THE INDUSTRIAL TRIBUNALS

CASE REF: 8760/18

CLAIMANT: **Lynsey Wilson**

RESPONDENT: **Praxis Care**

DECISION

The unanimous decision of the tribunal is that the claimant was constructively unfairly dismissed by the respondent. The matter will be relisted for a remedy hearing in the absence of a resolution by the parties.

CONSTITUTION OF TRIBUNAL:

Employment Judge: **Employment Judge Gamble**

Members: **Mrs F Cummins**
Mrs D Adams

APPEARANCES:

The claimant represented herself, and was supported and assisted by her sister, Mrs A. Martin.

The respondent was represented by Mr S. Doherty, Barrister-at-Law, instructed by Worthingtons Solicitors.

BACKGROUND

1. The claimant, who is a qualified social worker, worked at all material times as a Team Leader for the respondent in its Locke House scheme, in Portadown. The respondent is a charity which provides care for vulnerable adults and children with mental health conditions and learning disabilities throughout Northern Ireland.

2. The claimant, as a Team Leader, managed other support workers and also key worked allocated service users within the scheme. Prior to her departure on sickness absence, she was directly line managed by Ms Karen Harding, who was the scheme manager. Ms Harding's line manager was Mary Clarke.

3. The claimant claims she was constructively unfairly dismissed, following a series of occurrences which were set out in detail in her claim form. These were further

amplified and explained in her witness statement and supplementary witness statement.

4. In summary, the claimant complained that during a time when she had been subject to extreme stress in her workplace, she had not been effectively supported and had been subject to instances of bullying by Ms Harding. The claimant was absent from work from 30 June 2016 on grounds of illness and did not return to work before her resignation. During her sickness absence, she was assessed by the respondent's Occupational Health Physician on three occasions. On the final occasion, on 27 April 2017, although the claimant was assessed as fit to return to work, she was described as still experiencing moderate anxiety.

5. During the claimant's sickness absence, both Ms Clarke and Ms Harding had been promoted. Following Ms Harding's promotion on a temporary basis, she was no longer the claimant's direct line manager. A return to work meeting was organised, and Ms Harding was to be present, along with her new line manager (Niamh Nugent). The claimant objected to the presence of Ms Harding, explaining her objections, and requested that if Ms Harding was to be present, that she be afforded support. The respondent stated that it was important that Ms Harding attend the meeting and the claimant's request for the attendance of her trade union representative as support was also declined.

6. Following this, the claimant lodged a grievance by letter dated 23 May 2017 in which she formalised her complaint of bullying and detailed her concerns, including the handling of the return to work meeting. These complaints were explored through grievance meetings. Ms Clarke was appointed to investigate and hear the claimant's grievance.

7. The claimant received a grievance outcome letter dated 17 November 2017.

8. The claimant appealed this outcome. The appeal was heard and considered by David Walsh, a senior manager in a different department with the respondent organisation. The grievance appeal outcome was contained in a letter dated 9 February 2018.

9. The claimant resigned, giving her contractual notice, by letter dated 22 February 2018. Her last day of work was 22 March 2018.

10. The claimant lodged her claim to the Industrial Tribunal on 18 June 2018.

11. The claimant's claims were refuted by the respondent for the reasons which were set out in its response, and in the evidence of its witnesses.

CASE MANAGEMENT

12. The case was subject to Case Management on 5 October 2018, when the case was listed from 5-8 February 2019 (inclusive). At that Case Management Discussion it was directed that the parties respond to any Notices received. In addition, it was ordered that the parties should exchange any document which was relevant to any issue which would be for consideration at the hearing. The matter was further case managed on 31 January 2019, (at which time the claimant was not present, having misunderstood that she was required to attend at Killymeal House in person, rather

than by telephone). At that Case Management Discussion, it was agreed by the respondent's representative that the claimant would be afforded inspection facilities in relation to a class of documents which she had first requested by letter dated 26 October 2018. The correspondence from the respondent, and the representations made at the Case Management Discussion, stated that the respondent had resisted production of this class of documents on grounds of relevance.

13. The disputed documentation was eventually included in the bundle for the tribunal, and much of it was clearly relevant and necessary for the fair disposal of the proceedings. This ought to have been obvious at the outset given the detail included in the claimant's claim form. At the section entitled "Details of claim", the claimant set out nine pages of narrative. Further, at the time of the Case Management Discussion of 31 January 2019, the respondent was in receipt of witness statements from the claimant and Mr Redmond.

14. At that Case Management Discussion, the respondent's Counsel also pursued an application against the claimant for discovery in respect of a 2015 appraisal, which the claimant had requested from the respondent. This appraisal (the first appraisal completed by Ms Harding in respect of the claimant) was eventually produced by the respondent. Following the Case Management Discussion held on 5 February 2019 (the first day of the scheduled hearing), when the claimant indicated that the document had been emailed to Ms Harding, the respondent arranged for the claimant's old email account (on its server, and to which the claimant had no access) to be reactivated and this document, which was therefore within the respondent's possession and control at all material times, was produced to the claimant.

15. Despite the claimant attending the respondent's solicitor's offices for inspection of the documents on Thursday 31 January 2019, and despite a clear written direction from the tribunal that the additional material identified as relevant by the claimant should be served by email by 5pm on Friday 1 February 2019, the additional material was not served until Sunday 3 February 2019 at 18:30. The reason provided by the respondent's solicitor was that advices were sought from Counsel as to "relevance".

16. The claimant became very distressed on the morning of 5 February 2019, which was the first day of the scheduled hearing. She advised the tribunal that further relevant documents (over and beyond those emailed on Sunday 3 February 2019) had been served on her just before the parties were brought into the hearing room.

17. Accordingly, a further Case Management Discussion was held on 5 February 2019 when the claimant's application for a short adjournment was acceded to, given her status as an unrepresented litigant and further in light of the fact that the tribunal was on notice of her vulnerability to stress from the material in the bundle. The claimant was permitted to adduce a further supplementary witness statement to deal with the additional matters which had been discovered to her over the previous weekend and that morning. Accordingly, the hearing did not start until 7 February and then continued on 8, 11 and 13 February 2019.

18. At the Case Management Discussion on 5 February 2019, the respondent's Counsel informed the tribunal that his advice had been sought over the period

1 to 3 February 2019 on "redaction" and not "relevance", contrary to what the tribunal had previously been informed. Of the documents included in the supplementary bundle, a small number of redactions were made. No application was pursued in relation to the nature of these redactions.

19. The claimant also served documentation on the respondent late. The tribunal was informed that she had served documentation on 31 January 2019 (albeit that it was largely documentation which had been provided to her by the respondent on foot of a Subject Access Request made before she brought her claim, and which was referenced throughout her claim form and statement which had been served several weeks before).

20. During the course of the hearing, further documents were discovered, having been referred to by one of the respondent's witnesses, during cross examination and described as "relevant". The claimant also produced further diary extracts from her original diaries.

ISSUES FOR DETERMINATION BY THE TRIBUNAL

21. The parties did not set out a formal statement of legal and factual issues for determination by the tribunal. The issue before the tribunal was whether the claimant had been constructively unfairly dismissed. Accordingly, the tribunal considered whether any of the matters complained of by the claimant, whether taken in isolation or cumulatively (as a last straw), amounted to a repudiatory breach of the contract of employment by the respondent, entitling the claimant to resign.

SOURCES OF EVIDENCE

22. The tribunal considered witness statements and heard evidence from the claimant, James Redmond and Martina Ferris on behalf of the claimant. Mr Redmond and Ms Ferris were colleagues of the claimant. The tribunal also considered a supplementary witness statement from the claimant. The claimant gave oral evidence on the significance of the further discovered documentation at the commencement of the hearing. The claimant was also recalled to give further evidence on 13 February 2019 following the discovery of a further page of the disputed 2016 appraisal (the second appraisal of the claimant by Ms Harding). The tribunal also considered witness statements and heard evidence from Karen Harding (the claimant's line manager and manager of the Locke House scheme before the claimant's departure on long term sick leave), Mary Clarke (Ms Harding's Line Manager and the investigating officer for the claimant's grievance) and David Walsh (Acting Director of Finance and the officer who heard the claimant's appeal against the grievance outcome) on behalf of the respondent. All of the witnesses were cross examined.

23. The tribunal also considered all of the documents within a bundle of documents which had been exchanged between the parties, as well as a supplementary bundle and further documents which were made available during the course of the hearing.

THE HEARING

24. The claimant was permitted to have her sister, Mrs Martin, sit with her. Mrs Martin also questioned the respondent's witnesses on the claimant's behalf, with the agreement of the respondent's representative.

25. The parties delivered oral submissions at the conclusion of the evidence. Both parties lodged written legal submissions which are appended to this judgment, and Counsel for the respondent referred the tribunal to Harvey on Industrial Relations and Employment Law **("Harvey")** on dismissal by the employee. Not all of the authorities set out in the discussion of the relevant authorities were opened to the tribunal, nevertheless some of the authorities considered below in this judgment were before the tribunal as a consequence of being referred to within the relevant section of **Harvey.**

THE POLICY AND PROCEDURAL BACKGROUND TO THIS CASE

26. The respondent maintains a number of relevant policies which were included in the bundle of documents provided to the tribunal, relevant excerpts from which are set out below:

> **"<u>Stress at work policy –</u>**
>
> *5. Praxis Care fully acknowledges that it has the same duty of care for the mental health and well-being of its employees as it does for their safety and physical well-being. It will treat stress in the same way as any other health hazard and assess the risks relating to it. Praxis Care is aware that it has responsibilities under health and safety and disability legislation and that full observance of other discrimination legislation is also necessary to support mental well-being. Praxis Care will act to prevent risks that are reasonably foreseeable, and will make reasonable adjustments where practicable and any recording of information will conform to the latest data protection requirements.*
>
> *6. Praxis care recognises that stress, especially chronic stress, can be a considerable risk to both physical and mental health. … Praxis care is committed to:*
>
> - *identifying potential stressors in the workplace and taking action to reduce risks once identified. …*
>
> *7.* ***Roles - The Manager***
>
> *Managers have a critical role in minimising and managing stress risks… Through the supervision process managers may become aware of stress issues and at this stage they have a responsibility to review workloads, responsibilities and tasks etc and to inform the Human Resources Department for advice on offering support to the employee(s) in question. …*
>
> *As part of the normal management processes, managers are expected to:*
>
> *…*

- *Monitor and review the workloads and working time of employees to ensure that neither becomes excessive.*

- *Manage poor performance and attendance effectively to prevent unnecessary pressures on colleagues and teams. …*

- *Encourage openness of communication especially in regard to work pressures, and not to foster a culture that sees stress as personal weakness.*

- *Seek support from the Human Resources Department if in any doubt about action to take in regard to a stress-related issue. …*

Employees

Stress is not a sign of weakness and anybody at any time may experience stress for a variety of reasons. Employees should not hesitate to seek support if they are experiencing stress or feel that they are at risk of stress. By means of the Praxis Care supervision process employees are afforded the opportunity to discuss with their managers any concerns they may have in relation to their work. Managers have a responsibility to act when any employee states that they are experiencing stress. At this stage managers should review workloads, responsibilities and tasks etc and they should inform the Human Resources Department for advice on offering support to the employee(s) in question."

