



EMPLOYMENT TRIBUNALS

Claimant: Mrs D Smith

Respondent: Reliance Locums Ltd

HELD AT: Sheffield

ON: 20 and 21 May 2019

BEFORE: Employment Judge Brain

REPRESENTATION:

Claimant: In person

Respondent: Mr W Haines, legal consultant

JUDGMENT having been sent to the parties on 5 June 2019 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

1. These reasons are provided at the request of the respondent's representative.
2. The claimant was employed by the respondent as a dispensing assistant working in one of the respondent's pharmacies. The statement of particulars of employment at pages 72 to 76 of the bundle gives the claimant's commencement date as 1 December 2009. The claimant's contract of employment ended on 27 March 2019.
3. She presented her complaint to the Employment Tribunal on 10 August 2018. Before doing so, she underwent mandatory early conciliation as required by the Employment Tribunals Act 1996. She commenced mandatory early conciliation on 14 June 2018. The early conciliation certificate was issued on 14 July 2018.

Accordingly, there is no issue that the claimant's claim form was presented to the Tribunal within the relevant limitation period which would have expired on 14 August 2018.

4. The claimant's complaint is one of constructive unfair dismissal. It is the claimant's case that the respondent was in fundamental breach of contract. The alleged fundamental breach was of the term implied in the contract that the respondent would not, without reasonable and proper cause, act in a manner calculated or likely to destroy or seriously damage mutual trust and confidence. For brevity I shall refer to this as the "implied term".
5. The claimant's case, as set out in her grounds of claim accompanying the claim form, was that the respondent was in breach of the implied term for the following reasons:
 - *That there was a failure to properly manage a locum pharmacist.*
 - *That there was a threat to dismiss the claimant and cut ties with her.*
6. On 2 January 2019 I conducted a case management preliminary hearing. The issues were identified. It is worth setting out paragraph 3 of the case management summary (shown at page 16 of the bundle) in full. This records that I was told by the claimant that the cause of her resignation was the following incidents:
 - 6.1. *That on 6 February 2018 the claimant found herself treating a four-year-old child. The locum pharmacist, Tausif, rebuked the claimant for prescribing penicillin for the child as this incurred extra cost for the pharmacy. The director of the respondent pharmacy, Mr Gupta, was in India at the time and Tausif telephoned him while he was over there in order to get permission for him in order to prescribe the penicillin. [I interpose to say that this is factually incorrect: Mr Gupta was in Sheffield working in a different pharmacy owned and operated by the respondent on this date]. In the course of this incident, Tausif talked down to the claimant, told her that it was no part of her function to telephone doctors' surgeries about patients or to give advice to patients and that she should confine herself only to dispensing prescriptions.*
 - 6.2. *The claimant took issue with Tausif's assessment of her role which was contrary to her job description and the way that she had performed her role over the previous nine years. She escalated the matter to Mr Gupta.*
 - 6.3. *There was then an incident which took place on 19 February 2018. This involved the dispensing of medication to a woman who had contracted an infection due to difficulties with one of her contact lenses. Tausif spoke to the claimant similarly to how he had spoken to her regarding the incident with the child. The claimant left work that day. She was then certified as unfit to work by her General Practitioner initially for a period of two weeks from 21 February 2018 and then for a further four weeks thereafter. Effectively she never returned to work at the pharmacy.*
 - 6.4. *During the course of her sick leave Mr Gupta let it be known around the workplace that the claimant had resigned her employment when she had not done so.*
 - 6.5. *Mr Gupta failed to ensure that the claimant was paid her contractual sick pay entitlement.*

