672A. The very essence of the breach of the implied term is that it is calculated or likely to destroy or seriously damage the relationship.
- (4) The test of whether there has been a breach of the implied term of trust and confidence is objective. As Lord Nicholls said in *Malik* at page 35C, the conduct relied on as constituting the breach must 'impinge on the relationship in the sense that, looked at objectively, it is likely to destroy or seriously damage the degree of trust and confidence the employee is reasonably entitled to have in his employer'.
- (5) A relatively minor act may be sufficient to entitle the employee to resign and leave his employment if it is the last straw in a series of incidents. It is well put at paragraph 480 in *Harvey Industrial Relations and Employment Law*:

'Many of the constructive dismissal cases which arise from the undermining of trust and confidence will involve the employee leaving in response to a course of conduct carried on over a period of time. The particular incident which causes the employee to leave may in itself be insufficient to justify his taking that action, but when viewed against a background of such incidents it may be considered sufficient by the courts to warrant their treating the resignation as a constructive dismissal. It may be the last straw which causes the employee to terminate a deteriorating relationship.'

Paragraph 15:

'The last straw principle has been explained in a number of cases, perhaps most clearly in **Lewis v Motorworld Garages Limited [1986] ICR 157**. Neill LJ said (page 167C) that the repudiatory conduct must 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. Glidewell LJ said at page 169F(3), 'the breach of this implied obligation of trust and confidence may consist of a series of actions on the part of the employer which cumulatively amount to a breach of the term though each individual incident may not do so. In particular 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? (See **Woods v WM Car Sales (Peterborough) Ltd [1981] ICR 666**). This is the last straw situation.'

Paragraph 16:

‘Although the final straw may be relatively insignificant it must not be utterly trivial. An entirely innocuous act on the part of the employer cannot be a final straw, even if the employee genuinely and subjectively but mistakenly interprets the employer’s act as destructive of the necessary trust and confidence.’

## Submissions

### Claimant's Submissions

30. Claimant's counsel produced written submissions consisting of 28 pages. This may be thought a little excessive for a two day hearing, when most of the facts were agreed. In addition to the case law referred to my me, counsel also introduced the following propositions and cases:

- There does not have to be deliberate conduct or bad faith for the obligation of mutual trust and confidence to be destroyed – **The Post Office v Roberts [1980] IRLR 347 EAT**.
- An employee need not be aware of an employer’s breach of his or her rights at the time of resignation in order to claim that there was a repudiatory breach of contract, as a contract can be so egregiously breached that it is obvious that a reason for an employee leaving had everything to do with the breach – **Mruke v Khan [2018] EWCA Civ 280**.
- Where the conduct is a breach of the implied term of trust and confidence then not only will it be repudiatory but by definition there will be no reasonable or proper cause for the employer’s behaviour – **Frith Accountants v Law [2014] IRLR 510 EAT**.
- **Kaur v Leeds Teaching Hospitals NHS Trust [2018] IRLR 833 CA** at paragraph 55 – The Court of Appeal set down the approach to be taken in a constructive dismissal case:
  - What was the most recent act or omission on the part of the employer which the employee says caused or triggered his or her resignation?
  - Has the employee affirmed the contract since that act?
  - If not, was that act (or omission) by itself a repudiatory breach of the contract?
  - If not, was it nevertheless a part of a course of conduct comprising several acts and omission which viewed cumulatively amounted to a repudiatory breach of the implied term of trust and confidence?

If it was there is no need for any separate consideration of possible previous affirmation.



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

31. Both counsel agreed the issues at the outset of the case.

32. The claimant asserts that the defence adopted by Mrs Gwinnett when cross examined raised serious questions with regard to her credibility. It led to the respondent departing from its original defence. The respondent in the ET3, justified the additional payment to the claimant on the basis that the claimant was the subject of a safeguarded TLR, whereas the claimant said that her TLR was not extended and she received a recruitment and retention payment which was not capable of justifying additional responsibilities. The ET3 asserted that the respondent had a contractual right to allocate additional responsibilities to the claimant because she was in receipt of a safeguarded TLR, but during her evidence in cross examination Mrs Gwinnett admitted that there was no such thing as a TLR extended for a year in the STPCD. She conceded in cross examination that she could not insist on the claimant undertaking additional duties as the claimant TLR payment was actually a recruitment and retention allowance, and admitted that she had conflated the terms TLR and recruitment and retention allowance when discussing the same with the claimant and writing to her in those terms.