27. **Anti-Harassment and Bullying Policy**

"2 *….It should be noted that it is the impact of the behaviour which is relevant and not the motive or intent behind it. …*

4 Staff Responsibilities

All staff have a responsibility to help ensure a working environment in which the dignity of staff is respected. … Staff should alert manager to any incident of harassment or bullying to enable this organisation to deal with the matter.

6 The organisation's responsibilities

All complaints of harassment will be dealt with promptly, seriously and confidentially….

2.1.8 Meeting with Anyone who can Assist with the Investigation

The investigating officer and personnel representative (or other representatives) will meet anyone who can assist with the investigation. This may include supervisors and co-workers and may also include anyone who observed the complainant's demeanour immediately before and after the alleged incident(s) or any colleague with whom the complainant discussed the alleged incident(s). Each individual will be asked to outline what happened. …"

The Capability Policy

28. The respondent's Capability Policy set out operating principles, namely that capability procedures were to be used constructively to help and encourage employees to improve; that before any form of action would be taken there would be a thorough investigation into any unsatisfactory performance; and that individuals would be informed of any areas of unsatisfactory performance and given the opportunity to state their case. The first stage of dealing with unsatisfactory performance is the convening of an informal review meeting, where areas of concern are communicated to the member of staff. The employee is told at the start of the meeting that it is a review meeting concerning unsatisfactory performance. This is a separate process from supervision. If performance is still unsatisfactory during the review period, the employee is invited to a formal review meeting. Escalation of the process involves the issuing of a Written Note, followed by a Final Written Note and ultimately termination.

Supervision Policy

29. The respondent's Supervision Policy which was in force during the relevant time (having since been revised) required that a minimum of 10 supervision and mentoring sessions should be carried out in a calendar year. The policy statement within the Supervision Policy states:

> *"Praxis Care is committed to ensuring that staff receive the necessary levels of supervision as detailed within this policy. It is envisaged that supervision will enable staff to carry out their job role better, more comfortably and with less anxiety."*

Supervision applies to all employees within the respondent organisation. Supervision was clearly an integral part of the respondent's operation. The policy notes that a copy of the supervision record is to be kept by the supervisor and supervisee in a locked filing cabinet. The policy also contains a requirement that supervision records should be kept for the duration of an employee's employment and retained for three years before being destroyed.

Managing Attendance Policy

30. The respondent's Managing Attendance Policy sets out that: *"A "Return to Work" interview, between the employee and Manager, will take place on the return to work."*

AGREED FACTS

31. The claimant commenced employment with the respondent in 2011. Prior to the disputed 2016 Appraisal (the second appraisal conducted by Ms Harding), the claimant was in general terms recognised as a dedicated employee who worked hard for the respondent. In her role as a Team Leader, the claimant managed other support workers, as well as key working allocated service users within the scheme. Prior to her departure on sickness absence, she was directly line managed by Ms Karen Harding, who was the scheme manager for the Locke House scheme. Ms Harding's line manager was Mary Clarke.

32. The matters set out below are also common case between the parties:

32.1. Locke House scheme in Portadown, where the claimant worked, was busy and challenging.

32.2. The 2016 Appraisal (the second appraisal of the claimant carried out by Ms Harding) records Ms Harding's criticism of the claimant's time management skills and compared her unfavourably with other staff.

32.3. The claimant was absent from work from 30 June 2016 on grounds of illness and did not return to work before her resignation. Initially, the claimant was certified as unfit to work due to mental and physical exhaustion. A number of Fit Notes certified the cause of her absence as anxiety and depression. During her sickness absence, she was assessed by the respondent's Occupational Health Physician on three occasions. The Occupational Health Physician confirmed on 28 September 2016 that the claimant had "*quite significant anxiety symptoms"* and confirmed that there was "*medical evidence that she has an underlying medical condition related to the work situation*." On the final occasion, on 27 April 2017 the claimant identified a number of factors which had contributed to her workplace stress; namely: demands – understaffing; control; support – lack of this from her direct manager (Ms Harding); Relationships – Difficulties with manager; and change – staff turnover and new service users. At this time, although fit to return to work, the claimant was assessed by the Occupational Health Physician as still experiencing moderate anxiety.

32.4. During the claimant's period of sickness absence, both Ms Clarke and Ms Harding were promoted. Ms Harding was promoted on a temporary basis from Manager of the Locke House Scheme to Head of Operations, Southern Zone. Ms Clarke was promoted to the post of Director of Care in the Republic of Ireland. Following Ms Harding's temporary promotion, she was no longer the claimant's direct line manager. A return to work meeting was organised in May 2017, and it was proposed that in addition to the claimant's current line manager (Niamh Nugent), Ms Harding would also be present. The claimant objected to the presence of Ms Harding, explaining her objections, and requested that if Ms Harding was to be present, that she be afforded support. The respondent stated that it was important that Ms Harding attend the meeting and the claimant's request for the attendance of her trade union representative as support was also declined. The claimant sustained a panic attack on the telephone with Human Resources when advised of Ms Harding's proposed attendance at the meeting.

32.5. Following this, the claimant lodged a grievance by letter dated 23 May 2017 in which she formalised her complaint of bullying and detailed her concerns, including the handling of the return to work meeting. Ms Clarke was appointed to investigate and hear the claimant's grievance. The claimant's complaints were explored through grievance meetings held on 15 June 2017 and 10 August 2017.

32.6. On completion of Ms Clarke's investigation, the claimant received a grievance outcome letter dated 17 November 2017. In the grievance, Ms Clarke upheld just two of the claimant's twenty nine complaints; namely - Ms Harding approving Time Off In Lieu ("TOIL") for the claimant's staff; and Ms Harding not having maintained appropriate contact with the claimant during her period of illness. In her outcome

letter Ms Clarke rejected the claimant's complaint of bullying, concluding *"I can see no evidence of bullying and harassment from your manager Karen Harding."*

32.7. The claimant appealed this outcome on 23 November 2017 and set out her grounds for appeal in a letter dated 1 December 2017. The appeal was heard and considered by David Walsh, a senior manager in a different department with the respondent organisation. The grievance appeal outcome from Mr Walsh was contained in a letter dated 9 February 2018. Mr Walsh upheld one further complaint from the claimant regarding the proposed attendance of Ms Harding at the return to work meeting. Save for that one additional matter, he did not uphold her appeal and did not find her other complaints substantiated.

32.8. Following receipt of this letter, the claimant resigned by letter dated 22 February 2018, giving her contractual notice of one month. Her last day of work was 22 March 2018.

MATTERS OF DISPUTE BETWEEN THE PARTIES

33. Following the conclusion of the evidence, the tribunal considers the following as the main areas of factual dispute between the parties:

33.1. **Capability:** Whether the claimant was, prior to her sick leave, either subject to or intended to be subject to the Capability Policy;

33.2. **Support:** Whether the claimant was appropriately supported by her line manager, Ms Harding, when she reported that she was under extreme stress within the workplace;

33.3. **Supervisions:** Whether the claimant received the minimum number of supervisions during the 2015-2016 reporting cycle;

33.4. **Workload:** Whether Ms Harding allocated additional work to the claimant before she became ill or whether Ms Harding removed work from the claimant during the relevant period;

33.5. **Rota:** Whether the measure of removing rota preparation duties from the claimant was an act of support (as contended by the respondent) or whether it served to undermine the claimant (as contended by the claimant);

33.6. **Agency staff:** Whether agency staff were deployed by Ms Harding to support the claimant when she reported her high levels of stress;

33.7. **Shouting incidents:** Whether Ms Harding shouted at the claimant on two separate occasions, namely:

33.7.1. At her appraisal meeting, when Ms Harding allegedly shouted "*maybe you're in the wrong job!*"; and

33.7.2. At a meeting on 21 June 2016, when the claimant alleges she was shouted at and humiliated in the presence of other staff.

33.8. **The 2016 appraisal:** Whether the content of the 2016 appraisal between the claimant and Ms Harding had been agreed;

33.9. **Return to work interview:** Whether it was Human Resources or Ms Harding who sought Ms Harding's attendance at the return to work meeting; and what the significance of the proposed attendance was;

33.10. **The conduct of the grievance:** Whether the claimant's grievance was investigated in a fair and appropriate manner, and in particular:

33.10.1. **Bias:** Whether Ms Clarke was biased in favour of Ms Harding;

33.10.2. **Consideration of evidence:** Whether Ms Clarke considered relevant evidence which supported the claimant's complaint (arising from James Redmond's resignation and grievance);

33.10.3. **Protracted process:** Whether the grievance process was unduly protracted;

33.10.4. **Reasonable process:** Whether the investigation was a reasonable investigation.

33.11. **The adequacy of the grievance process:** Whether the grievance process provided the claimant a reasonable opportunity for redress of her grievance.

33.12. **The appeal:** Whether the grievance appeal process cured any defect with the grievance process;

33.13. **Addition:** Whether the grievance appeal process added anything to that which went before;

33.14. **Resignation:** Whether the claimant in fact resigned in response to the alleged breach of contract by the respondent; and

33.15. **Breach:** Whether any of the matters (whether in isolation or taken together) relied on by the claimant amounted to a repudiatory breach of contract.

ASSESSMENT OF THE EVIDENCE BY THE TRIBUNAL

34. The tribunal found that there was significant variance on the evidence between the parties.

35. The tribunal found the claimant to be an honest, credible and consistent witness. The tribunal also found both Mr Walsh's evidence to be honest and credible. Ms Clarke's evidence was generally honest and credible during cross examination. However, the tribunal did not find parts of her written statement of evidence to be credible or consistent with aspects of her oral evidence given during cross examination or other evidence which was before the tribunal. The tribunal did not find Ms Harding's evidence to be credible in significant respects. Some examples of the inconsistencies which undermined her credibility are set out further below. At times, she was evasive, seeking to deflect from having to answer questions by responding with questions. Moreover, the tribunal did not find that her claims of having been a supportive manager were supported by the documentary evidence which was before it. Accordingly, in respect of certain matters where there has

been a conflict between the claimant's evidence and Ms Harding's evidence, the tribunal has preferred the evidence of the claimant.

36. One of the documents which was provided as part of the late discovery was the claimant's 2015 appraisal document in respect of the claimant. This appraisal was the first appraisal of the claimant completed by Ms Harding. This document was contained at pages 40 to 59 in the supplementary bundle. This appraisal was completed in positive terms, recognising that the claimant had worked hard during that year. It also noted the significant challenges in the scheme and stated that the claimant found it difficult to complete paperwork on time due to the scheme being so busy. Ms Harding committed herself to working with the claimant through supervision to address this issue, during the following reporting cycle. At pages 60 to 68 of the supplementary bundle the claimant's pro forma preparation for the appraisal was also included. During cross examination, the claimant gave evidence that this pro forma appraisee preparation document had been sent to her line manager. Ms Harding denied receiving this document. Given the provenance of this document, namely that this document was provided by the respondent, following the reactivation of the claimant's work email account, and then recovered from a trawl searching for the email to Ms Harding forwarding the 2015 appraisal (following the case management discussion when the claimant had indicated that the 2015 appraisal was emailed to Ms Harding) the tribunal did not accept Ms Harding's evidence on this point.

