EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mrs R Kelly	**v**	**RHK Business Advisers LLP**

Heard at: Reading **On:** 9 March 2018

Before: Employment Judge Finlay

Appearances
For the Claimant: Miss G Rezaie of Counsel.
For the Respondent: Mr A Webster of Counsel.

RESERVED JUDGMENT

1. The complaint of unpaid accrued holiday pay is dismissed following withdrawal by the claimant.

2. The claimant was unfairly dismissed and her dismissal was in breach of contract.

RESERVED REASONS

Introduction

1. This claim was part heard on 9 March 2018 in the Reading Employment Tribunal. The claimant was represented by Miss Rezaie and the respondent by Mr Webster. The tribunal heard evidence from the claimant and from Mr David Hall and Mr Bradley Thomas for the respondent. A witness statement had been produced and signed by Mr Matthew King, a qualified financial adviser, but Mr King did not attend the hearing to give evidence in person. Prior to the tribunal the parties had agreed a bundle of just over 250 pages and it was agreed that the tribunal should read only those documents referred to in the evidence or to which it was specifically taken.

2. The parties had helpfully prepared and agreed a list of issues and confirmed that it set out the totality of the issues to be decided by the tribunal. In relation to the specific allegations set out at paragraph 1a of the list, Miss Rezaie confirmed that it was the claimant's case that each was sufficient to be a stand-alone (repudiatory) breach of contract, but the claimant was also arguing that taken together they constituted a cumulative breach. The claimant was not relying on the "last straw" doctrine.

3. Mr Webster confirmed that if the tribunal were to find that the claimant had been constructively dismissed, the respondent was not arguing that the respondent had a potentially fair reason for that dismissal. Accordingly, a finding of constructive dismissal would lead to a finding of unfair dismissal.

4. In relation to the issue at 2a, Mr Webster confirmed that the conduct of the claimant relied upon was two-fold. Firstly, the failure by the claimant to copy the respondent's partners interim emails in which she gave advice to clients. Secondly, the manner in which she had engaged with one particular client (Spider PR) before that client had been properly set up as a client of the firm, coupled with her lack of communication to Mr Thomas regarding her dealings with that client.

Preliminary Matters

5. The following introductory matters were considered at the start of the hearing:

    5.1 Miss Rezaie confirmed that the claimant was not pursuing her complaint of accrued but unpaid holiday pay. Accordingly, that complaint was dismissed upon withdrawal.

    5.2 Mr Hall had produced two witness statements, the second being a supplemental witness statement which had been signed on 22 September 2017. Mr Webster stated that the supplemental statement responded to matters set out in the claimant's statement. Miss Rezaie objected to its introduction stating that the respondent had no permission to rely on it, and that the respondent should not have the opportunity to rely on it.

    5.3 Following a discussion, Miss Rezaie confirmed (a) that she was not suggesting that the statement was irrelevant to the respondent's pleaded case, (b) that the claimant had received the supplemental statement in September 2017 and (c) that the claimant suffered no prejudice by the introduction of the supplemental statement. For these reasons, the tribunal admitted the statement, which pertained primarily to remedy.

    5.4 Mr Webster referred to documents 32-34A which he advised had recently been included in the bundle. Mr Webster was not objecting to those documents being included, but stated that they referred to what he described as an important point, namely the claimant's

relationship with CRK, and that the respondent had previously been asking for documents in relation to this point.

5.5 The other documents which were referred to which were not in the agreed bundle were the claimant's notes of her discussions with Mr Hall and Mr King on 30 January and with Mr Hall on 1 February. These documents were first produced by the claimant at approximately 1:30 p.m. on the day of the hearing. Whilst questioning why they had been produced so late and noting that the respondent's witnesses may require more time to consider questions relating to those documents, Mr Webster did not object to their introduction nor seek an adjournment to enable him to seek detailed instructions.

5.6 It was agreed that liability would be dealt with first, and if the tribunal had time at the end of the day, the tribunal would then deal with remedy if necessary. In the event, there was insufficient time and a provisional remedy hearing was listed with the agreement of the parties.