33. It was submitted that Mrs Gwinnett had deliberately misinterpreted the STPCD provision so as to impose further duties upon the claimant. Throughout the submissions there is reference to the respondent imposing additional responsibilities upon the claimant..

34. The claimant submitted that the most recent act that triggered the claimant's resignation was the decision to impose additional responsibilities on her. Such decision, it is alleged, was taken on 14 January 2019 in an email to the claimant. The claimant resigned some six weeks later on 27 February 2019. In the intervening period there had been a week of half-term and she had begun to experience work related stress diagnosed on 25 February, two days before she resigned. There was not sufficient length of time to reasonably conclude that she had affirmed the employment contract following the alleged breach.

35. The claimant alleges that the additional responsibilities were more than simply attending a Wednesday meeting and reporting back to the faculty on a Thursday, and included overseeing the running of the faculty in terms of deadlines and collective preparation, uniting the departments within the faculty focussing on the whole school purpose, and working with Emma Blackhurst on specific matters as required. The claimant further asserts that there was no difference between the words "asked" and "imposed" and she did not recognise the distinction. The language and tone adopted in emails and statements made it clear that she was expected to perform the additional duties allocated to her.

36. It was pointed out that the claimant initially refused to take on the role of interim Head of the Humanities Faculty and immediately after that she was told that the school could ask her to perform additional duties because she was in receipt of an extended TLR. She accepted the extra demands made of her because of her acceptance of the legal justification presented to her by the respondent. Lesley Gwinnett had chosen to lie to the claimant when telling her that she was in receipt of

an extended TLR. It is alleged that Lesley Gwinnett breached the claimant's contract of employment by acting unilaterally and without any proper consideration of the provisions in the STPCD.

37. The claimant further argues that she should not have been made the subject of protection on 1 September 2015 as her duties had not changed and therefore her TLR should have continued as it was, without protection. At this stage of the case the claimant withdrew her allegation that the meeting on 19 December was an unfair disciplinary investigatory meeting. She did however continue to say that she was the subject of unsubstantiated concerns by the respondent regarding her professionalism and ability to do her job, and that this was a breach of the implied term of mutual trust and confidence. She was not given notice of the meeting nor of the allegations that were being made about her. The three allegations made to her were that:

- (1) she was not supportive of the mixed attainment policy;
- (2) the unprofessional manner in which it was considered she had signed off her emails; and
- (3) the reports that the claimant was placing both staff and pupils under too much pressure.

38. In particular, that the claimant's open door policy with regard to pupils and parents during lunchtime and breaks contravened health and safety regulations, and one Year 11 pupil saying he felt stressed by the pressure.

39. The claimant requested evidence in support of the matters that had been raised but none was forthcoming. However, the claimant was supposed to be reassured by an email from Emma Blackhurst in which she was told that the criticisms made very clearly then were by no means as serious as was implied at the time.

#### The Respondent's Submissions

40. The respondent had sight of the claimant's written submissions at the point of submitting their own. With regard to the allegation that the respondent wrongly safeguarded the claimant's TLR, the respondent expressed surprise that she continued to rely on that allegation, as she accepted in her oral evidence that she was not aware of this potential issue when she resigned, and it did not influence her resignation. Even if it had done so, the breach itself dated back to 2015 when she was placed on safeguarded TLR. The claimant had therefore inevitably affirmed any breach years prior to her resignation by working without complaint whilst being in receipt of the safeguarded TLR payment. It was put on the basis that the claimant's responsibilities did not change as a result of the restructure but in fact there did not have to a reduction in a teacher's responsibilities for a TLR to be safeguarded in accordance with the STPCD.