37. At paragraph 31 of Ms Harding's statement she made the following claim: *"In relation to the allegation of bullying: I understand this to be repeated abuse or harassment over a considerable period of time. I can state I have worked in a management position for the last 30 years and <u>have never once been accused of such behaviour in the workplace</u>."* (Emphasis added)

38. During the course of the hearing, the tribunal became aware (through the evidence of Mary Clarke) that a grievance, accusing Ms Harding (and Ms Clarke) of bullying, was lodged by another employee, Pauline Heslip, on 29 September 2016, some 9 months prior to the claimant's grievance. In another email that was placed before the tribunal, a reference was made to Ms Heslip having met both Ms Harding and Ms Clarke to discuss the grievance. Further, Mr Redmond also referred to bullying against the claimant in his resignation letter in April 2017 and thereafter formalised his complaint of bullying by letter dated 4 May 2017 following his resignation and was interviewed on 15 June 2017 (the same day as the claimant was also interviewed).

39. The tribunal also noted that although the grievance investigation into the claimant's grievance had upheld the claimant's complaint regarding Ms Harding's approval of TOIL requests (on the basis of Ms Harding's acceptance that there was an issue regarding handling TOIL requests), Ms Harding's statement included the following comment in regard to that matter: *"However, I would like to note that procedurally it is the responsibility of the registered manager to make such decisions based on the needs of the scheme ensuring there is no risk to staff or SUs at any time. Therefore, as I see it, I was actually going above and beyond to attempt to accommodate LW."* This was far from acceptance of the grievance outcome in this regard.

40. At paragraph 39 of Ms Harding's statement she stated as follows: *"LW (the claimant) did complete the rota as part of her duties. My role was to check the rota on a monthly basis to ensure the required contracted level of staff and appropriate skill mix were on shift in order to promote a good level of service. A colleague of LW's namely PH complained that LW had been allocating herself more weekends off than other TLs and produced a document evidencing this. When I reviewed the rota in detail this was confirmed. I discussed this with LW and explained this was not appropriate and that weekend working should be delegated fairly in future. I understand PH also discussed her concerns with LW independently of my conversation with her which LW states was my fault and caused issues between her and her colleagues which was not the case."* (Emphasis added.)

41. During cross examination, Ms Harding conceded that the preparation of the rota was actually the responsibility of the scheme manager, that is, Ms Harding herself.

42. In her statement Ms Harding also made a claim at paragraph 18 that other team leaders with a similar workload were not experiencing the same difficulties with paperwork. She recounted having given the claimant an example of a team leader who worked 24 hours per week and *"still had the same number of SUs to key work as [the claimant] had."* However in cross examination, Ms Harding admitted that the number of service users was actually pro-rated. The omission of the term "pro-rata" from the statement was a material omission which, but for the concession in cross examination, could have misled the tribunal.

43. These issues of credibility with Ms Harding's evidence tainted her evidence and in consequence the respondent's case.

RELEVANT FINDINGS OF FACT IN RELATION TO THE DISPUTED MATTERS SET OUT AT PARAGRAPH 33 ABOVE WITH REASONS

44. It is not necessary for the tribunal to consider each and every complaint raised by the claimant in her grievance in order to make a finding as to whether she has been constructively dismissed.

45. Following its assessment of the evidence, the tribunal makes relevant findings of fact in relation to the series of occurrences as follows:

45.1. **Capability:** The tribunal finds that whilst there were issues regarding the claimant's submission of her paperwork, the claimant was not subject to a formal capability process. The tribunal further finds that the issues with the paperwork were the result of scheme pressures, staff turnover and understaffing. The tribunal does not find that the claimant had been in any way subject to the capability process (whether informal review or formal review), nor does it find that initiation of the Capability Procedure was being contemplated by the respondent prior to the claimant absenting herself on sick leave. The tribunal is satisfied that the capability process had not been initiated. The tribunal accepts the claimant's evidence of Ms Harding mooting the potential for the capability process to be invoked during the appraisal process in April 2016. However, the tribunal finds this is evidence that the claimant was being bullied and threatened rather than supported by Ms Harding.

The reasons for this finding are as follows:

45.1.1. In the 2015 appraisal, which was only furnished at the commencement of the hearing, Ms Harding described the claimant's work on the following terms:

> *"Lynsey has worked hard throughout the last year considering the changes within the staff team both management and support worker level, in what is considered as being a challenging and busy scheme. Lynsey is committed to her role in the development of service provision.*
>
> *There have been numerous changes in the staff team throughout the last year. I feel this has led to difficulties in the management structure and this has impacted on Lynsey's role as a TL. …*
>
> *Lynsey has stated she finds it difficult to complete paperwork on time due to the scheme being so busy. I will work with Lynsey through supervision to put timeframes in place to rectify this process…"*

45.1.2. The evidence in chief on behalf of the respondent was that there were ongoing capability issues and the invoking of the Capability Process was imminent. Ms Harding in her statement said *"I was going to instigate the capability procedure on her return to work <u>if things did not improve."</u>* (Emphasis added.) In cross examination, Ms Harding accepted that she had not consulted with Human Resources as would have been a necessary first step in formally invoking the capability process.

Ms Clarke stated that: *"it was very clear that capability issues had been identified with the claimant's performance and her manager was preparing to take her through a formal capability process."* However, during cross examination she conceded that the invoking of the formal capability process had not been discussed with her during her supervision of Ms Harding.

Further, in her statement, Ms Clarke said: *"I was aware that Karen Harding had some concerns regarding the claimant's work performance/output and had been addressing this."* During cross examination, she was unable to identify what these concerns were. She expressed her view that her own answers to the tribunal could be influenced by the evidence which she had heard from others which had preceded her own.

Ms Clarke further conceded that she had not had cause to consider concerns relating to the claimant, as affecting the scheme operation or safety. She further confirmed that the direction that she had given to Ms Harding, when issues regarding the claimant's paperwork had been raised, was to continue addressing these issues through supervision and appraisal and to provide additional support.

During cross examination Ms Clarke described her reference in her statement to *"the performance issues and upcoming capability process"* as *"badly written"* as she was not aware of a formal capability process being instigated. She then clarified for the tribunal that if she had to write her statement again she would not have used that wording, but would have said merely that Ms Harding was addressing performance issues. She further stated that she was not aware of these issues through her supervision of Ms Harding, but became aware of them through her investigation of the claimant's grievance during 2017.

45.2. **Support:** The tribunal finds that the claimant was not adequately supported when she reported her stress levels to the respondent.

The reasons for this finding are as follows:

45.2.1. The tribunal found no evidence that the respondent had devised or enacted a support plan which was capable of addressing the issues which lay at the heart of the claimant's stress. No such plan was devised during the lengthy period of absence or in anticipation of the claimants' return.

45.2.2. The tribunal did consider the exchange of emails where the claimant had provided details of her outstanding work to Ms Harding. The tribunal also reviewed the exchange of emails between the claimant and Ms Harding which were included at pages 188 to 192 and page 447 to 448 of the bundle. These emails were clearly part of a series of messages. However, they were not presented in that way in the bundle. The tribunal, acting as an industrial jury, finds the emails from Ms Harding to be curt, inappropriate and likely to have increased the claimant's stress levels. On 8 April 2016 Ms Harding requested a list of the claimant's outstanding paperwork so that a structured time management plan could be devised. The claimant responded to this request on 12 April 2016. Her email, which was well structured and detailed, commenced with the words "to do list". The list of outstanding work was lengthy and comprehensively set out. On 14 April 2016 Ms Harding sent the claimant a one sentence email requesting details of what paperwork had been completed from that list by close of play. That email was sent at 14:54. Ms Wilson replied to that email at 21:26 with an update. In her email she advised, amongst other things, that *"I completed a to-do list for each staff member that I supervise so that they are aware of what they can be working on while I'm off, from the list I had created for me and including the extra tasks, and checking the remainder of MDs co-worked files. There are support plans/risk assessments etc in these files that have not yet been signed off by the service users. Is it still my responsibility to get them signed even though I did not complete them? Or is MD better doing it in the circumstances as he had been co-working them during the time they were written?"*

Ms Harding's reply, sent on 15 April 2016, commences with the following: *"In order to manage your workload I suggest <u>you refrain from making to-do lists</u> and concentrate on completing review minutes, support plans and risk assessments."* (Emphasis added). The tribunal does not view this management as supportive, but oppressive.

45.2.3. Further matters set out below, including Ms Harding's conduct of the appraisal meeting and in seeking to address matters in the way she chose to do on 21 June 2016 also support the finding that appropriate support was not provided.

45.2.4. The tribunal finds that the allocation of administrative days to the claimant could potentially have supported the claimant, however in the circumstances of this case this measure did not amount to the provision of adequate support. The tribunal accepts the claimant's evidence was that she was frequently unable to avail of these due to staff shortages and TOIL requests.

45.3. **Supervisions:** The tribunal further finds that Ms Harding did not conduct the minimum number of supervisions during the year ending with the 2016 appraisal, as required by the Supervision Policy.

The reasons for this finding are as follows:

45.3.1. The tribunal makes this finding having heard the evidence of both the claimant and Ms Harding, preferring the evidence of the claimant. The tribunal is persuaded by the absence of records for the disputed supervisions. During cross examination, Ms Harding suggested that the claimant must have retained the supervision records. (This allegation, which was not contained in Ms Harding's statement, was never put to the claimant during cross examination.) The tribunal was entirely unimpressed with this suggested reason for their non-availability. Ms Harding, as scheme manager, was responsible for retaining paperwork. Even if the tribunal is in error in respect of this finding of fact, it remains the case that Ms Harding did not arrange extra supervisions beyond the minimum to support the claimant. This fact undermines her evidence that she supported the claimant.

45.4. **Workload:** The tribunal finds that the claimant was allocated additional service users during a time she was reporting difficulties.

The reasons for this finding are as follows:

45.4.1. Ms Harding also gave evidence that the claimant was only key working 6 service users in April 2016. The claimant's evidence was that she was responsible for 11 service users at that time. This was reflected in the "Reviews" section of the supervision document dated 4 April 2016, which included 4 additional service users who had been added to the claimant following a team leader meeting on first of March 2016. During cross examination, Ms Harding went as far as to suggest that all 31 service users within the scheme ought to have appeared on the claimant's supervision record. The tribunal preferred the claimant's evidence, although the tribunal accepts that a number of service users were reallocated as recorded in the email exchange in April 2016 between Ms Harding and the claimant.