- 6.6. *Mr Gupta also failed to ensure that the respondent paid to the claimant the correct amount of her holiday entitlement. [The claimant said during the course of the hearing that she did not resign in response to the issues referred to in paragraphs 6.4, 6.5 and 6.6. The focus is thus upon the issues in paragraphs 6.1, 6.2 and 6.3].*
7. The claimant contends that the matters set out in her claim form and articulated at the case management summary (recorded in paragraphs 6.1, 6.2 and 6.3) were a breach of the implied term and that accordingly the respondent was in fundamental breach. This entitled her, pursuant to section 95 of the Employment Rights Act 1996, to resign (with or without notice) and claim that she has been constructively unfairly dismissed. Against that background, I shall now set out the evidence and my findings of fact.
8. I heard evidence from the claimant. On behalf of the respondent I heard evidence from the following witnesses:
- Manish Gupta. He describes himself in his printed witness statement as the owner of the respondent. The Tribunal takes judicial notice of the fact that he is registered at Companies House as one of two directors (the other being Sarika Gupta).
 - Tausif Patel. He worked for the respondent as a locum pharmacist upon a self-employed basis between 1 April 2015 and 30 April 2018.
 - Morgan Haigh. He is employed by the respondent as a dispenser.
9. The claimant worked part-time for the respondent. She worked on Mondays, Tuesdays and Wednesdays.
10. As summarised in my case management summary, the course of conduct of which the claimant complains culminating her resignation commenced on Tuesday 6 February 2018. The claimant's evidence about this incident is at paragraphs 7 to 10 of her witness statement. This is as follows:
- “(7) On Tuesday 6 February 2018 (reference at page 108) a very unwell four-year-old child was brought into the pharmacy with a severe throat infection. The child was very distressed and crying with discomfort from his throat. He had been to see his GP and presented to the pharmacy with a prescription for Phenoxymethyl penicillin liquid. I took the prescription from his dad and handed it to Tausif. I took the stock from the shelf to mix ready for dispensing. Tausif told me abruptly to “leave it”.*
- (8) He proceeded to make a phone call to Mr Gupta, lasting around 10 minutes. I could only understand the odd word of this phone call but I knew that it was regarding the cost of the medication. I knew the issue to be that the prescription was worded in a way that a small financial loss would be incurred if we were to hand out the stock on the shelf against the written description on the prescription. This is commonplace and easily overcome by requesting that the wording of the prescription is amended by the GP to reflect the product dispensed.*
- (9) Tausif kept the patient waiting for the duration of the phone call then proceeded to dispense the product anyway. I felt this added unnecessary stress to the boy and his dad who were the only people in the pharmacy. I had asked Tausif if I should send the patient to another pharmacy and was told “no”. I felt despondent at this action and the fact that the poorly child was made to sit in the pharmacy for*

much longer than required due to awaiting the decision as to whether we could “afford to lose £7”. When I questioned why the financial loss to the pharmacy was relevant to the case of the patient at that moment, Tausif became irate and started shouting and waving his arms around saying that “you don’t understand how much money this pharmacy is losing”. My response was that we are here to provide a service to the public and that in my opinion patient care far outweighs profit margins.

(10) Tausif and I ended up having a heated discussion leading me to feeling very stressed. This resulted in heightened anxiety to the point that I felt unwell and asked to go home. It is said (reference page R32) that I left Tausif on his own until 1pm. This is untrue as my colleague Lynn Whitworth was due to start her shift at the time I left and we met at the door when we discussed the incident”.

11. Mr Patel’s evidence in his witness statement is as follows:

“(13) On 6 February 2013 a new prescription came in for penicillin.

(14) I knew we only had enough for the prescriptions we already had for that day.

(15) The claimant was about to dispense it and I asked her politely to hold on whilst I called Mr Gupta to find out if we could dispense it.

(16) He said that we should on this one occasion but as we were already running low not to dispense any new penicillin prescriptions.

(17) I informed the claimant about this and also asked her to let me know if there were any new requests for penicillin.

(18) For some unknown reason, the claimant took offence to that and shouted at me that “I don’t need your permission for giving penicillin to patients”.

(19) Despite her persistent shouting at me I asked her to calm down which did not work and hence, I had to ring the superintendent pharmacist (Mr Gupta) again.

(20) While I was dialling Mr Gupta the claimant said, “don’t ring him or else I will leave the pharmacy and you will be on your own”.

(21) Nevertheless, I thought it prudent to contact Mr Gupta.

(22) Mr Gupta spoke to the claimant also, after which she left the premises without permission leaving me on my own until the afternoon shift started.

(23) At no point during my conversation was I disrespectful towards the claimant.

(24) Mr Gupta did speak with me about the incident and although I was concerned about the claimant’s unusual and unreasonable behaviour, I wanted to move forward constructively and suggested he dealt with the matter informally and we could hopefully put it behind us”.

12. Mr Gupta’s account in his witness statement is as follows:

“(58) On 6 February 2018 I received a telephone call from Tausif.

(59) Tausif had borrowed two bottles of penicillin from my other pharmacy to fulfil the prescription obligations for that day as there was a stock shortage at Hermitage.

(60) Tausif explained to me on the phone that a patient had come in with a new prescription wanting penicillin.

(61) Tausif explained that he had asked the claimant to wait before dispensing as he wanted to check what other prescriptions we had for penicillin that day but the claimant was refusing to follow his instructions.