The facts

6. Having heard the evidence of the three witnesses and considered the documentation to which it was referred, the tribunal makes the following findings of fact:

6.1 The respondent is a limited liability partnership based in Gateshead providing accountancy and business advisory services. It has four partners/members, namely Mr David Hall, Mr Geoff Miller, Mr Bradley Thomas and Mr Peter Storey. The respondent employs approximately 25 staff. The partners are not employees, but Mr Webster confirmed that it would be vicariously liable for the actions of its partners as if they were employees.

6.2 The claimant commenced work with the respondent in March 2002. She lives in Fleet, Hampshire and was recruited to assist the respondent establish a presence in the south of England. The claimant worked from home. She was a senior employee, holding the title of director – advisory and planning. She worked primarily with Mr Hall and Mr Thomas, rather than Mr Miller or Mr Storey. Her main contact was Mr Hall and it seems that they had a good relationship least until the claimant's departure. Whilst Mr Hall is the managing partner, it was clear from the evidence that Mr Thomas is an influential force within the partnership, with a reputation as a "rainmaker", having been responsible for some 40% of the respondent's fees at one time. It is clear from the manner in which they gave evidence that Mr Thomas is a more brusque and direct personality than Mr Hall.

6.3 Prior to 2016, there had been no significant issues between the claimant and the respondent. The claimant was a trusted senior member of staff and had a clean performance and disciplinary record.

6.4 By the later part of 2016, the respondent's costs had increased and fees generated by the claimant had not been as high as in previous years.

6.5 The claimant was supported in her role by a personal assistant. In November or December 2016, Mr Thomas advised the claimant that her PA was being released and henceforth administrative support would be provided from the head office in Gateshead. There was a dispute whether the claimant's PA was an employee or whether she had been engaged via a sub-contractor arrangement. It seemed to me that this did not matter – it was not in dispute that this resource was removed from the claimant. She was unhappy about this and even offered to reduce her salary to keep the PA.

6.6 On 26 January 2017, Mr Thomas attended a meeting with an IFA, Mr Matthew King, regarding an introduction by Mr King of a new client to the respondent for tax advice. Mr King worked both with Mr Thomas and the claimant at the respondent. During that meeting, Mr King showed Mr Thomas two emails from the claimant to two mutual clients. There is a dispute as to why those emails were shown to Mr Thomas by Mr King. No one else was present at the meeting and there are no contemporaneous notes. Mr Thomas says that Mr King showed him the emails because Mr King had a concern that the claimant had in Mr Thomas' words "overstepped the mark" in giving investment advice. If correct, this would be in breach of ICAEW Regulations and could have been a very serious matter for the respondent.

6.7 The claimant's case was that she spoke to Mr King subsequent to that meeting, and that he denied raising any such concerns. She alleges that the emails were shown to Mr Thomas by Mr King because Mr Thomas asked Mr King for details of work being undertaken by the claimant for mutual clients who were dealt with by the claimant.

6.8 Mr King had produced a written witness statement on behalf of the respondent in which he deals with this meeting very briefly as follows:

> "I contacted Bradley Thomas in January 2017 to set up a meeting which took place on 26 January 2017. The purpose of that meeting was to outline a specific client scenario and introduce the client to Mr Thomas.
>
> At no point before did Mr Thomas request any information from myself as to Rachel Kelly and her level of advice with clients."

6.9 I consider that the significance of Mr King's witness statement is as much in what it omits as much as what it says. He does not mention the two emails and he does not mention any issue of investment advice. Taken together with this statement I do not find Mr Thomas' version plausible. Whilst I understand to an extent that Mr King might not have wished to become involved in this dispute, having a business relationship with both the claimant and respondent, and might feel "caught in the middle", it has not been explained why, having made a statement for the respondent in August 2017, he omits to mention these crucial points, either to confirm or deny. I find as a matter of fact that Mr King did not raise a concern that the claimant was giving investment advice, but that he showed Mr Thomas two emails on his iPad as examples of work undertaken by the claimant or to show Mr Thomas what fees might be in the pipeline, and then Mr Thomas jumped to the conclusion that there may be such a concern.