45.5. **Rota:** The tribunal finds that the removal of the rota duties from the claimant was not a measure of support, but undermined the claimant before her peers.

The reasons for this finding are as follows:

45.5.1. Ms Harding cited the removal of responsibility for rota preparation from the claimant as a measure of support. The claimant was clear during her cross examination that whilst this measure could have been supportive, it was not intended to be so at the time. She gave evidence that this measure came about in the context of a complaint by a fellow Team Leader, Pauline Heslip, about perceived unfairness in rota allocation of weekends. As such, the claimant contended that the measure was not intended to be supportive, but served to undermine her with her colleagues. The tribunal prefers the evidence of the claimant on this point.

45.6. **Agency staff:** The tribunal finds that the respondent did not engage agency staff to ease pressure on claimant when she reported her stress.

The reasons for this finding are as follows:

45.6.1. Ms Harding gave evidence that she had recruited agency staff during staff shortages before the claimant went on long-term sick leave. However, Ms Clarke gave oral evidence that she had allowed Ms Harding to use agency staff as a result of the grievance. The tribunal prefers the evidence of Ms Clarke on this point.

45.7. **Shouting incidents:** The tribunal finds that the claimant was shouted at on the two occasions she complained of; once at the appraisal meeting and further at a meeting with other staff. The tribunal is of the view that a serious deterioration in the claimant's relationship with Ms Harding occurred following the supervision meeting in April 2016. This was compounded by the appraisal in April 2016.

45.7.1. The tribunal finds that Ms Harding did say to the claimant *"maybe you're in the wrong job".* Further, on the balance of probabilities, the tribunal finds that Ms Harding raised her voice when the phrase was stated. The tribunal cannot be certain whether the phrase was stated at the appraisal meeting in April 2016, as asserted by the claimant, or on 27 June 2016 as asserted by Ms Harding.

The reasons for this finding are as follows:

45.7.1.1 The claimant alleged that Ms Harding had shouted *"Maybe you're in the wrong job"* during the appraisal meeting. Ms Harding's statement gave an account of an exchange on 27 June 2016 when she suggested to the claimant that if she *"was so unhappy perhaps the [team leader] role was not for her".* In the grievance outcome letter at page 253 of the bundle, Ms Clarke noted that *"KH acknowledged that the appraisal which was conducted was difficult… I believe that a discussion did take place in relation to your career path and whether this was the right role for you, however that you may have initiated this and questioned your future…."* On an assessment of the all of the evidence, and given the other inconsistencies in the respondent's case, the tribunal prefers the claimant's evidence on this point.

In the context of an employee who was reporting extreme levels of stress, such a comment by a manager was neither supportive nor appropriate.

45.7.2. The tribunal finds that on 21 June 2016, Ms Harding did shout at the claimant in front of her colleagues.

The reasons for this finding are as follows:

45.7.2.1. The claimant and Mr Redmond both gave evidence of what occurred on 21 June 2016, when the claimant's case is that she was confronted by Ms Harding in the presence of her peers and humiliated about matters which she was not to blame for. Mr Redmond also confirmed his account in his grievance letter.

45.8. **The 2016 appraisal:** The tribunal finds that the content of the 2016 Appraisal added by the appraiser (Ms Harding), in which Ms Harding was very critical of the claimant, was not agreed. The appraiser's comments record that 10 out of 12 supervisions took place. The tribunal has found at paragraph 45.3 above that this was not the case. Further, the appraiser comments record that the claimant was only key working 6 service users at the time of the appraisal. This is contrary to the tribunal's findings at paragraph 45.4 above.

The reasons for this finding are as follows:

45.8.1. The tribunal prefers the evidence of the claimant on this issue. The tribunal also notes that the document was not signed off by either party. The tribunal has found

45.9. **Return to work interview:** The tribunal finds that it was Ms Harding who proposed her attendance at the return to work meeting. Ms Harding's evidence was that her attendance was proposed by Human Resources.

The reasons for this finding are as follows:

45.9.1. The tribunal considered that the email exchange on pages 200-201 of the bundle evidenced that it was Ms Harding (and not Human Resources) who put forward the suggestion that she should attend, following receipt of an email enclosing an Occupational Health report dated 27 April 2017 in respect of the claimant. Ms Harding also clarified for the tribunal that she had read this Occupational Health report in respect of the claimant attached to one of the emails in the exchange at the time of this email.

45.9.2. Ms Harding's proposed attendance, following her consideration of the content of the Occupational Health report dated 27 April 2017, was both contrary to the terms of the Managing Attendance Policy and completely inappropriate in the circumstances. That report detailed that the claimant felt unsupported by her line manager and that she had difficulties with her line manager. This was a reference to Ms Harding. Whilst the tribunal accepted that the report indicated that she would need to discuss these issues with management, the tribunal, acting as an industrial jury, finds that a return to work meeting was not an appropriate forum for exploring these issues. There should have been a separate meeting to explore mediation, as the claimant gave evidence she had been willing to explore. The proposal for the line manager to attend when the Occupational Health report records that the claimant had been scored as moderate for anxiety was clearly not prudent. Her need for additional support through the process is also documented in that Occupational Health report. The decision to deny her the support of being accompanied by her trade union representative in those circumstances was therefore unreasonable.

45.10. **The conduct of the grievance:** The tribunal finds that the investigation of the claimant's grievance was not investigated in a fair and appropriate manner.

The reasons for this finding are as follows:

45.10.1. **Bias:** Ms Clarke did appear biased towards Ms Harding. The role of Ms Clarke was compromised by the email of 7 June 2017 (sent before the claimant had

ever been interviewed in relation to her grievance). Ms Clarke's evidence was that she did not discuss *the detail* of the claim with Ms Harding. However, the email from Ms Harding to Ms Clarke dated 7 June 2017 commenced as follows: *"Hi Mary, In relation to the grievance made by Lynsey Wilson TL Thomas St, Portadown on the 23 May 2017 I state the following."* The email contained a denial of bullying, an assertion that she had maintained contact during her period of sickness absence, as well as the following claim: *"I can evidence this through both the supervision and appraisal records I have kept since 15 January 2015 as I feel the records indicate that I have tried my best to support Lynsey through the capability process by both reducing her workload and offering her a mentoring role to support her to manage her work tasks including her paper submission which did create a professional issue between Lindsay and myself, however I felt we had resolved through discussion."* (Emphasis added) the email contained a further defence of Ms Harding's interactions with the claimant. The email even included an account of her intentions in being present at the return to work meeting.

This email does not sit easily with Ms Clarke's role as the investigating officer. It creates an impression of bias in favour of Ms Harding and undermines any appearance of impartiality and independence on the part of Ms Clarke. The tribunal were troubled by how this email came to be sent to Ms Clarke, especially as Ms Clarke had not at that time met with the claimant for the initial grievance meeting.

Ms Clarke's evidence around this point was extremely inconsistent. She stated that she had no recollection of receiving the email, and then later advised that she had "disregarded" it. It is difficult to understand how Ms Clarke could disregard that which she claimed to have no recollection of receiving. Moreover, Ms Clarke then stated that she had had to enquire from Ms Harding recently as to what the email was about.

45.10.2. **Consideration of evidence:** Ms Clarke did not consider relevant evidence which supported the claimant's complaint (arising from James Redmond's resignation and grievance).

Ms Clarke gave an account of interviewing Mr Redmond about the specific incident referenced by him in his resignation and grievance, where he asserted that the claimant had been humiliated in his presence and the presence of others. However, Mr Redmond's evidence was that he was not interviewed about this incident. The tribunal preferred Mr Redmond's evidence on this point as the interview notes, prepared by Stephen Trueick (who was acting as minute taker), which were provided in the supplementary bundle at pages 1 to 13 confirm that there was no discussion of the incident as part of the investigation of Mr Redmond's grievance. The notes commence with the following: *"explained purpose of today + only to deal with points in relation to you - not what he believed about others".* This corroborates Mr Redmond's account on this issue, namely that he was not interviewed about the issues relating to the claimant.

Ms Clarke was also the investigating officer in respect of Mr Redmond's grievance. During the hearing she was directed to a handwritten note (at page 193 of the bundle). This handwritten note which was made by Mr Redmond recorded the incident referenced above. During cross examination Ms Clarke

was specifically asked whether she considered the handwritten note in the context of her investigation of the claimant's grievance, she replied that she didn't think she did refer to it and that she had tried to keep the two grievance meetings separate.

James Redmond was not interviewed. Ms Clarke, as investigating officer, could have and should have interviewed Mr Redmond as a witness. The organisation still had his address and Ms Clarke could easily have sought to make contact with him, especially as it had an ongoing investigation arising from his grievance complaint. It would have been very straightforward for Human Resources to write to Mr Redmond and seek his assistance as a witness.

45.10.3. **Protracted process:** The tribunal finds that in the circumstances of a grievance which raised 29 specific incidents and 65 issues, the grievance process was not unduly protracted.

45.10.4. **Reasonable process:** The tribunal finds that the investigation was not a reasonable investigation. Ms Clarke admitted during cross examination that Supervision and appraisal documentation had not been reviewed by her. The investigation did not review relevant records which would have been easily accessible or seek information beyond Ms Harding's direct account of her dealings with the claimant.

The basis for upholding the two points which were upheld as part of the grievance was that these were conceded by Ms Harding. The limited grievance outcome finding in the claimant's favour did not, in these circumstances, satisfy the tribunal that the grievance process was reasonable or adequate.

Ms Clarke as Investigating Officer did little more than rehearse Ms Harding's account as her finding. This rehearsal of Ms Harding's account resulted in Ms Harding's assertion that there were capability issues being included in the grievance outcome. Ms Harding did wrongly advise Ms Clarke in the context of the grievance investigation, as detailed in the email dated 7 June 2017 that the claimant was currently subject to a formal capability process. This claim, which was not accurate, was reflected in the grievance outcome, which included an assertion that "*KH (Ms Harding) advises that she had capability concerns in relation to you*" and that the presence of Ms Harding at the return to work meeting was to ensure that the claimant's new manager would be aware of *"ongoing capability issues".*

The tribunal finds the claimant would understandably have been taken aback by the content of the grievance outcome letter relating to alleged capability issues. This was a matter she raised at appeal.

45.11. **The adequacy of the grievance process:** In light of the above findings, the tribunal further finds that the grievance process did not afford the claimant reasonable opportunity for redress of her grievances.

45.12. **The appeal:** The tribunal finds that the appeal did not cure the defects with the grievance investigation. The appeal outcome, whilst it did uphold the complaint regarding Ms Harding's proposed attendance at the return to work meeting, did not cure the fundamental flaws from the earlier grievance process. Further, at

page 292 of the bundle, in the appeal outcome letter Mr Walsh wrote: *"James Redmond (JR) has already been interviewed regarding this incident as part of his original grievance and Karen was asked about the incident also."* Mr Walsh's statement also includes this assertion, following confirmation that he had referred to existing investigation minutes. During cross examination, he admitted that he had not had sight of Stephen Trueick's notes which were contained at pages 1 to 13 of the supplementary bundle. Instead, he was provided with the handwritten note, attached to Mr Redmond's grievance (which was not considered by Mary Clarke in relation to the claimant's grievance or Mr Redmond's grievance as set out at paragraph 45.10.2 above). If, as he had stated in the appeal outcome letter, he had reviewed the investigation minutes, it should have been obvious that there were no formal minutes in respect of the purported interview with James Redmond.