(62) It was his belief that all the penicillin in stock was already accounted for with current prescriptions and therefore he would have to order more to come in later that afternoon or advise on an alternative for the patient.

(63) Tausif explained that the claimant was refusing to wait as requested by him and was causing quite an unnecessary disturbance in the shop.

(64) I agreed for Tausif to dispense the penicillin.

(65) I then got a second call from Tausif moments later.

(66) He explained that he had asked the claimant to let him know if there were any further penicillin requests and that she had responded quite unreasonably to say she didn't need his permission.

(67) I asked Tausif if I could speak with the claimant. I asked the claimant to please carry on with her duties for that day and that I would be in the pharmacy the following day and we could talk through any issues then try to work through what I hoped would be a simple resolution and a simple misunderstanding.

(68) I understand the claimant then left the pharmacy without authorisation that day on 6 February at approximately 10.30am leaving Mr Patel by himself until later that afternoon when the next shift came in".

13. The claimant was due to work on Wednesday 7 February 2018. The claimant notified Mr Gupta that she was not feeling well and would not be in work that day (page 101).
14. The claimant's next working day was Monday 12 February 2018. That morning, she sent Mr Gupta a message to say that she was "*not in this week .. speaking to GP later in the week .. stressed out .. struggling to digest my new job role .. sorry*".
15. Mr Gupta replied to say that, "*No one's job role has changed as far as I am concerned. If it is anything [that] can be sorted by talking I am in today if you want to discuss. Take care*".
16. The claimant attended the pharmacy on 12 February 2018. In effect, she accepted Mr Gupta's invitation to discuss matters. She says that she, "*went into the pharmacy and explained the incident. Mr Gupta's reply was that Tausif has 'communication problems' and that he would ask Tausif to apologise to me*". (This evidence is at paragraph 11 of the claimant's witness statement).
17. For his part, Mr Gupta says at paragraphs 72 and 73 of his witness statement that there was an informal discussion on 12 February 2018 for approximately 30 minutes to discuss the claimant's concern over her role. Mr Gupta reassured her that nothing had changed and he could not understand why she would think that it had. He said that he discussed with her how matters could be resolved following the disagreement between the claimant and Tausif.
18. The claimant sent a message to Mr Gupta on 13 February 2018 in which she thanked Mr Gupta for seeing her and that she hoped to "*get back to how we were*". Mr Gupta says that he discussed matters with Mr Patel "*to make sure he was ok and to ask him if he had any issues he wanted to discuss regarding the claimant*". Mr Patel, according to Mr Gupta, said that the claimant had refused to "*observe a*

lawful and reasonable management instruction from him regarding the penicillin and with regards to how the claimant had spoken to him but he was happy to move forward and didn't want to raise any concerns at this stage in an effort to move on positively". I refer to paragraphs 75 and 76 of Mr Gupta's witness statement. Mr Patel gives a similar account of his discussion with Mr Gupta on 13 February 2019 at paragraphs 23 and 24 of Mr Patel's witness statement.

19. The claimant returned to work on Monday 19 February 2018. Mr Gupta's evidence is that at 10.39 that morning he received a text message from the claimant in which the claimant told him that *"If Tausif undermines me one more time I'm going for a sick note ..."* This prompted Mr Gupta to telephone the pharmacy. He spoke with Mr Patel. Mr Gupta takes up the story with reference to the following passages in his witness statement:

"(82) Tausif explained that two patients had attended the respondent's [pharmacy] one of whom had a problem with her eye.

(83) The claimant had dealt with their query and had suggested they visit the eye clinic.

(84) Tausif explained that they had returned not long after as they hadn't received any help from the clinic and therefore Tausif had asked if he could help with anything.

(85) Tausif went on to say that he had been through his questions with the customer and had recommended and sold an item to them.

(86) At that point the claimant had taken exception as Tausif put it to me, he had interfered in her matters.

(87) I could hear the claimant in the background shouting and swearing.

(88) I couldn't understand why the claimant had taken such offence to Tausif dealing with a customer.

(89) The claimant said, "If I walk out of this fucking pharmacy it will close".

(90) I was particularly offended by this.

(91) I understand the claimant then got her coat and walked out without authorisation leaving Mr Patel on his own in the pharmacy again".

20. Mr Patel says as follows about the 19 February 2018 incident in the following passages in his witness statement:

"(25) On 19 February 2018 two female patients came in with a query about an eye problem.