6.10 The respondent has a document headed "RHK London – Procedures and Instructions" which is intended for the claimant and others named in the document. This document contains the procedure or instruction that "Where outgoing emails contain advice or recommendations of any sort, BCT is blind copied in with the email for intervention/comment as required". This document appears to have been produced following an ICAEW audit and it was Mr Hall's evidence that it had been the respondent's policy since 2015. The claimant gave evidence that she did not know whether she had received it, and the respondent had no evidence to suggest that it had been sent to her.

6.11 Whilst the claimant stated that she did send to Mr Thomas some emails by blind copy and also on occasions sent him drafts of advice for discussion, she acknowledges that this was rare and in particular she could not state that she had blind copied the two emails to clients which Mr King showed Mr Thomas. However, there was no evidence before me that the respondent ever treated this as a serious issue or had ever raised it with the claimant. It was clearly part of the claimant's role to give advice to clients and the respondent (and Mr Thomas in particular) must therefore have been aware for some time that the claimant was not complying with this procedure.

6.12 Whilst traveling back from the meeting with Mr King, Mr Thomas sent two emails to the partners of the respondent from his iPhone. They are timed at 19:03 and 19:22 respectively. The content of those emails is at the heart of this claim. The first reads simply: -

"I suggest she goes tomorrow happy to chat about it."

The second reads:

> "Hmm taking over my introduction? Not happy! And will take it back.
> David: What? .."

There is no dispute that Mr Thomas was referring to the claimant in these emails.

6.13 The way in which Mr Thomas sent these emails was by forwarding an email from the claimant dated 19 January which had responded to a request on behalf of Mr Thomas for a progress update regarding a client, or possibly a potential client at that point, named Spider PR. Spider PR had been introduced to Mr Thomas by one of Mr Thomas' introducers in March 2016. At that stage, it was agreed that the respondent would act for Spider PR and that the claimant would undertake the day-to-day work for that company. There is a client set up procedure set out in Mr Thomas' witness statement at paragraph 16 which has to be completed for any new client, the final stage of which is what is described as "professional clearance" from the client's incumbent advisers. There was an outstanding tax issue relating to Spider PR, and the respondent and Spider PR agreed that the incumbent advisers should resolve that issue before the respondent formally began to act for Spider PR. This professional clearance had not come through by January 2016.

6.14 The email sent on behalf of Mr Thomas on 19 January was to various staff including the claimant, and simply stated:

> "Brad asked if everyone involved in the above client could send him a progress update and let him know if there are any loose ends that need tying up please."

The claimant had responded that same day confirming that there had been a lot of things going on with the proprietor of the business and the business itself, and that she had been arranging various meetings with introductions to banks. She had had a number of telephone calls with the proprietor, but as these issues were confidential, she offered to provide details by telephone rather than in writing. It is correct that between March 2016 and January 2017, the claimant had carried out various tasks on behalf of Spider PR, and there is a summary in an extract from the respondent's data capture system which was in the bundle of documents. None of this work was charged to Spider PR and I have concluded that the claimant did not do anything in relation to Spider PR on behalf of the respondent which was inappropriate in the light of the lack of professional clearance. Equally, I find that there was nothing inappropriate in the email of 19 January to the claimant (and others) which was sent on behalf of Mr Thomas.

6.15 The respondent has a coding system for its clients. Mr Thomas' clients are given the "B" code and the claimant's the "K" code. It is apparent from both Mr Thomas' and the claimant's emails of 19 January that Spider PR has a "K" code. It is also apparent from Mr Thomas' second email of 26 January that Mr Thomas considered that the claimant had "taken over his introduction".

6.16 Dealing with the two emails of 26 January in turn, Mr Thomas asserted that his first email related not to Spider PR but the concern that the claimant had been giving investment advice to other clients. He said that he had used the 19 January Spider PR email simply for convenience. Although it is hard to see why it would not be equally convenient to send a fresh email to his partners, I do accept Mr Thomas' evidence on this point. It seems to me from reading his second email that it was at that point that Mr Thomas addressed his mind to Spider PR.