41. There was no dispute that a number of concerns were raised with the claimant in the meeting on 19 December and the parties were in broad agreement as to the nature of those and the manner in which they were raised. The respondent

agrees that the claimant did not take the raising of those concerns. She continued to refer back to the issues in subsequent meetings in January. The issue is whether or not they created a fundamental breach of contract, and that test is objective. The way in which the claimant reacted or responded to the raising of those concerns cannot be sufficient to establish a fundamental breach of contract on the part of the respondent. The concerns were raised with the claimant in the same meeting that she was asked to take on additional responsibilities. If the respondent had genuine and significant concerns over the claimant's performance it is difficult to see why the decision would have been taken to provide her with those additional responsibilities. The intention of the respondent was to bring the claimant into the more senior team and the concerns were matters to be reflected upon as part of that move. It is difficult to see how an argument can be sustained that the raising of concerns with the claimant should objectively be assessed as a fundamental breach of contract. The claimant accepted in her oral evidence that it is broadly appropriate for an employer to raise concerns with members of staff informally depending on the situation.

42. In response to the suggestion that the claimant does not recognise the distinction between being asked to perform additional duties and those duties being imposed, it is alleged that it is a different approach to the issue than has been taken by the claimant up to the point of her giving evidence. The pleaded case was that the claimant was given a management instruction and forced to take on additional duties. The claimant's submissions suggest that the respondent's position was that it had a contractual right to allocate additional responsibilities. The respondent's case is that the claimant's allegation, which includes that she was forced to take on additional duties, is denied and that the claimant was requested to take on additional duties. The claimant was always given a choice as to whether she accepted the additional duties (email dated 14 January 2019 page 401). This was a response to the claimant's query as to whether the retention of her extended TLR was dependent on assuming the interim Head of Faculty role, and the reply was as follows:

“Retaining the extended TLR is therefore not conditional on assuming the interim role of Faculty Head during KA's illness and recovery. The request to take on these additional duties is in line with TPC as it a reasonable request of the Head given your current rate of pay.”

43. The respondent would say the claimant had a choice as to whether or not to accept the interim role but that her level of pay would be retained irrespective of her choice.

44. The claimant accepted in cross examination that she was never told that she must undertake such responsibilities, and the claimant's submissions are therefore inconsistent even with the claimant's own oral evidence. The claimant was always at liberty to refuse to take on the interim Head of Faculty role if she wished to.

45. The claimant's allegation that the respondent failed to abide by the provisions of the STPCD is based on the assertion that the respondent used them as justification to force the claimant to accept additional responsibilities. In the claimant's written submissions issues of credibility are raised in relation to the language used when referred to the STPCD and the extended TLR in particular. It is alleged that Lesley Gwinnett admitted that she had lied to the claimant when telling

her that she was in receipt of an extended TLR. In fact Lesley Gwinnett made no such admission in her oral evidence and she did not deliberately mislead the claimant for three reasons:

- (1) Lesley Gwinnett explained she had used the term “extended TLR” to satisfy the claimant given that the claimant was not familiar with the STPCD;
- (2) The claimant had threatened to resign when Lesley Gwinnett had no opportunity to recruit a replacement. She wanted to reassure the claimant quickly and directly and had she done anything else she may have triggered the claimant's resignation. Lesley Gwinnett did in fact state in her email to the claimant on 21 May that the TLR protection was to be extended for recruitment and retention purposes. Had she deliberately wanted to mislead the claimant she would not have mentioned recruitment and retention at all. The claimant at the time was only concerned, as she admitted in her evidence, that her salary remained the same and not the specifics as to how that was brought about.
- (3) In May 2018 there was no suggestion that KA would step down from her role as Head of faculty and that the role would need to be filled on an interim basis. There was no reason, therefore, for LG to mislead the claimant as she had nothing to gain by doing so. It is further suggested that the respondent used STPCD to force the claimant to take on additional responsibilities, but the email of 14 January referred to above referred to above made the point that it was reasonable to request these additional duties given the current rate of pay and the desire to see things improve in the faculty, which is very much appreciated. The respondent did not use the STPCD to insist that the claimant take on additional duties. The email does not say that, but it does say that it is reasonable to request that the claimant takes on additional duties. There is no suggestion therefore that the respondent failed to abide by the provisions of the STPCD at all and did not use them to compel the claimant to accept additional responsibilities.