(26) They were initially helped by the claimant, who sent them to the eye clinic.

(27) The two patients returned shortly after as they didn't get any help from the eye clinic.

(28) On their return the second time around I asked the patients if I could help with anything.

(29) The patients told me their problem and I helped them.

(30) Unfortunately, the claimant took exception to this as she felt that I was interfering in her matters.

(31) *I was the responsible pharmacist on that day and as a result I was just carrying out my duty of care towards our patients. I genuinely couldn't understand why the claimant thought I was interfering.*

(32) *Mr Gupta called the pharmacy landline, as I understand the claimant had texted him, and the claimant passed me the phone.*

(33) *I spoke to Mr Gupta to clarify the situation, as he was unaware.*

(34) *I told my side of the events and he told me to carry on doing my job.*

(35) *He asked to speak to the claimant so I handed her the phone and walked off.*

(36) *I overheard the claimant saying "I want to see how long you will last here without me."*

(37) *She walked out of the pharmacy without permission and didn't return".*

21. The claimant's account, at paragraph 12 of her witness statement, is that, *"Within the first hour of my shift [on 19 February 2018] Tausif had ignored me and taken over a consultation I was having with the customer. I then sent Mr Gupta another message (page 103) reporting that I was again being undermined and that if this continued I would feel no option than to take sickness absence from work due to work related stress, exacerbated by the fact that the situation had not been resolved and I was continuing to be undermined and embarrassed. The shop phone then rang. Mr Gupta asked to speak to me. I answered the phone and was told "I am sick of this, you sort yourself out or you've got four weeks and your gone". I said I understood what he was saying and that I didn't feel well and needed to go home. I arranged the GP appointment for the following day and was granted a sick note dated 21 February (page R104)".*

22. The sick note at page 104 is dated 21 February 2018. The claimant's GP signed her off as unfit for work due to work related stress for a period of two weeks to 6 March 2018. The claimant then in fact received a fit note for a further four weeks to 3 April 2018. Again, this was because of work related stress.

23. The claimant says that she had no further communication with Mr Gupta until she received the letter at page 107. I need to set this letter out in full. It is addressed to the claimant and headed "Absence Without Leave". It is from Mr Gupta. He then goes on to say:

"I'm aware that on 19 February 2018 you left our premises/your place of work without permission. To date you have not contacted me regarding this unauthorised absence. As you are currently absent without authority, this absence is unpaid.

*You should be aware that your actions are a breach of company's disciplinary rules and constitutes **(an act of gross misconduct) OR (a fundamental breach of contract)**. You are required to attend an investigatory meeting at **(Heritage Pharmacy) on 26 February at (11am)**.*

*At this investigatory meeting you will have the opportunity to explain the circumstances relating to your decision to leave site without prior permission **(and not attend work since that date)**. Should I decide that your explanation is unsatisfactory, it may be dealt with under the company's disciplinary procedure.*

*I would stress that this is not a disciplinary hearing and therefore the statutory right to be accompanied **does not apply**.*

Attendance at this meeting is, we believe, a reasonable and lawful instruction. Wilful refusal to follow this instruction is potentially an act of gross misconduct which may render you liable to summary dismissal.

Should you have any queries regarding the content of this letter, please do not hesitate to contact me on my contact number.” (The bold typing is as per the original letter).

24. On 23 February 2018 the claimant sent a text to Mr Gupta (page 103). This was timed at 16:53 and reads, *“In reference to your letter received 21 February [being that at page 107] I respectfully request to defer the meeting with you to a later date as I am under instruction not to attend whilst absent from work due to work related stress”.*

25. On 20 March 2018 the claimant sent a letter of resignation to Mr Gupta. This letter is at page 109 and is headed “Constructive Unfair Dismissal”. The letter reads:

“I write further to your letter to me dated 21 February 2018. After careful consideration of your conduct towards me over the past year, I have come to the conclusion that the best course of action is for me to resign from Heritage Pharmacy on the basis that I have been constructively dismissed.

I consider that you have failed to properly manage Tausif, your locum pharmacist, who has repeatedly undermined me at work and failed to recognise my role and responsibilities as a dispensing assistant. Tausif has embarrassed me in front of customers and rudely intervened when I have provided advice on general medicinal products and answered telephone calls from surgeries. These duties form part of my job description. This has caused me a great deal of stress and worry, leading to my GP signing me off due to ill health from 21 February 2018 for four weeks.