6.17 However, the fact that he used the 19 January email to communicate with his partners had an unintended consequence. The respondent's email management system (Virtual Cabinet) automatically filed Mr Thomas' two emails onto the Spider PR file which meant that any member of staff who looked on that file for any reason would be able to see them. Indeed, the claimant herself did see the emails sometime between 19:22 on 26 January and their removal the following morning.

6.18 Mr Hall did not see Mr Thomas' emails until he came into work on the following morning. He asked Mr Thomas about them and arranged a meeting with all four partners later that day to discuss them. He also removed the emails from Virtual Cabinet. I have no doubt that he did so to prevent the claimant and any other member of staff from being able to read them. He was at that stage unaware that the claimant had already read them. It is not known whether any other member of staff saw those emails.

6.19 On reading the emails, the claimant concluded that the respondent was intending to sack her. Mr Thomas' evidence was that his first email does not refer to a suggestion of immediate dismissal, but to what he described as a "potential suspension scenario". I do not accept this. The words used by Mr Thomas are straight forward and to the point. He was suggesting that the respondent should dismiss the claimant with immediate effect. I also believe that it was entirely reasonable for the claimant to have concluded that Mr Thomas wanted her out of the business. It would also have been reasonable for any of the other partners who read it to come to that conclusion, and any member of staff who might have read it could reasonably have concluded that the respondent was going to sack the claimant. This is the logical and reasonable explanation of Mr Thomas' own words. Similarly, whilst the respondent asserts

that the second email does not imply any dishonesty, the wording used by Mr Thomas does at least suggest impropriety by the claimant, in that he is suggesting that the claimant has "stolen" one of his clients. Taking the two emails together, it was also entirely reasonable for the claimant to form the view that there had been other communications between the partners about her.

6.20 The respondent's partners met at lunchtime on 27 January to discuss Mr Thomas' emails. Mr Thomas had a copy of one of the two emails from the claimant which Mr King had shown him, and the partners quickly concluded that the claimant had not overstepped the mark by giving investment advice in that email. Mr Thomas did not have a copy of the other email shown by Mr King and so Mr Thomas was asked to locate it. Mr Thomas then reviewed that second email and concluded likewise that no investment advice had been provided by the claimant.

6.21 Mr Hall also asked Mr Thomas to speak to the claimant to clarify where the client engagement process was with Spider PR. His evidence was that whilst Spider PR was destined to become a "K" client, Mr Thomas should remain in control of the timing of the client engagement. Mr Hall did not suggest that the claimant had committed any sort of misconduct or disciplinary offence by coding Spider PR as "K". Mr Thomas did telephone the claimant, leaving a voicemail message, but the claimant did not return the call. The claimant had a note of the message which Mr Thomas agreed was accurate. The message is in a friendly tone and invites the claimant to call Mr Thomas to clarify whether there is still an issue regarding Spider PR's account. It does not mention the coding. The claimant did not return Mr Thomas' call.

6.22 27 January 2017 was a Friday. At 10am on the following Monday morning (30 January) the claimant emailed Mr Hall to say that she was aware that the respondent's partners had recently had discussions about her and that she would like to know what they were. She did not let on in that email that she had seen Mr Thomas' two emails of 26 January. Mr Hall contacted the claimant later that day and during their conversation, Mr Hall told the claimant that the partners had considered an issue regarding an email brought to their attention by Mr King but had decided that it was a non-event. The claimant challenged Mr Hall regarding whether it was Mr King or Mr Thomas who had suggested that the claimant had been giving investment advice, and Mr Hall suggested to the claimant that there was a misunderstanding between the claimant and Mr Thomas, and that the claimant should talk to Mr Thomas about that misunderstanding. In his evidence to the tribunal, Mr Hall stated that later in the conversation the claimant had asked Mr Hall about the two emails of 26 January. I do not accept this evidence, primarily because it is not consistent with either the claimant's, or more particularly Mr Hall's record of their

subsequent conversation on 1 February. I find that on 30 January, the claimant was waiting to see whether Mr Hall would mention the emails from Mr Thomas, but Mr Hall did not do so.