46. The final allegation made by the claimant is that the respondent pursued a course of action intended to force her to resign. This was not referred to in the submissions by claimant's counsel at the end of the case. The suggestion appears to be that it amounts to an allegation that Lesley Gwinnett attempted to force the claimant out of the school by putting her in a position where she had more responsibility. In fact if Lesley Gwinnett had wanted the claimant to resign she could have arranged the same in May 2018 by not agreeing to her request for her pay to stay the same. The allegation therefore that the respondent wished to force the claimant to resign is unsupported by evidence.

47. Whether phrased as an imposition or a request, the reasons for the respondent identifying the claimant as someone who would be able to take on the additional duties has only been addressed by the claimant in the context of the STPCD. The respondent would seek the Tribunal to consider it from a broader perspective.

48. By January 2019 KA had stepped away from the role for the remainder of the academic year and the duties needed to be undertaken on an interim basis. The claimant as subject leader within the Humanities Faculty was a natural candidate to take it on, and was in fact being paid more than the Head of Faculty in any event. The claimant acknowledged that throughout the previous years of benefitting from a safeguarded TLR she had not been given additional duties, when on the basis of the STPCD she could have been. The claimant had herself expressed a desire for the way that the faculty was being run to improve, and it made sense therefore to give her the opportunity to do so, and to have a hand in affecting change. She was not being asked to take on the full Head of Faculty role but only elements of the role which predominantly involved attending a meeting that fell within her normal working days in any event. It must therefore have been reasonable to ask her to undertake additional duties, and as such that cannot amount to a fundamental breach of contract.

49. It is agreed, that the last potential fundamental breach of contract was on 14 January 2019, which was the date on which the clarification email was sent to the claimant. The claimant resigned on 27 February 2019, six weeks later. Whether a party had affirmed a breach of contract is a matter of conduct rather than time as per Langstaff J in **Chindove v Morrisons Supermarkets UKEAT/0201/13/BA**. The difficulty for the claimant, however, is that even by the half-term break it had been over a month since the email of 14 January, and since then the claimant had worked her usual hours, undertaken her usual duties and the additional duties that she now complains of. She did not take sick time until two days prior to her resignation and raised no grievance. She was paid her salary at the level that had been agreed in May 2018. The claimant's conduct therefore must have affirmed the breach by the time that she resigned.

### Conclusions

50. Asking the questions set out in **Kaur v Leeds Teaching Hospitals NHS trust [2018] IRLR 833 CA** at paragraph 55:

(a) *What was the most recent act or omission on the part of the employer which the employee says caused or triggered his or her resignation?*

51. It would seem that the most recent act or omission on the part of the employer was agreed between the parties as being the email on 14 January 2019.

(b) *Has the employee affirmed the contract since that date?*

52. The claimant worked for some weeks after 14 January, but there was a week of half-term and she resigned two days after she was signed off work with work related stress. She did undertake the additional duties in this time of attending a weekly meeting and feeding back to the faculty the following day. I was not told in evidence that she was asked to do anything else other than that in this period by way of additional duties. At the time she believed she was obliged to undertake those duties, and I note did not submit a grievance in that time. However, there was actually little time before she did resign. In the circumstances I do not consider that the claimant had affirmed her contract after 14 January 2019.

*(c) Was that act by itself a repudiatory breach of contract?*

53. The respondent offered the claimant the opportunity to be the interim Head of Faculty. When she refused they asked her to take on a small part of the responsibilities of the Head of Faculty. Because she was told that they had the right to do so as part of her extended protected TLR, she simply did it. She did however admit to the Tribunal that she was not interested in the way in which her pay had been protected, but in the fact that her pay had been protected. The email confirming that to be the case conflated a safeguarded extended TLR with a recruitment and retention allowance. She cannot say therefore she lacked notice about the recruitment and retention allowance, although it was far from clear exactly how the extension had been made. An employer asking an employee to take on a small amount of additional responsibility, for that is what I find it to have been, is unlikely in any circumstances objectively to be committing a repudiatory breach of contract. In this case asking somebody to work in their normal working hours to attend a one hour meeting on a Wednesday, and to feed back in a meeting at which she would be present in any event on a Thursday morning, along with working to pull the department together (after her complaint that the previous manager had failed so to do) can only objectively be described as an insignificant increase in her workload. I do not find that such was imposed upon her: she was asked to do it and did so for a number of weeks.