Despite raising my issues with Tausif with you this month, matters have not been resolved. In fact, you informed me over the telephone that if I did “sort myself out” then I would be dismissed. Therefore, whilst considering whether or not to raise a grievance, I cannot see this would actually achieve anything.

In addition, I believe rightly owed to me such as wages, holiday pay and sick pay have not been forthcoming for some time.

This letter counts as my resignation and I am providing one week’s notice from the date of this letter. I am unable to work this period of notice due to ill health.

Please make arrangements to pay my salary, including holiday pay, up to Tuesday 27 March 2018. I or my solicitors will contact you further in due course with a proposed settlement agreement”.

26. The following emerged during the course of the claimant’s cross examination and live evidence before the Tribunal:

26.1. The claimant recognised that she is not a dispenser or pharmacist and has to work under the supervision of a qualified person.

26.2. The claimant said that she had not resigned immediately after 19 February 2018 because of demanding domestic commitments entailing her looking after her ill brother and ill father.

- 26.3. The claimant said that she did not pursue a grievance pursuant to the respondent's grievance procedure due to being unfit for work through work related stress.
27. The following emerged from the cross examination of Mr Gupta and his live evidence before the Tribunal:
- 27.1. Mr Gupta saw nothing wrong with Mr Patel intervening in the consultation with the patients on 19 February 2018. Mr Gupta was of the view that it is the prerogative of the pharmacist to intervene if he or she thinks fit. Mr Gupta says that when he discussed matters with Mr Patel on 19 February 2018 he (Mr Gupta) said words to the effect that the claimant had four weeks to sort matters out or she would have to leave the business and then *"we'll see what happens"*. Mr Gupta denied discussing matters with the claimant. The claimant put it to Mr Gupta that he had spoken to her directly and said to her words to the effect *"sort yourself out or you've got four weeks and you're gone"*. (Plainly, there is a conflict of evidence as between the claimant and Mr Gupta as to whether or not there was a direct conversation between them on 19 February).
- 27.2. Mr Gupta said that the message he intended to convey during the conversation was that the claimant and Mr Patel should sort matters out between them but if they were unable to do so he would have to intervene.
- 27.3. Mr Gupta said that he did not inform others within the pharmacy that the claimant was leaving the business prior to her letter of resignation on 20 February 2018.
- 27.4. Mr Gupta fairly acknowledged that he did not respond to the claimant's text sent at 16:53 on 23 February 2018 (referred to in paragraph 24 above).
28. The following evidence emerged from the cross examination and live evidence before the Tribunal of Mr Patel:
- 28.1. When the patient returned from the opticians and visited the pharmacy for a second time on 19 February 2018, Mr Patel had asked the patient if he could be of assistance.
- 28.2. Mr Patel said that Mr Gupta had asked Mr Patel for an account as to what happened following Mr Gupta's receipt of the text from the claimant sent at 10:39 on 19 February.
- 28.3. Mr Patel said that when Mr Gupta was on the telephone later that morning, he had utilised the telephone's speaker function in order that all three could participate in the discussion. In contrast to what he said at paragraph 32 of his witness statement, Mr Patel said that the claimant did not answer the telephone call.
29. The claimant confirmed that it was not part of her case that she had resigned upon the basis that Mr Gupta was alerting members of staff to the fact that the claimant had left the business prior to 20 March 2018. Further, it was no part of her case that she resigned and is claiming constructive dismissal because of a failure to pay her any remuneration due. (The parties had in fact reached settlement of the claimant's holiday pay and sickness pay claims prior to the commencement of the hearing).