45.13. **Addition:** The tribunal finds that the grievance appeal outcome *did* add to what had gone before, because the claimant did not receive redress and because the investigation defects were not cured, but rather were compounded. The tribunal also finds that the appeal outcome letter also contributed to the breach of contract by the respondent in another respect. The claimant was aware at the time she received the appeal outcome letter that it contained a material inaccuracy, in that, contrary to the tenor of that letter, Mr Redmond had not been interviewed in relation to his allegation about the claimant having been bullied. The claimant gave oral evidence during cross examination that she had been in contact with Mr Redmond around the time she received the grievance outcome letter in November 2017, and had asked him whether he'd been spoken to about the incident. The claimant was therefore in a position to fully appreciate the extent to which the statement by David Walsh in the appeal outcome letter that *"James Redmond has already been interviewed regarding this incident as part of his original grievance"* was untrue.

45.14. **Resignation:** The tribunal finds that the claimant did resign in response to a culmination of the matters set out above. The respondent's representative suggested to the claimant that she did not resign in response to a breach of contract, but because she was frustrated with her job. He referred her to her comments in the 2016 appraisal. The tribunal accepts the claimant's evidence that she did not wish to leave her job, and that she loved her job. In the tribunal's view, if this had not been the case, she would have resigned at a much earlier stage, rather than pursuing the grievance and appeal processes. The expression during the 2016 appraisal of her dissatisfaction with the state of affairs which pertained, and her querying in a rhetorical way her choice of career, do not support the conclusion that the claimant had reached a settled conviction to pursue a change of career, as suggested by the respondent's representative. The 2016 appraisal records that she felt frustrated in her post (page 183) as well as documenting in some detail her issues. She recorded (at page 185) that she felt unhappy in her role and that she was merely "*considering looking for jobs elsewhere*". (Emphasis added.) She immediately qualifies this statement with *"however I would miss the service users with whom I work."*

45.15. **Breach:** The tribunal finds on an application of the relevant law that the matters set out above do amount to a breach of contract, which was repudiatory in nature.

THE RELEVANT LAW

Constructive Dismissal – Statutory Provisions

46. The Employment Rights (Northern Ireland) Order 1996 ("the Order") provides:

> *"Article 127. – (1) for the purposes of this Part an employee is dismissed by his employer if … - (c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct.*
> *…"*

Legal Principles

47. **Harvey** states at Division D1 at 403 as follows:-

> "In order for the employee to be able to claim constructive dismissal, four conditions must be met:
>
> (1) There must be a breach of contract by the employer. This may be either an actual breach or an anticipatory breach.
>
> (2) That breach must be sufficiently important to justify the employee resigning, or else it must be the last in a series of incidents which justify his leaving. Possibly a genuine, albeit erroneous, interpretation of the contract by the employer will not be capable of constituting a repudiation in law.
>
> (3) He must leave in response to the breach and not for some other, unconnected reason.
>
> (4) He 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".

48. If the employee leaves in circumstances where these conditions are not met, he will be held to have resigned and there will be no dismissal within the meaning of the legislation at all.

49. In **Pedersen v Camden London Borough Council** *[1981] IRLR 173*, *[1981] ICR 674*, Lawton LJ distinguished three separate issues which may arise in determining whether there is a constructive dismissal or not:

(i) what are the terms of the contract of employment?

(ii) did the facts as found by the tribunal constitute a breach of contract by the employer? and

(iii) was that breach a fundamental breach of contract?

50. The Court of Appeal accepted that the first question was one of law, but it took the view—and the point was conceded by counsel on both sides—that questions (ii) and (iii) were essentially questions of mixed law and fact.

51. In **Western Excavating (ECC) Ltd v Sharp [1978] 1 All ER 713; [1978] IRLR 27 CA** the test for constructive dismissal whether the employer had acted in breach of contract in a way which entitles the employee to resign, rather than whether the employer has acted unreasonably. However, **Brown v Merchant Ferries Limited [1998] IRLR** the Northern Ireland Court of Appeal noted that *"That simple dichotomy can however be misleading because if the employer's conduct is seriously unreasonable that may provide sufficient evidence that there has been a breach of contract."*

RELEVANT LAW ON IMPLIED CONTRACTUAL TERMS

The duty of trust and confidence

52. In ***Malik v Bank of Credit and Commerce International SA*** *[1997] IRLR 462*, *[1997] ICR 606* the implied term of trust and confidence was held to be as follows:

> *"The employer shall not without reasonable and proper cause conduct itself in a manner calculated and likely to destroy or seriously damage the relationship of confidence and trust between employer and employee."*

Lord Steyn stated that:-

> *"The implied obligation as formulated is apt to cover the great diversity of situations in which a balance has to be struck between an employer's interest in managing his business as he sees fit and the employee's interest in not being unfairly and improperly exploited."*

53. **Harvey** continues at paragraph 430:

> **"**In *Baldwin v Brighton and Hove City Council [2007] IRLR 232*, *[2007] ICR 680* the EAT had to consider the issue as to whether in order for there to be a breach the actions of the employer had to be calculated and likely to destroy the relationship of confidence and trust, or whether only one or other of these requirements needed to be satisfied. The view taken by the EAT was that this use of the word 'and' by Lord Steyn in the passage quoted above was an error of transcription of the previous authorities, and that the relevant test is satisfied if either of the requirements is met ie it should be 'calculated or likely'. One important result of this is that, as 'likely' is sufficient on its own, it is not necessary in each case to show a subjective *intention* on the part of the employee to destroy or damage the relationship, a point reaffirmed by the EAT in *Leeds Dental Team Ltd v Rose [2014] IRLR 8, EAT*. As Judge Burke put it:
>
> > *"The test does not require a Tribunal to make a factual finding as to what the actual intention of the employer was; the employer's subjective intention is irrelevant. If the employer acts in such a way, considered objectively, that his conduct is likely to destroy or seriously*

damage the relationship of trust and confidence, then he is taken to have the objective intention spoken of…""

54. Counsel for the respondent conceded that the test in **Malik** is now recognised as being properly stated as *"calculated or likely".* In **Rice v Dignity Funerals Ltd [2018] NICA 47** the Northern Ireland Court of Appeal concluded that there had been no failure to apply the appropriate **Malik** test, which the tribunal summarised as *"an implied term in the employment contract that the employer will not conduct itself in a manner likely to damage the relationship of trust and confidence between the employer and employee."*

55. The test for breach of the implied duty of trust and confidence is an objective one. The duty of trust and confidence may be undermined even if the conduct in question is not directed specifically at the employee. The duty may be broken even if an employee's trust and confidence is not undermined. It also follows that there will be no breach simply because an employee subjectively feels that such a breach has occurred, no matter how genuinely this view is held. In **Buckland v Bournemouth University Higher Education Corporation [2010] EWCA Civ 121; [2010] IRLR 445** the Court of Appeal held that the question of whether the employer has committed a fundamental breach of the contract of employment is not to be judged by a range of reasonable responses test. The test is objective: a breach occurs when the proscribed conduct takes place. Further, a repudiatory breach is not capable of being remedied so as to preclude acceptance. The wronged party has an unfettered choice of whether to treat the breach as terminal, regardless of his reason or motive for so doing. All the defaulting party can do is to invite affirmation by making amends. In that case, the Court of Appeal also wrestled with the question of whether a constructive unfair dismissal could be for a fair reason.

> *"46 I have mentioned the mismatch between constructive dismissal and the statutory unfairness test. One only reaches s.98(4) through the gateway of s.98(1) and (2). The latter of these includes in the qualifying reasons for dismissal a reason which relates to the capability or conduct of the employee. It may legitimately be said that the reason for the repudiatory conduct of the university in undermining Professor Buckland's position as an examiner related to his capability and conduct in the role.*
>
> *47 But how does one decide, pursuant to s.98(4), whether the university acted reasonably in treating this as a sufficient reason for dismissal? Since the university did not consciously either dismiss Professor Buckland or therefore treat anything as a sufficient reason for doing so, the question makes little sense. One has to make sense of it by translating it into the question whether the university behaved reasonably in undermining his status. So posed, the question answers itself, for the university could not intelligibly seek to justify something it said it had not done."*

56. **Morrow v Safeway Stores plc [2002] IRLR 9** established that a breach of the implied duty of trust and confidence is always repudiatory. In that case, the a manager's actions in criticising an employee in public in the manner in which he did amounted to a breach of the implied term in the appellant's contract that the employer should maintain her trust and confidence.

THE DUTY OF CO-OPERATION

57. **Harvey** states at paragraph 462:

> *"The duty not to undermine the trust and confidence in the employment relationship could arguably be subsumed under a wider contractual duty which is imposed on the employer, namely to* co-operate *with the employee."*

Further at paragraph 464:

> *"Another specific aspect of the duty to co-operate is the obligation on the employer to provide a satisfactory working environment to enable the employee to carry out his work properly. In Graham Oxley Tool Steels Ltd v Firth [1980] IRLR 135 the employee left after working for up to two months in a temperature of 49°F. It was held that the failure to provide a proper environment was here so grave and of such a duration that it amounted to a fundamental breach of contract entitling the employee to leave and claim for unfair dismissal."*

58. **Associated Tyre Specialists (Eastern) Ltd v Waterhouse [1976] IRLR 386, [1977] ICR 218** established that there is an implied term in the employment contract that an employee is entitled to management's support in carrying out the employer's policy.

THE DUTY PROMPTLY TO REDRESS GRIEVANCES

59. In **W A Goold (Pearmak) Ltd v McConnell [1995] IRLR 516** the EAT accepted that there was an implied term in the contract of employment *'that the employers would reasonably and promptly afford a reasonable opportunity to their employees to obtain redress of any grievance they may have'.* (Emphasis added.) This requires not only prompt access to a grievance procedure, but for the operation of that grievance procedure to be reasonable and offer a reasonable opportunity of redress to the aggrieved employee.

60. The Northern Ireland Court of Appeal in **Lindsay Knox v Henderson Retail Ltd [2017] NICA 17** considered the proposition that a tribunal was not entitled to look behind or beyond a grievance process at the matters which led to its initiation. The Court of Appeal rejected that proposition stating:

> *"As to logic, the adequacy of the grievance process necessarily involved an examination of the alleged matters giving rise to the grievance. Otherwise the tribunal would be deprived of the context required to enable it to assess the sufficiency of the grievance process including its conduct and outcome."*

Although this authority was not opened to the tribunal by either party, the legal principle set out above should not be controversial.