6.23 In the claim form, the claimant alleges that in the conversation on 30 January, Mr Hall implied that she was being paranoid. The claimant does not repeat this allegation in her witness statement, but in cross-examination, she initially stated that Mr Hall used the word in that conversation. However, in the claimant's own records of the subsequent conversation on 1 February (after her resignation) she states that Mr Hall used the word "paranoid" and I find that he did not use the word on 30 January. He may well have tried to convince her that the partners were not talking about her behind her back. At this point Mr Hall did not know that the claimant had seen Mr Thomas' emails and was no doubt keen to limit the subject matter of the conversation to the issue, or non-issue, of the investment advice.

6.24 It is apparent from the respondent's timesheets that the claimant was working long hours between 26 January and 31 January. The latter date is the deadline for submission of tax returns, and I accept the claimant's evidence that she was working to ensure that the deadline would not be missed and that those clients would not be let down. Equally, there is no suggestion that the respondent prevented the claimant from continuing to work or otherwise acted on Mr Thomas's suggestion that she 'go now'. In all likelihood, Mr Hall and the other partners had persuaded Mr Thomas that they had no grounds to dismiss (or, on Mr Thomas' version, suspend) the claimant.

6.25 On 1 February at 14:51, the claimant sent an email to Mr Hall resigning with immediate effect. In that email, she states that:

> "The manner in which RHK has conducted itself in relation to me and my relationship with my clients has been completely unreasonable and unprofessional. It is clear through the manner in which RHK has conducted itself that I can have no trust or confidence in the relationship which is supposed to exist between employer and employee. The necessary trust and confidence in our relationship has now broken down because of the actions taken by RHK and I therefore resign my employment with immediate effect."

She does not mention the emails of 26 January specifically in that resignation email.

6.26 In response, Mr Hall telephoned the claimant sometime after 3pm that day. Mr Hall suggests that he had been genuinely shocked by the claimant's resignation, but of course Mr Hall did not know at that stage that the claimant had seen Mr Thomas' emails. It is common ground that during this conversation there was discussion regarding the emails of 26 January, but even from his own record, Mr Hall

does not seek to explain Mr Thomas' wording but refers again to the "misunderstanding" regarding Spider PR. It is also common ground that Mr Hall tried to persuade the claimant to reconsider. It was Mr Hall's understanding that they would speak again the following day and Mr Hall decided not to notify his partners of the resignation until the following morning. Mr Hall also said that if the claimant was to leave, he would prefer it to be a "managed exit" in respect of the "K" clients.

6.27 Early on the following morning, Mr Hall arranged for some flowers to be sent to the claimant. Mr Hall maintains that he did so because the claimant had advised him of a serious health scare, whereas the claimant stated that she did not tell Mr Hall about this until later. There was a significant amount of discussion about this during the hearing. It may be that nothing turns on it, however, as it occurred after the resignation. The note accompanying the flowers read:

> "Rachel. Chin up! We will get through this. David x"

Whilst I am happy to accept that Mr Hall will have had the claimant's health in mind, the use of the phrase "We will get through this" leads me to the conclusion that at least part of the reason for the flowers was to try and persuade the claimant to withdraw her resignation.

6.28 In the event, the claimant did not respond to Mr Hall on the following day and following further attempts to speak to her in the forthcoming days, the claimant did telephone Mr Hall on Sunday 5 February, confirming that she wished to leave immediately and that she had not been at work since 31 January. Mr Hall tried to persuade her at least to work her notice and service the needs of her clients. It was agreed that they would speak again the following day and the claimant telephoned Mr Hall on 6 February, confirming that her resignation was effective immediately and advising Mr Hall that she had dealt with any outstanding bills.

The Law

7. By Section 94 of the Employment Rights Act 1996, an employee has the right not to be unfairly dismissed by his employer. To make a complaint that this right has been contravened, the employee must first establish that (s)she has been dismissed. In this case, the claimant asserted that she had been "constructively dismissed" in accordance with Section 95 ERA, in that she had terminated her contract of employment "in circumstances in which she (was) entitled to terminate it without notice by reason of the employer's conduct".