30. Whether an employee is entitled to terminate his or her contract of employment with or without notice for the purposes of a statutory unfair dismissal claim and to claim constructive dismissal must be determined in accordance with the law of contract. An employee is entitled to treat himself or herself as constructively dismissed if the employer is guilty of conduct which is a significant breach going to the root of the contract of employment or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract. The implied term of trust and confidence is an essential term of the contract.
31. Conduct is repudiatory if, viewed objectively, it shows an intention no longer to be bound by the contract. Neither the intentions of the parties nor their reasonable belief that their conduct would not be accepted as repudiatory are determinative.
32. I have set out above the evidence which I have heard. I have also set out the relevant principles that apply in order to determine whether or not an employee has been constructively dismissed. I shall now turn to my findings of facts and conclusions.
33. There is little in the way of disputed fact about the incident of 6 February 2018. There is no dispute that the claimant was presented with a distressed and ill child, that Mr Patel interceded and checked with Mr Gupta whether or not the prescription could be dispensed to the child.
34. I can fully understand the claimant's subjective feelings of upset and distress in witnessing an ill child being made to wait for around 10 minutes before she was able to dispense the penicillin for him. However, in my judgment, Mr Patel acted reasonably in seeking guidance from Mr Gupta. Mr Patel was concerned about the stocks of penicillin and that there was only enough for the prescriptions that the pharmacy already had for that day. Mr Gupta's evidence is that Mr Patel acted properly and reasonably in checking with him due to Mr Patel's concerns about penicillin stocks.
35. I can accept that the claimant may have perceived Mr Patel to have been abrupt with her in telling her to "leave it" while he sought guidance from Mr Gupta. It is unsurprising, in my judgment, that Mr Patel did speak shortly to the claimant. This is because Mr Patel would also have been aware of the child's distress and the need to quickly seek guidance from Mr Gupta. Mr Patel therefore found himself in a situation of some pressure.
36. In my judgment, Mr Patel's intervention was reasonable and was with proper cause. If a locum pharmacist (or an equivalent in another trade or profession) was unable to properly intercede where a subordinate is dealing with a matter in order to seek guidance from the owner or proprietor of a business without being held to be in breach of the implied term then management would be rendered difficult if not impossible. Curt and abrupt conversations are commonplace in work places that work under pressure and at speed. Indeed, Mrs Smith fairly acknowledged this to be the case during the course of the hearing.
37. In my judgment therefore, there is nothing in the respondent's conduct towards the claimant which shows an intention no longer to be bound by the contract of employment upon the basis of what transpired on 6 February 2019. Even if there was conduct damaging of trust and confidence then in my judgment the respondent had reasonable and proper cause for acting as it did that day.

38. There also appears to be little factual dispute as to what happened between 6 February 2018 and the claimant's next working day which was on 19 February 2018. In the intervening period Mr Gupta was supportive of the claimant. He invited the claimant to discuss matters with him. She took up his invitation by going into the surgery on 12 February 2018. This appears to have reassured the claimant. Certain it is she was reassured enough to commence work on 19 February 2018.
39. Although there appears to be little factual dispute about what happened between 6 and 19 February 2018, I should observe that the claimant fairly acknowledged that Mr Gupta's supportive stance was consistent with recent earlier dealings with her. An incident occurred around the end of January 2018. I need not go into detail about this. Suffice it to say that it concerned the issue of the labelling of boxes of prescription medication by her and that Mr Gupta's handling of it was, as the claimant herself accepted, lenient towards her. Therefore, it is credible that Mr Gupta offered support and encouragement after the 6 February 2018 incident.
40. There is little factual dispute in the main about the incident of 19 February 2018. The claimant attended to the patient with the eye infection and recommended that she seek the advice from an optician. Mr Gupta fairly accepted in evidence that there was nothing wrong with the claimant's approach. It is also not in dispute that the optician was unable to help her and she returned to the pharmacy a second time. Upon the second occasion Mr Patel interceded. It was that intervention which precipitated the claimant's text timed at 10:39 on 19 February at page 103.
41. There is no dispute that Mr Gupta telephoned the pharmacy. There is then a significant factual dispute between the parties as to what happened during the course of the telephone discussion. The claimant is clear (from paragraph 12 of her witness statement) that Mr Gupta spoke to her directly and said to her, "*I am sick of this, you sort yourself out or you've got four weeks and your gone*". The respondent's account (from Mr Gupta and Mr Patel) is that there was no discussion directly between Mr Gupta and the claimant.
42. The respondent's account is somewhat undermined by the inconsistent version of events given by Mr Patel who makes no mention in his printed witness statement of the telephone having been put on speaker-phone in order that the claimant could participate in the conversation. Further, in his witness statement Mr Gupta does not give any evidence as to what he said to Mr Patel whereas before me he said that he asked Mr Patel to convey the message to the claimant that if matters were not resolved then he would give the claimant four weeks' notice.
43. I prefer the evidence of the claimant that she was spoken to directly by Mr Gupta and as to what was said during the course of the telephone call of 19 February. The claimant has given a very clear account of matters. Mr Patel and Mr Gupta on the other hand have given inconsistent accounts and appeared somewhat uncertain as to the course of events that day. However, even if I were to prefer the evidence of the respondent, I would find that the message was clearly conveyed to the claimant (*via* Mr Patel) that it was for her to resolve matters with Mr Patel and that if she did not she would face the prospect of losing her job.
44. It is not in dispute that the claimant was certified as unfit for work due to work related stress. It is also not in dispute that on 21 February 2018 Mr Gupta sent the letter to the claimant at page 107 and did not respond to the claimant's text asking for a deferral of the meeting.