THE DUTY TO PROVIDE A SUITABLE WORKING ENVIRONMENT

61. In **Waltons and Morse v Dorrington [1997] IRLR 488** the EAT held that it was an implied term of the contract of employment that *'the employer will provide and monitor for his employees, so far as is reasonably practicable, a working*

environment which is reasonably suitable for the performance by them of their contractual duties'. **Harvey** states that the obligation *"*may even extend to creating a working environment which is not psychologically damaging to the welfare of employees, such as one where bullying or harassment occurs." (Para 471)

62. The Health and Safety at Work (Northern Ireland) Order 1978 imposes a general duty on employers "to ensure, so far as is reasonably practicable, the health, safety and welfare at work of all his employees" and for the "provision and maintenance of a working environment for his employees that is, so far as is reasonably practicable, safe, without risks to health, and adequate as regards facilities and arrangements for their welfare at work."

THE LAST STRAW

63. In **Kaur v Leeds Teaching Hospitals NHS Trust [2018] EWCA Civ 978, [2018] IRLR 833,** Underhill LJ approved the following passages of Dyson LJ in **Omilaju v Waltham Forest London Borough Council [2005] EWCA Civ 1493, [2005] IRLR 35, CA***:*

> *''15. The last straw principle has been explained in a number of cases, perhaps most clearly in* Lewis v Motorworld Garages Ltd [1985] IRLR 465, [1986] ICR 157. *Neill LJ said (p 167C) that the repudiatory conduct may consist of a series of acts or incidents, some of them perhaps quite trivial, which cumulatively amount to a repudiatory breach of the implied term of trust and confidence.*
>
> *Glidewell LJ said at p 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? … This is the 'last straw' situation."*
>
> *16. Although the final straw may be relatively insignificant, it must not be utterly trivial: the principle that the law is not concerned with very small things (more elegantly expressed in the maxim "*de minimis non curat lex*") is of general application ….*
>
> *19. The quality that the final straw must have is that it should be an act in a series whose cumulative effect is to amount to a breach of the implied term. I do not use the phrase "an act in a series" in a precise or technical sense. The act does not have to be of the same character as the earlier acts. Its essential quality is that, when taken in conjunction with the earlier acts on which the employee relies, it amounts to a breach of the implied term of trust and confidence. It must contribute something to that breach, although what it adds may be relatively insignificant.*
>
> *20. I see no need to characterise the final straw as "unreasonable" or "blameworthy" conduct. It may be true that an act which is the last in a*

series of acts which, taken together, amounts to a breach of the implied term of trust and confidence will usually be unreasonable and, perhaps, even blameworthy. But, viewed in isolation, the final straw may not always be unreasonable, still less blameworthy. Nor do I see any reason why it should be. The only question is whether the final straw is the last in a series of acts or incidents which cumulatively amount to a repudiation of the contract by the employer. The last straw must contribute, however slightly, to the breach of the implied term of trust and confidence. Some unreasonable behaviour may be so unrelated to the obligation of trust and confidence that it lacks the essential quality to which I have referred. (Emphasis added.)

21. If the final straw is not capable of contributing to a series of earlier acts which cumulatively amount to a breach of the implied term of trust and confidence, there is no need to examine the earlier history to see whether the alleged final straw does in fact have that effect. Suppose that an employer has committed a series of acts which amount to a breach of the implied term of trust and confidence, but the employee does not resign his employment. Instead, he soldiers on and affirms the contract. He cannot subsequently rely on these acts to justify a constructive dismissal unless he can point to a later act which enables him to do so. If the later act on which he seeks to rely is entirely innocuous, it is not necessary to examine the earlier conduct in order to determine that the later act does not permit the employee to invoke the final straw principle."

IS THE BREACH FUNDAMENTAL?

64. Once a tribunal has established that a relevant contractual term exists and that a breach has occurred, it must then consider whether the breach is fundamental. Where an employer breaches the implied term of trust and confidence, the breach is inevitably fundamental **(Morrow v Safeway Stores plc 2002 IRLR 9, EAT)**. A key factor to be taken into account in assessing whether the breach is fundamental is the effect that the breach has on the employee concerned.

65. The employee must resign in response to the breach. In **Wright v North Ayrshire Council [2014] IRLR 4**, at paragraph 20 of the judgment it states:-

> *"Where there is more than one reason why an employee leaves a job the correct approach is to examine whether any of them is a response to the breach, not to see which amongst them is the effective cause."*

66. In **Western Excavating (ECC) Ltd v Sharp [1978] 1 All ER 713; [1978] IRLR 27 CA**, it was pointed out that an employee must make up his mind regarding resignation soon after the conduct of which he complains. If he continues for any length of time without leaving, he will lose his right to treat himself as discharged from the contract. However, where there is no fixed period of time within which the employee must make up his mind, a reasonable period is allowed. This period will depend on the circumstances of the case including the employee's length of service, and whether the employee has protested against any breach of contract.

67. In **Mari (Colmar) v Reuters Ltd UKEAT/0539/13 (30 January 2015, unreported)** Judge Richardson reviewed case law on the issue of whether receipt of sick pay over an extended period will amount to an affirmation of the contract. He held that

there is no simple rule of law as to whether receipt of sick pay is or is not a neutral factor; noting that ultimately, each case will depend on its own particular facts.

68. **Harvey at paragraph 523.01** states on the authority of **W E Cox Toner (International) Ltd v Crook [1981] IRLR 443, [1981] ICR 823** *"Even where there is a breach, the employee may choose to give the employer the opportunity to remedy it. The employee will not then be prejudiced if he delays resigning until the employer's response is known."*

69. **Air Canada v Lee [1978] IRLR 392, [1978] ICR 1202** established that the employee will be entitled to a reasonable period to decide whether to leave or not. **Cockram v Air Products plc [2014] IRLR 672, EAT** Simler J held that the tribunal had not erred in finding that the claimant in that case had affirmed his contract in giving more than contractual notice. She further held that under the English equivalent of Art. 127(1)(c), the fact of giving notice does not by itself constitute affirmation. This is a limited variation of the common law position to allow only for the giving of notice.

THE PARTIES' SUBMISSIONS

70. In considering the issues before it, the tribunal has had due regard to the oral and written submissions of the parties on both the evidence and the law. The oral submissions are summarised below.

The Respondent's submissions

71. The respondent's representative was critical of what he described as the diffuse manner in which the claimant had presented her case. He contended that the main question for the tribunal to address itself to was *"Why did the claimant resign?"*

72. He submitted that the reason for that resignation had not been the staff shortages at the scheme, as the claimant had not resigned in 2016. He further contended that the respondent accepts that Locke House was a difficult scheme, with service users who had complex and demanding needs. His contention was that this is a part of the nature of this work. Whilst he accepted that these matters could cause difficulties, he contended that this was the reason that social work is regarded as a vocation.

73. The respondent's representative contended that the claimant did not resign in response to the incident on 21 June 2016, when the claimant alleged that she had been shouted at and humiliated in the presence of her peers. He noted that notwithstanding what had gone before the claimant was still preparing to return to work in 2017. He referred the tribunal to paragraph 48 of the claimant's witness statement, suggesting that on a fair reading of this, there were more significant events which caused her to resign. He suggested that on the claimant's case, it was from the point of the return to work meeting that the claimant's respect and confidence in the respondent began to falter.

74. On the respondent's representative's submission, whilst he accepted that sensible people would disagree about the requirement to have Ms Harding attend the return to work meeting, he cited the content of the Occupational Health report in April 2017 which opined that the claimant's return to work was dependent on meeting with

management to resolve the outstanding workplace issues. On his submission, the return to work meeting was an opportunity to address these matters.

75. He further contended that it had been recognised by Mr Walsh in the grievance appeal outcome that common sense would have said that Ms Harding should not have been present at that meeting.

76. He further submitted that Ms Harding's proposed attendance did not in any event constitute a breach of contract, because there was no provision in the contract which stated that Ms Harding could not attend. He further contended that her proposed presence at that meeting was not calculated to destroy trust and confidence. In addition, he contended that it was not likely to destroy trust and confidence, given that the claimant had been absent for one year. In his submission, it was not foreseeable that the claimant would have suffered a panic attack as a reaction to this proposal, albeit that the respondent's representative accepted that this was a genuine reaction. The respondent's representative invited the tribunal to consider the matter from the employer's perspective and suggested that the respondent had allowed an appropriate period of time for the claimant to recover and that she had been found medically fit to return to work. He suggested that the purpose of Ms Harding's attendance was to provide reassurance around changes and not to berate and criticise the claimant.

77. The respondent's representative contended that even if the tribunal disagreed with him in relation to the proposed attendance of Ms Harding at the meeting, that the claimant did not resign at that time. Further, in his submission, the appeal outcome from Mr Walsh had cured that issue, with the consequence that even if the claimant had lost trust in the respondent following that meeting, the appeal outcome would have served to restore the claimant's trust and confidence.

78. In noting that the claimant's resignation followed the grievance appeal outcome, the respondent's representative contended that the claimant had delayed too long.

79. In relation to the length of time taken to hear and respond to the claimant's grievance complaint, the respondent's representative accepted that the process had been prolonged. In his submission, this is not uncommon generally and that in this particular case it was unsurprising given the number of allegations made by the claimant which required to be investigated.

80. The respondent's representative suggested that the tribunal should view the claimant's case as suggesting only that the grievance process was drawn out and not sufficiently thorough, but not that the process was a sham. He emphasised to the tribunal that Ms Clarke had upheld two of the claimant's grievances and that Mr Walsh had upheld a further complaint on appeal. He contended that the grievance process did not need to be carried out to a criminal standard. He suggested that the claimant's complaint about the grievance process was driven by her disappointment at not being vindicated.

81. In relation to the incident on 21 June 2016, the respondent's representative suggested that this was a matter of interpretation as to whether this amounted to bullying. He noted that Ms Harding had accepted that she was direct and he conceded that she was undoubtedly confrontational. He invited the tribunal to find that even if voices had been raised, this demonstrated nothing more than

Ms Harding's frustration that paperwork had not been completed. He characterised this as having happened in the heat of the moment. He invited the tribunal to consider whether this constituted bullying, and in so doing he suggested that the test was not a reasonableness test, having accepted that it would have been more reasonable for that exchange to have occurred on a one to one basis. In any event, the respondent's representative suggested that the claimant did not resign as a result of that incident, or those which occurred before.

82. The respondent's representative accepted that the discovery process had been unsatisfactory. He contended that the lack of paperwork supporting the disputed supervisions did not mean that those supervisions did not take place. He noted that Ms Harding had asserted that the claimant had taken the relevant records. He again suggested that her resignation was not in response to the supervision issue. He further contended that she had not resigned in relation to staffing shortages, accepting that the claimant had *"to her credit persevered".*

83. The respondent representative addressed the duty to provide a suitable working environment for the claimant. He noted that the claimant was prepared to return to work. All of the difficulties which were identified, had been identified before the claimant departed on sick leave. On the respondent's representative's submission, the workplace was challenging and difficult, but remained suitable.