8. The case of *Western Excavating (ECC) Ltd v Sharp [1978] IRLR 27* established that constructive dismissal involves the following three elements:

   (1) There must be a breach of contract by the employer which is sufficiently serious to justify the employee resigning;

   (2) The employee must have left in response to that breach; and

   (3) The employee must not have affirmed the contract before leaving (for example, by delaying too long before resigning).

9. In determining whether the first element is present, there is a need to prove that the conduct of the employer is sufficiently serious and calculated or likely to cause such damage that it can fairly be regarded as repudiatory of the contract of employment. It must be so serious that the employee is entitled to regard himself or herself as entitled to leave immediately without notice.

10. The claimant relied upon a breach of the implied duty of trust and confidence. In the case of *Mahmood v BCCI [1997] ICR 607*, it was established that every contract of employment contains an implied term that the employer must not conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between the employer and employee, without reasonable and proper cause. Any breach of this implied term will be sufficient to fulfil the second element above and will constitute a "repudiatory" breach of contact (*Morrow v Safeway Stores Ltd [2002] IRLR 9*).

11. In determining whether there has been a breach of the implied term, the impact of the employer's actions on the employee is more significant than the employer's intentions. This impact should be assessed objectively (*Malik v BCCI [1998] AC 20 per Lord Steyn*)

12. The breach of contact must be a contributor to the employee's decision to resign, although it need not be the only reason for his/her resignation (*Nottinghamshire County Council v Meikle [2004] IRLR 703*).

13. By Section 123(6) ERA: "where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable, having regard to that finding".

14. By section 122(2): "where the tribunal considers that any conduct of the complainant before the dismissal was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the tribunal shall reduce or further reduce that amount accordingly".

15. Three factors must be present for a reduction of the compensatory award for contributory fault:

- The claimant's conduct must be culpable or blameworthy.
- It must have actually caused or contributed to the dismissal.
- The reduction must be just and equitable.

(*Nelson v BBC (No.2) [1979] IRLR 346 (CA)*)

Conclusions

16. Applying the law to the findings of fact above, my conclusions are as follows.

17. The first issue is whether the respondent conducted itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between an employer and employee, by virtue of the matters set out paragraph 1a i to vii of the agreed list of issues. If the answer to that question is on the affirmative, then it is necessary to consider whether the respondent did so without reasonable and proper cause.

18. Dealing with the specific conduct in turn:

> "i. Making the Claimant's Personal Assistant redundant in December 2016 despite the Claimant offering to take a pay cut to avoid this (paper apart to ET1 para 6)."

My conclusion is that the respondent's decision to replace the claimant's local administrative support with support from head office was a proper business decision in response to the respondent's financial situation at the time. Whilst the decision would mean that the claimant would have to spend more time on administrative tasks herself (for example, by posting letters), it was not an action calculated or likely to destroy or seriously damage the relationship of trust and confidence. However, even if I am wrong about this, the claimant stated unequivocally in evidence that her resignation had nothing to do with her PA leaving. On the contrary, she stated that ultimately, the reason for her resignation was the emails from Mr Thomas. I clarified this answer with her at the time. In re-examination, the claimant stated that in January 2017, she had been surprised to find that three members of staff based in Gateshead had not been made redundant and that she believed that the respondent was trying to exclude her. However, she did not resile from her previous answer that her resignation had nothing to do with her PA leaving.

19. "ii. Bradley Thomas stating in an email of 26 January 2017 time at 19:03 that the Claimant should be immediately dismissed (paper apart to ET1 para 9)."

I have found above that whilst he did not use those exact words, the only sensible interpretation of Mr Thomas' words was that the claimant should be dismissed immediately.