45. Mr Gupta's explanation for not responding is that the claimant was off work having been certified as unfit by her GP. However, the claimant herself had expressly invited contact (by virtue of her text requesting a deferral at page 103). Further, there is nothing within the sick notes to contra-indicate contact from the respondent with the claimant.
46. The claimant had also received Mr Gupta's letter at page 107. In my judgment, she was correct to infer that Mr Gupta had reached a concluded view of matters. Despite Mr Haines' valiant efforts, there is no other way of fairly and reasonably reading that letter (cited in paragraph 23 above) than that Mr Gupta had reached a concluded view that the claimant had committed an act of gross misconduct by absenting herself from the business on 19 February 2018. That conclusion is not saved by Mr Gupta's reference to an invitation to the claimant to attend an investigatory meeting. Objectively, the claimant could have reposed no faith in Mr Gupta to investigate the matter having already expressed a concluded view.
47. It is my judgment that objectively the respondent had, by its actions on and after 19 February 2018, demonstrated that it no longer intended to be bound by the implied term of mutual trust and confidence. In contrast to how he had dealt with matters at the end of January and following the incident of 6 February 2018, Mr Gupta effectively washed his hands of matters on and after 19 February 2018. He instructed the claimant and Mr Patel to sort matters out between themselves. I can accept that Mr Gupta was exasperated and spoke in the heat of the moment on 19 February 2018. However, he took no action to offer any support for the claimant or to manage the situation after that date.
48. On the contrary, he sent to the claimant a letter expressing a concluded view that she was guilty of gross misconduct in circumstances where he had undertaken no investigation into the matter. Mr Gupta made no effort to retract that concluded view at any stage. Further, he ignored the claimant's request to defer the date of the meeting because she was absent through ill health. Even if I were to accept that Mr Gupta reasonably believed that he should not contact the claimant because she was unfit to work and had been certified as such by her GP that is no bar to a finding that objectively his actions (other than ignoring the text seeking a deferral of the meeting) showed an intention no longer to be bound by the fundamental term in question.
49. The claimant was therefore in a position where:
- No effective action had been taken by Mr Gupta on behalf of the respondent to resolve matters between her and Mr Patel.
 - The claimant had been left to sort matters out herself. This was difficult for her as the junior in the relationship with Mr Patel.
 - The respondent had reached a concluded view that the claimant was guilty of gross misconduct arising out of the incident of 19 February 2018.
 - The respondent had ignored a request from the claimant to defer the meeting to discuss the incidents of that day.
50. In the circumstances, I agree with the claimant that Mr Gupta had failed to properly manage the situation between her and Mr Patel, had threatened to dismiss her and by ignoring her he had cut ties with her. In those circumstances, there was a fundamental breach of contract as the respondent was in breach of the implied term. It is difficult to see any reasonable and proper cause for Mr Gupta behaving

towards the claimant as he did. Indeed, this may be contrasted with how he had dealt with matters in January and early February 2018. There can in my judgment be no reasonable and proper cause for having reached a premature concluded view about events without investigating them, abrogating managerial responsibility to deal with a difficult working relationship between people working alongside one another and ignoring the claimant while she was off work due to sickness. The claimant was entitled to accept the respondent's repudiatory breach and treat herself as discharged from the contract of employment.

51. Mr Haines submitted that the claimant had affirmed the contract and waived her right to treat herself as discharged in response to the repudiatory breach. In my judgment, the claimant did not wait too long and did not affirm the contract. Indeed, the aspect of the breach of the implied term that relates to Mr Gupta ignoring the claimant was a continuing breach in any event. However, even if one were to take the date of the fundamental breach as 21 February 2018 (being the date of the letter at page 107) her delaying for a period of four weeks in the circumstances does not constitute affirmation of the contract. This has to be seen in the context of in excess of eight years of employment, a need to find an alternative position and unfitness to work through stress at work.
52. I also do not accept the respondent's case that the claimant resigned solely to take up her position in alternative employment with the Dinnington Surgery. There is simply no evidence that the claimant was looking for alternative work before the events that constitute the fundamental breach of contract. The cause of the claimant's resignation (or at the very least a material cause of it) was the fundamental breach and not the claimant's wish to go and work elsewhere.
53. It follows therefore that the claimant's complaint of constructive dismissal succeeds. The respondent has not advanced a permitted fair reason for the constructive dismissal. The claimant was therefore constructively unfairly dismissed.
54. I now turn to remedy. No question of re-employment arises. Therefore, the Tribunal may consider the making of a basic award and a compensatory award.
55. The basic award is calculated by reference to the formula set out at section 119 of the 1996 Act. It may be reduced in circumstances where the Tribunal considers that any conduct of the complainant before the dismissal was such that it would be just and equitable to reduce the amount of the basic award to any extent.
56. The compensatory award shall be in 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. The compensatory award may be reduced where the dismissal was to any extent caused or contributed to by any action of the claimant. If so, then the Tribunal may reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding.
57. I find as a fact that there was no conduct of the claimant which contributed to her constructive dismissal. Even if I were to accept that the claimant had shouted on 6 and 19 February 2018 (which I do not) then that did not contribute to the respondent's conduct towards her anyway. It was the respondent's conduct which was in repudiatory breach of the contract by way of breach of the implied term. There was no suggestion made on behalf of the respondent that the claimant