84. The respondent's representative noted that the claimant had resigned following receipt of the grievance outcome. He asked the tribunal to consider what had the grievance outcome added to what had gone before. He contended that the grievance appeal process by Mr Walsh amounted to a thorough process, where he had sought additional evidence from two other staff members through Human Resources, who had told him they could not be contacted.

85. He further submitted that even if Mr Walsh had been provided with the grievance minutes of Mr Redmond's grievance, he would have gained nothing, as he accepted that there was no reference to the claimant in the minutes of that interview. He further noted that Mr Walsh had considered the one-page handwritten account (which had formed part of Mr Redmond's grievance) and that his interpretation had remained that the claimant had not been bullied.

86. The respondent's representative contended that there had been no serious breaches of contract in this case. He suggested that a trivial breach was not enough. He further contended that the claimant had not resigned in response to the matters complained of and that the real reason for her resignation had been disclosed in her appraisal, namely that she did not see her long-term future in that job.

87. The respondent's representative then considered the respondent's own policies. He suggested that a matter amounting to a breach of those policies would not suffice to allow the claimant to succeed.

88. He suggested that Ms Harding had been entitled to challenge the claimant regarding uncompleted paperwork and pose the question to the tribunal, *"so what if she raised her voice?"* He suggested that even if the claimant felt bullied, without trivialising her feelings or the impact upon her, he submitted that this would not prove constructive unfair dismissal, as it was not a subjective test. He reminded the

tribunal that in accordance with his legal submissions, the matter would have to be considered objectively.

The claimant's submissions

89. Mrs Martin on behalf of the claimant submitted that the respondent had breached an implied term of the contract to provide a safe and suitable working environment for the claimant. She asserted that adjustments were not made to deal with the claimant's recorded concerns of stress, which were having a detrimental effect on the claimant's well-being. She suggested that the respondent was aware of the pressures on the scheme and had put nothing in place to support the welfare of staff, even when these had been raised by the claimant.

90. She contended that after those concerns were raised, the claimant's workload had been increased. She suggested that it did not matter whether this had been temporary or otherwise. She further contended the claimant had been subject to greater scrutiny regarding her performance and ability following having raised these complaints.

91. She noted that references to the support which had been given to the claimant had been described in terms of capability performance. She contended that the respondent had failed to apply its own stress at work policy. She recognised that the respondent was seeking to rely on supervisions as having supported the claimant. She drew the tribunal's attention to the dispute as to the frequency of the supervisions.

92. Mrs Martin further contended that an action plan was to have been developed by Ms Harding, and that this had not been done. She contended that additional steps which could have been taken were not taken quickly to address general issues arising from pressures on the scheme. In particular, she asserted that there was no evidence of recruitment of additional staff or use of agency staff before the tribunal. She further noted Ms Clarke's evidence that agency staff had been utilised only after the grievance process.

93. She suggested that other support mechanisms were not explored when the claimant complained of stress, for example a referral to Occupational Health.

94. She further contended that the claimant had been subject to bullying behaviour prior to her sickness absence. Thereafter, she asserted that the claimant's allegations of bullying were not pursued in accordance with the relevant policies which stated *"all complaints will be dealt with promptly, seriously and confidentially".* She drew attention to the failure to follow up Mr Redmond's allegation that the claimant had been subject to bullying, and asserted that there had been no follow-up in relation to another employee, IC.

95. Mrs Martin further submitted that there had been a breach of confidentiality in relation to the claimant's grievance, given that it was clear from the evidence before the tribunal that Ms Harding had heard about the claimant's grievance from Ms Clarke in advance; notwithstanding that Ms Clarke was to be the investigating officer. She suggested that the sending of the email by Ms Harding and the content of the email showed that Ms Harding had been asked for her version before the grievance hearing had even taken place. She contended that this called into

question the independence of Ms Clarke. She further suggested that Ms Clarke should at that time have considered recusing herself from the investigation, and that this had not happened.

96. She suggested that there had been no thorough investigation into the events of 21 June 2016, when she alleged she had been shouted at and humiliated in the presence of her peers. She contended that Ms Clarke had had an opportunity to gain information from Mr Redmond, but that the minutes of their interview showed that it hadn't even been discussed. Thereafter, no arrangement was put in place to contact him.

97. She further contended that the grievance process was insufficient as the grievance outcome merely recounted what Ms Harding had said, and that no further information had been considered.

98. In relation to the appeals process, Mrs Martin submitted that this had relied heavily on the word of Ms Harding and the original grievance outcome, and had failed to review the original documentation for verification of evidence, even though the claimant had said that the grievance had failed to consider matters and had even suggested where further evidence could be found. She submitted that Mr Walsh had failed to review documentation, had placed reliance on the grievance outcome letter which had issued to Mr Redmond, and had failed to review the investigation minutes which would have revealed that Mr Redmond had not been interviewed in relation to the claimant. Mrs Martin highlighted that Mr Walsh had stated in evidence that he considered himself to be investigating the matter afresh, and in that context suggested that the failure to review was more significant.

99. Mrs Martin contended that the claimant had loved the work she was doing, but not necessarily the environment. She asserted that the claimant had been prepared to return when Ms Harding was no longer her line manager. She contended that the claimant's references to considering leaving in the appraisal reflected her frustration.

100. In relation to the question of delay, Mrs Martin submitted that the claimant had deliberated over her decision for a little over a week, which was not unreasonable given the magnitude of the decision she was making.

101. She contended that the resignation was due to a series of events following which the claimant had felt she could no longer rely on the respondent, given the deteriorated relationship of trust and confidence and suggested that the respondent could not be trusted to look after her well-being.

102. Mrs Martin also highlighted the significance of the return to work meeting, asserting that Human Resources had insisted the claimant attend a return to work meeting with her alleged bully. She contended that this bullying was within their knowledge from Mr Redmond's resignation. She highlighted the significance of Ms Harding having requested to be in attendance. She contended that even when the situation was explained to the respondent, they had insisted that Ms Harding would have to be present and that the claimant would not be entitled to be accompanied by her trade union representative.

103. The claimant also took the opportunity to make a number of additional submissions. She emphasised to the tribunal that it was after the appeal outcome letter that she felt that her trust in the respondent was finally gone.

104. The claimant also drew attention to the significance of the minutes of Mr Redmond's grievance meeting, which were only provided at the very last minute. She asserted that before those minutes were produced, she had only been able to rely on what she had been told by Mr Redmond when she had been in contact with him. She emphasised the significance of the discrepancy between what was actually discussed in Mr Redmond's grievance meeting, compared to what was recorded in his grievance outcome, where it was asserted that his allegations regarding the claimant had been investigated, but not upheld.

105. The claimant further contended that there were additional failures by Mr Walsh during the grievance appeal process, in particular his failure to review the other documentation, to ascertain the truth of Ms Harding's account.

106. In relation to the issue of her reason for resigning, the claimant submitted that her 2016 appraisal recorded that she was considering looking for other employment elsewhere and that this was a result of her environment not being conducive to her well-being. She contended that the wording of that appraisal should not be interpreted as recording an intention to leave immediately.

107. The claimant further acknowledged that it was positive that some of the matters raised by her in her grievance complaint had been upheld. Notwithstanding this, she contended that the way the grievance process had been conducted as a whole did not restore her trust and confidence.

APPLICATION OF THE LAW TO THE FINDINGS OF FACT

108. The tribunal, on the basis of the findings of fact listed at paragraph 45 above, finds that the conduct complained of by the claimant amounted to a series of actions on the part of the employer which cumulatively amounted to a repudiatory breach of contract. The last act in the series of matters complained of which caused her resignation was the content of the grievance appeal outcome letter dated 9 February 2018. That letter taken in the context of all that preceded it exceeded the test of potentially being "relatively insignificant" as set out in **Kaur** above. The conduct complained of by the claimant, taken cumulatively, was sufficiently serious as to entitle the claimant to resign and further, the tribunal find that she did in fact resign in response to those actions, within a reasonable period and without delay. Following the completion of the grievance and appeal process, the tribunal finds that the claimant could have no confidence that the breach of the duty to provide the claimant with a satisfactory working environment would not recur or that she would receive adequate support and co-operation in the future. It is not surprising that following this course of events the claimant felt she had no alternative but to resign. The tribunal find that she was justified in doing so.

109. The terms of the contract which were breached were: (i)the implied term of trust and confidence; (ii)the duty to co-operate; (iii)the duty to provide a suitable working environment; and (iv)the duty to deal with grievances reasonably and promptly.

Implied term of trust and confidence

110. The findings at paragraph 45 above further ground the conclusion that those matters, taken cumulatively and viewed objectively, were likely to destroy or seriously damage the relationship of trust and confidence with the respondent, as per **Leeds Dental.** In relation to its finding at paragraph 45.7 above that Ms Harding shouted at the claimant on two occasions, the tribunal does not accept the submission of the respondent's representative that this was within the bounds of managerial prerogative. Rather, this sits squarely with the facts in **Morrow** and amounted to a repudiatory breach of the implied duty of trust and confidence. The claimant was not immediately in a position to address this with the respondent organisation due to her illness. The delay between this occurrence is not fatal in these particular circumstances in light of her intervening incapacity, her decision to seek redress per her contractual right and because of the contribution of the later breaches which are entirely consistent with the last straw doctrine, set out at paragraph 63 above.

The duty to co-operate

111. The failure to provide the minimum number of supervisions, arrange additional supervisions and establish a proper measured support plan for the claimant also constituted a breach of the implied duty to co-operate with the claimant. As noted above, this conduct formed part of a series of actions.

The duty to provide a suitable working environment

112. The findings in relation to the lack of appropriate action to support the claimant and alleviate the stress she was reporting amounted to a breach of the respondent's own Stress at Work Policy, as well as a breach of the implied contractual obligation to provide a suitable working environment.

The duty to deal with grievances reasonably and promptly

113. The tribunal has found above that the delays in completing the grievance process did not amount to a breach of the implied term to deal with grievances promptly. However, the tribunal has also found that the grievance process did not afford the claimant reasonable opportunity for redress of her grievance, and this finding amounts to a breach of the implied term in that regard.

114. In light of its finding that there was no undue delay in completing the grievance or appeal processes given the breadth and complexity of the issues raised by the claimant, the tribunal does not find that there was a breach of the Labour Relations Agency Code of Practice. Accordingly, no uplift pursuant to the Industrial Relations (Northern Ireland) Order 1992 (as amended) is warranted. However, the grievance investigation did not adhere to the standards of the respondent's own Anti-Harassment and Bullying Policy.

Conclusion

115. The tribunal finds that the conduct of the respondent was likely to destroy or seriously damage the relationship of trust and confidence with the claimant. This is

by its nature repudiatory. The tribunal finds that the claimant resigned in response to this conduct.