*(d) Was there nevertheless as part of a course of conduct comprising of several acts and omissions which viewed cumulatively amounted to a repudiatory breach of the implied term of trust and confidence?*

54. I have spent a considerable amount of time sifting through the evidence in this case. The most that the respondent did was to raise areas of concern with the claimant in an informal (as she admitted) setting. They were not sufficiently significant to the respondent to consider it appropriate to begin disciplinary action. They were mentioned in the course of a meeting at which she was offered a temporary promotion. Even up to the beginning of this hearing, the claimant was asserting that they should have undertaken a full disciplinary process, and was accusing them of beginning an investigatory process without giving her appropriate support. That simply was not the case. There has to be an opportunity, as she agreed, for an employer to raise matters of concern in an informal setting where the employer has confidence and trust in the employee to do the right thing. If every transgression by an employee led to disciplinary action the workplace would be very unhappy. Matters that had arisen, in some cases months before, were simply mentioned in passing for the claimant to reflect upon if she were to take on the new role.

55. The failure to continue the TLR beyond 2015 may or may not have been a fundamental breach of contract – but if it were, it had long been affirmed by the claimant, who did not raise any form of complaint or grievance until the 3 year protection period was about to expire

56. The claimant appeared to be unable or unwilling to accept any criticism, however gently it was laid at her door. It was not the respondent who escalated these issues, and having mentioned them it considered them to be closed. The claimant, however, came back over and again to them, requesting evidence in

support, escalating minor problems into major issues. She must have known, particularly in relation to one incident, what she did, because she knew she had sent an email to pupils and parents offering them open access to her staff and herself over the lunch hour and break. She may not have been aware that the Academy's philosophy and policy was that staff should get their breaks and lunch hour but was told, and that should have been the end of the matter.

57. I do not find that there was a course of conduct which comprised several acts which when viewed cumulatively amounted to a repudiatory breach of the implied term of trust and confidence. The respondent had done all it could to retain the claimant in her role, to the extent of paying her above the rate at which her won manager was being paid. The claimant accepted in cross examination that it was open to her line managers to raise issues of concern with her, and that it should not be necessary to always take such matters down a formal disciplinary route.

58. I do note that the claimant had threatened to resign the previous year in an attempt to ensure that her salary was not reduced as she expected it to be at the end of the safeguarding of her TLR. Had the respondent wanted to persuade her to resign, they had the perfect opportunity then to do so by simply refusing her request. That did not happen.

59. I do not find that the claimant resigned as a result of a breach of the implied term of trust and confidence – I do not find there was such a breach. The claimant resigned out of choice. I am aware from her own evidence that she disliked the method of teaching that had been introduced where she dealt with mixed ability classes as opposed to streamed classes, and she disliked the fact that the school had introduced a faculty system placing the Modern Languages Department within the Humanities Faculty rather than having a separate Modern Languages Faculty. I think it more likely than not that her dissatisfaction with the way in which the school was now being managed had far more to do with her resignation than she was prepared to admit. There were no serious breaches by the respondent of the fundamental term of trust and confidence. Objectively, the claimant, an experienced and respected teacher should have accepted that the concerns raised would enable her to reflect on her work practices, whilst considering whether she wanted to take on the interim faculty role. We do know of course that there would be no financial incentive for her to do so.

60. The failure of the respondent to make absolutely clear the basis of the claimant's salary extension for 2018 to 2019 was not objectively a serious breach. I am satisfied that it was not deliberate, nor intended. The confirmatory email made clear reference to both safeguarded TLR and recruitment and retention. It was a conflated muddle. The claimant did not care on her own admission – she had what she wanted – the increased salary for another year.

61. I find therefore that the claimant resigned and she was not unfairly constructively dismissed.

Employment Judge Warren

Date 9 December 2020

RESERVED JUDGMENT AND REASONS  
SENT TO THE PARTIES ON

11 December 2020

FOR THE TRIBUNAL OFFICE

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