20. My conclusion is that the wording of this email constituted an act calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee. Whilst both parties accept that the partners, between themselves, are entitled to discuss their staff in terms which are not always favourable, this email went well beyond what is acceptable. Albeit inadvertently, it was not simply a discussion between the partners but a written statement which the claimant could and did read and which any member of staff might also have read. It completely undermined the claimant's position as a senior employee. As she pointed out when giving evidence, it is not as if she could have moved department away from Mr Thomas in such a small business. Furthermore, it is my conclusion that Mr Thomas had no reasonable or proper cause to make such a statement. In so far as it referred to the email shown to him by Mr King, it became clear very quickly to those reading those emails with any care that the claimant had not breached any rule or done anything wrong. In so far as it might have related to Spider PR, again Mr Thomas had no reason whatsoever to consider that the claimant be summarily dismissed. I accept that Mr Thomas may not have had the authority by himself to dismiss the claimant, and this would have been a decision to be taken by all of the partners, but Mr Thomas is an extremely senior person in the business. For whatever reason, Mr Thomas was telling his partners that the claimant should be dismissed from the business immediately.

21. "iii. Bradley Thomas informing the partners in an email of 26 January 2017 timed at 19:22 that the Claimant was taking over/away his client relationships (paper apart to ET1 para 10)."

Of itself, I do not consider that this email alone would constitute conduct calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee. It is couched in unfortunate wording but of itself does not cross that line. I acknowledge that it does suggest impropriety by the claimant, but ultimately the respondent's partners are entitled to decide which of their accountants serve the firm's clients. However, taken together with the previous email only a matter of minutes beforehand, I do consider that even if the previous email of itself was not a fundamental breach of contract, that the effect of these two emails together is clearly conduct calculated or likely to destroy or seriously damage the relationship of confidence and trust. As with the previous email, I do not consider that Mr Thomas had reasonable or proper cause to allege, in effect, that the claimant had stolen his client. There was nothing in the reply to the email of 19 January which lead to that conclusion.

22. "iv. on 30 January 2017 David Hall telephoning the Claimant and informing her that Bradley Thomas had mentioned to the partners that on 27 January 2017 an Independent Financial Adviser, Matthew King, confirmed that the Claimant had been giving investment advice (paper apart to ET1 para 12).

I do not consider that Mr Hall's statement on 30 January was conduct calculated or likely to destroy or seriously damage the relationship of confidence and trust. At that point, Mr Hall genuinely believed what he

had been told by Mr Thomas, in that it was Mr King who had raised the concern over investment advice. It was reasonable and certainly not a fundamental breach of contract for Mr Hall, with the knowledge that he had, to convey this information to the claimant in response to her request to know what the partners had been taking about.

23. "v. despite the partners concluding, having reviewed an email dated 23 January 2017 timed at 13:04 provided by Bradley Thomas, that there was no evidence the Claimant had given investment advice, Bradley Thomas continued to search for evidence or such wrong doing (paper apart to ET1 para 12).

This relates to the search for and review by Mr Thomas of the second email which had been referred to him by Mr King at their meeting on 26 January. I do not consider that Mr Thomas was thereby "searching for evidence of wrongdoing". I consider that he was doing no more than acting on Mr Hall's request to check that other email. The search for and review of that email does not constitute conduct calculated or likely to destroy or seriously damage the relationship of confidence and trust.

24. "vi. in the conversation of 30 January 2017 David Hall did not mention Bradley Thomas' emails dated 26 January 2017 timed at 19:03 and 19:22 (paper apart to ET1 para 14)."

I do not consider that Mr Hall's failure to mention these emails to the claimant in itself constitutes a repudiatory breach of contract, assuming, as he did, that she had not already read them. I agree with Mr Webster that an employee doesn't have the right to know everything which is said about her. However, the fact is that she did already know about them and Mr Hall's failure to 'come clean' about the emails when it was suggested that the partners had been talking about her contributed to the claimant's belief that the respondent was intent on removing her. Taken cumulatively with the sending of the emails, this is conduct which seriously damaged the relationship of trust and confidence. I accept that Mr Hall's ignorance of the claimant's knowledge of the emails from Mr Thomas meant that he therefore could not have appreciated the impact of his lack of openness on her, but whilst he did not intend or calculate to damage the duty of trust and confidence in that conversation, the impact on the claimant was significant.

25. "vii. David Hall was not open and honest with the Claimant in the conversation of 30 January 2017 but was attempting to protect Bradley Thomas by putting the blame on Matthew King and implying that the Claimant was paranoid (paper apart to ET1 para 15)."