having shouted on those two occasions contributed to her dismissal. Indeed, I note that Mr Gupta's letter at page 107 made no reference to any shouting or other inappropriate behaviour (other than absenting herself from work).

58. I find as a fact that the claimant did not shout on 6 and 19 February 2018. I can accept that she was emotional and upset. However, Mr Gupta was not present either on 6 or 19 February and could therefore give no direct account of having heard shouting. Mr Patel's account of the events of 19 February is confused so as to undermine the credibility of what he said happened on both dates. Having determined therefore that the claimant did not shout I find there to be no basis to make a reduction from either compensatory award or the basic award.
59. Relevant to the compensatory award is the question of the likely longevity of the claimant's employment. I find that had a disciplinary hearing occurred about the events of 19 February 2018 then there would be very little chance of the respondent, acting within the range of reasonable responses, dismissing the claimant for leaving work on 19 February 2018. The reality is that this was a management issue which a reasonable employer would recognise as its responsibility. Had this been properly managed then in my judgment there would be a high chance that the claimant would have remained employed by the respondent especially as Mr Patel left the employee of the respondent on 30 April 2018.
60. Furthermore, the respondent, acting reasonably, would have to take into account the fact that just two days later the claimant was signed off as unfit for work through work related stress. She did not leave surreptitiously but in full view of Mr Patel. Mr Gupta was aware of a difficulty in the relationship between Mr Patel and the claimant arising from what had happened on 6 February 2018. This was her first day back at work alongside Mr Patel. It is difficult to see how, acting within the range of reasonable responses, an employer could conclude that in those circumstances the employee's conduct would warrant summary dismissal.
61. The claimant acted quickly to mitigate her losses. She obtained an interview with the Dinnington Surgery on 23 March 2019. This was convenient for where she lives. She was engaged upon a fixed term contract for a period of six months. After that, she obtained a job with Green Arbour Pharmacy.
62. Mr Gupta said that there were vacancies and job prospects for dispensing assistants in Dinnington and in other areas near to where the claimant lives. Mr Gupta's evidence was that the claimant could easily obtain a job equivalent to that which she held with him.
63. The claimant expressed herself happy with the role that she held with the Dinnington practice and at the Arbour Pharmacy. They both suit her lifestyle as the jobs are close to where she lives. As she put it, she does not want to travel "*to the other end of Sheffield*".
64. It is my judgment that the claimant acted very quickly to obtain an alternative position. In my judgment any loss of earnings which she has sustained consequent upon the dismissal is not attributable to action taken by the respondent but rather by reason of the claimant's lifestyle choice only to consider working very close to home for understandable personal reasons. True it is but for the dismissal she would not have had to move jobs in the first place. However, I am persuaded by Mr Gupta's evidence (and he will have knowledge of the state of the job market for assistant dispensers) that the claimant could if she wished obtain more highly

remunerated employment if she willing to travel further afield but within a reasonable travelling distance. The claimant has chosen to eschew that possibility and work closer to home.

65. It is my judgment therefore that the claimant should recover from the respondent a basic award. This is calculated in the sum of £2,448. As far as the compensatory award is concerned, I make an award for the claimant in the sum of £300 for the loss of the statutory right not to be unfairly dismissed and the loss of the statutory notice period. These are valuable rights which have been lost to the claimant as a consequence of the dismissal.
66. However, in my judgment it is just and equitable not to make any award for loss of earnings for the reasons stated.

Employment Judge Brain
28 June 2019

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