I have already stated that Mr Hall at that time had the genuine belief that it was Mr King who had raised the concern about investment advice, rather than Mr Thomas. He had no reason to disbelieve Mr Thomas in this respect, and it was only after that conversation with Mr Hall that the claimant checked the position with Mr King himself. Accordingly, Mr Hall's conduct cannot have been conduct calculated or likely to destroy or seriously damage the relationship of confidence and trust but even if it

was, Mr Hall had reasonable and proper cause to suggest that it was Mr King who had raised the issue of investment advice.

As for the implication that the claimant was 'paranoid', I have found that he did not use the word in that conversation (although I believe he did so on 1 February). It is correct that Mr Hall was not entirely open with the claimant in this conversation, but his lack of openness was his failure to mention the two emails from Mr Thomas or any discussion between the partners of Mr Thomas's suggestion that the Claimant be ousted from the business, which is dealt with under vii above.

26. In summary, I conclude that:
    (i) the actions of Mr Thomas in sending the first email of 26 January 2017 and
    (ii) the cumulative effect of both of his emails on that date and the lack of openness of Mr Hall in his conversation with the claimant on 30 January

    constitute a repudiatory breach of the claimant's contract of employment. They were calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee, and indeed did so. For the reasons set out above, I also find that the respondent did not have reasonable and proper cause for the conduct in question.

27. The next issue to consider is whether the claimant resigned in response to the breaches I have found. It is my conclusion that the claimant resigned in response to items ii) to vii) of the list of issues above, not all of which constitute fundamental breaches of contract, whether individually or cumulatively. However, the breach of contract does not have to be the sole reason for the resignation and I find that the emails sent by Mr Thomas and the conduct of Mr Hall on 30 January were each a significant contribution to her decision to resign. I do not believe that the fact that she did not refer to them specifically in her email of resignation, but I accept her evidence to the tribunal to the effect that the emails were the major factor in her decision.

28. The next question is whether the claimant affirmed the contract thereby waiving the breach. The respondent relies on the fact that claimant did not resign until 1 February and carried on working (and working long hours) between 26 January and 31 January.

29. In my judgment, the claimant has not affirmed the contract. Having seen the emails from Mr Thomas late on the evening of 26 January, she should not be criticised for waiting until she has had her conversation with David Hall on 30 January, to ascertain his position as managing partner. She resigned within 48 hours of that conversation. In relation to the work she carried out, the claimant is a professional person who was finalising taxation matters for clients so that they did not miss the 31 January deadline (thereby risking missing the deadline for filing tax returns). In that

context, carrying on working for an extra couple of days does not constitute affirmation of her contract.

30. I then turn to the claimant's conduct. The first matter relied on by the respondent is the claimant's dealings on behalf of Spider PR before that company was officially set up as a client of the form. The claimant's actions are considered in paragraphs 6.13 and 6.14 above. Her actions were not culpable or blameworthy and it is not just and equitable to reduce the compensatory or basic award because of this conduct. I repeat that she undertook no billable work and seems to have been merely providing practical advice and assistance to the proprietor of the business whilst their incumbent advisers dealt with the substantive issues which needed to be finalised.

31. For the avoidance of any doubt, I also do not consider that it is just and equitable to reduce any award because the claimant coded Spider PR with "K" rather than a "B", in so far as that may be alleged. The claimant was not given any instruction to do otherwise and there is no reason to believe that had she been likely requested to amend it, she would not have done so.

32. The second matter relied upon by the respondent is the claimant's failure to adhere to the instructions and procedure document discussed above. Again, I do not consider that this was conduct which renders it just and equitable to reduce any compensation. The instruction did not form part of the claimant's contract of employment and the respondent is unable to provide evidence that she had even received it. Furthermore, the respondent must have known that the claimant was not complying with it long before January 2016 and yet took no action.

33. For these reasons, the claims of constructive dismissal and breach of contract succeed. The question of remedies will be dealt with by the tribunal on 8 June 2018.

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Employment Judge Finlay

Date: 18 April 2018

Sent to the parties on: .....

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For the Tribunal Office