116. The tribunal does not accept the respondent's representative's contention that the claimant did not resign quickly enough or that she did not resign in response to the breach. The claimant chose to exercise her contractual right to seek redress of her complaints through the grievance procedure and appeal. Accordingly, she was reserving her position following the lengthy period of incapacity. Her conduct during the grievance process was an attempt to remedy the breach in accordance with the terms of her contract, as per **W E Cox Toner (International) Ltd v Crook [1981] IRLR 443, [1981] ICR 823.** The elapse of time between some of the individual instances complained of, the earliest of which occurred in 2016, is not fatal to the claimant's claim in circumstances where these incidents were not the last straw relied upon by the claimant, but merely one of a number in a series of breaches, which were added to by subsequent events, in the form of the proposed conduct of the return to work meeting and the conduct of the grievance and appeal processes.

117. The claimant therefore succeeds in her claim for constructive unfair dismissal.

REMEDY

118. The claimant provided a schedule of loss. The respondent's representative stated that although it was not agreed, it was not unreasonable.

119. However, the tribunal had not sufficient information before it which vouched the claimant's ongoing loss to allow a remedy to be calculated. A further remedies hearing will be convened if the parties are unable to agree the claimant's losses.

Employment Judge:

Date and place of hearing: **7, 8, 11 and 13 February 2019, Belfast.**

Date decision recorded in register and issued to parties:

IN THE OFFICE OF THE INDUSTRIAL TRIBUNALS
AND THE FAIR EMPLOYMENT TRIBUNAL

BETWEEN:

Lynsey Wilson

CLAIMANT

AND

Praxis Care

RESPONDENT

WRITTEN SUBMISSIONS ON BEHALF OF THE RESPONDENT

Legal Submissions

CONSTRUCTIVE DISMISSAL

1. Article 127(1)(c) of the Employment Rights (Northern Ireland) Order 1996 (hereinafter referred to as the '1996 Order') states:-

> "1. For the purposes of this Part an employee is dismissed by his employer if (and, subject to paragraph 2(2) ... only 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".

The Four Elements Of The Test For Constructive Dismissal

2. This is usually referred to as constructive dismissal. In any clam for constructive dismissal there are four essential elements for a Tribunal to consider. Harvey at Division D1 paragraph 403 sets out those conditions as follows:-

    a. There must be a breach of contract by the employer. This may be either an actual breach or an anticipatory breach.

    b. That breach must be sufficiently important to justify the employee resigning, or else it must be the last in a series of incidents which justify his leaving.

    c. He must leave in response to the breach and not for some other, unconnected reason.

    d. He 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.

Contractual or Reasonableness Test?

3. The test in a constructive dismissal case is a contractual test and not a reasonableness test (Western Excavating (ECC) Ltd v Sharp [1978] 1 ALL ER 713). Therefore, the question is not whether the employer has acted reasonably but rather whether the employer acted in breach of contract in such a way that entitles the employee to resign and treat herself as dismissed.

2. It is however accepted that it would be incorrect to suggest that the reasonableness of the behavior of the employer, or indeed the employee, is entirely irrelevant. The Court of Appeal, in the case of Brown v Merchant Ferries Limited [1998] IRLR 682 at paragraph 18 stated that:

"that simple dichotomy can however be misleading because if the employer's conduct is seriously unreasonable that may provide sufficient evidence that there has been a breach of contract."

4. In the case of Courtaulds Northern Spinning Ltd v Sibson [1987] ICR 329 the EAT stated:

"Reasonable behaviour on the part of the employer can point evidentially to an absence of a significant breach of a fundamental term of the contract; conversely wholly unreasonable behaviour may be strong evidence of a significant repudiatory breach. Nevertheless it remains true that conduct, however reprehensible, may not necessarily result in a breach of a fundamental term of the contract."

5. The crucial point is that in a constructive dismissal claim therefore remains whether or not the employer is adjudged to have acted in a manner that amounts to a breach of a fundamental term of the contract of employment. That breach must then be so serious, so fundamental, that an employee can resign in response to the breach and claim unfair dismissal by reason of constructive dismissal.

The Implied Term of Trust and Confidence

6. In every contract of employment there is an implied term of mutual trust and confidence. The said term was set out by the House of Lords in Mahmud & Malik v Bank of Credit and Commerce [1997] IRLR 462. Lord Steyn at paragraph 54 formulated the term in the following manner:

"The employer shall not without reasonable and proper cause conduct itself in a manner calculated and likely to destroy or seriously damage the relationship of confidence and trust between employer and employee."

7. It is however submitted that the use of the word "*and*" in the context of the passage "*calculated and likely to destroy..*" is an error of transcription. Harvey at Division D1 paragraph 430 cites the case of Baldwin v Brighton and Hove City Council [2007] ICR 680, [2007] IRLR 232 as support for the proposition that the test is satisfied if the actions of an employer are calculated **or** likely to destroy or seriously damage the relationship of confidence and trust.

8. Further assistance as to what amounts to a breach of the implied term can be found at paragraph 14 of Lord Steyn's speech wherein he asserted:

"*The conduct must, of course, 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.*".

Grievance Proceedings and Constructive Dismissal

9. The case of Kaur v Leeds Teaching Hospitals NHS Trust [2018] EWCA Civ 978 involved a claim of constructive dismissal. The Claimant resigned after a disciplinary process that lead to her receiving a final written warning. The Claimant argued that she had not been treated properly from the start of the disciplinary process as she argued the investigation process, witness statements and other parts of the investigation were flawed. At paragraph 75 Underhill LJ stated:

*"In short, I believe that the Judge was right to find, as he did at para. 25, that what occurred in this case was "the following through, in perfectly proper fashion on the face of the papers, of a disciplinary process". **Such a process, properly followed, or its outcome, cannot constitute a repudiatory breach of contract, or contribute to a series of acts which cumulatively constitute such a breach**. The employee may believe the outcome to be wrong; but the test is objective, and a fair disciplinary process cannot, viewed objectively, destroy or seriously damage the relationship of trust and confidence between employer and employee."* [Emphasis Added]

10. By analogy it is submitted that neither a grievance process that is properly followed, nor the outcome of that grievance can constitute a repudiatory breach of contract, or contribute to a series of acts which cumulatively constitute such a breach.

The Nature of the Breach

11. Even if there has been a breach or breaches, that is far from the end of examination. The breaches must be repudiatory in order to allow a Claimant to treat the employment contract as at an end, see Hutchings v Coinseed Ltd [1998] IRLR 190. In fact the

breach must on an objective analysis go to the very root of the contract, see Mayer v British Broadcasting Corporation [2004] All ER (D) 34 (Nov), EAT.

The "Last Straw" Doctrine

12. In cases where an employee does not leave in response to a single incident, or a single breach of contract, but instead resigns in response to a series of incidents, the final incident that causes the employee to resign may in itself not amount to a repudiatory breach. However, when viewed against a background of the previous 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' that causes the employee to terminate a deteriorating relationship.

13. In the case of Lewis v Motorworld Garages Ltd [1985] IRLR 465, [1986] ICR 157, CA, Glidewell LJ expressly commented that:

"... 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?"

14. However, it was made clear by the English Court of Appeal in the case of Omilaju v Waltham Forest London Borough Council [2005] EWCA Civ 1493, [2005] IRLR 35, that although the final act may not be blameworthy or unreasonable it had to contribute something to the breach even if relatively insignificant. If, therefore, the "last straw" did not contribute anything to the earlier series of acts it was not necessary to examine the earlier history.

Sean Gerard Doherty
Counsel for the Respondent
Instructed by Worthingtons
8th February 2019

IN THE OFFICE OF THE INDUSTRIAL TRIBUNALS
AND THE FAIR EMPLOYMENT TRIBUNAL

BETWEEN:

Lynsey Wilson

CLAIMANT

AND

Praxis Care

RESPONDENT

WRITTEN SUBMISSIONS ON BEHALF OF THE CLAIMANT

Legal Submissions

CONSTRUCTIVE DISMISSAL

1. Article 127(1)(c) of the Employment Rights (Northern Ireland) Order 1996 (hereinafter referred to as the '1996 Order') states:-

> "1. For the purposes of this Part an employee is dismissed by his employer if (and, subject to paragraph 2(2) ... only 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".

Duty of Care

2. Health and Safety at Work (Northern Ireland) Order 1978:
General duties of employers to their employees
F94 .—F10F11F12
(e) the provision and maintenance of a working environment for his employees that is, so far as is reasonably practicable, safe, without risks to health, and adequate as regards facilities and arrangements for their welfare at work.

The Implied Term: Duty of Trust and Confidence

3. In every contract of employment there is an implied term of mutual trust and confidence. The said term was set out by the House of Lords in Mahmud & Malik v Bank of Credit and Commerce [1997] IRLR 462. Lord Steyn at paragraph 54 formulated the term in the following manner:

"The employer shall not without reasonable and proper cause conduct itself in a manner calculated and likely to destroy or seriously damage the relationship of confidence and trust between employer and employee."

*"In Malik their Lordships rejected three suggested limitations to the scope of duty. **Firstly**, they held that the trust and confidence may be undermined even although the conduct in question is not directed specifically at the employee." (Harvey, paragraph 431)*

*"**Third**, their Lordship held that this term may be broken even if subjectively the employee's trust and confidence is not undermined in fact. It is enough that, viewed objectively, the conduct is likely to destroy or seriously damage the trust and confidence." (Harvey, paragraph 433)*

4. It is however submitted that the use of the word "*and*" in the context of the passage "*calculated and likely to destroy..*" is an error of transcription. Harvey at Division D1 paragraph 430 cites the case of Baldwin v Brighton and Hove City Council [2007] ICR 680, [2007] IRLR 232 as support for the proposition that the test is satisfied if the

actions of an employer are calculated **or** likely to destroy or seriously damage the relationship of confidence and trust.

5. In Leeds Dental Team Ltd v Rose [2014] IRLR 8, EAT, Judge Burke stated;
"The test does not require a Tribunal to make a factual finding as to what the actual intention of the employer was; the employer's subjective intention is irrelevant. If the employer acts in such a way, considered objectively, that his conduct is likely to destroy or seriously damage the relationship of trust and confidence, then he is taken to have the objective intention spoken of ..."

The Implied Term: Duty of Co-operation and/or Support

6. *"The duty not to undermine the trust and confidence in the employment relationship could arguably be subsumed under a wider contractual duty which is imposed on the employer, namely to co-operate with the employee. Indeed, in Malik v BCCI [1997] IRLR 462, [1997] ICR 606, HL Lord Steyn commented that this was probably the origin of the term. An example of this, extending to an implied obligation to support the employee, can be seen in Associated Tyre Specialists (Eastern) Ltd v Waterhouse [1976] IRLR 386, [1977] ICR 218... The EAT accepted that it was a term of her contract that she was entitled to management's support in carrying out the employer's policy." (Harvey, paragraph 462).*

"Another specific aspect of the duty to co-operate is the obligation on the employer to provide a satisfactory working environment to enable the employee to carry out his work properly." (Harvey, paragraph 464).

The Implied Term: Duty to Provide a Suitable Working Environment

7. *"In Waltons and Morse v Dorrington [1997] IRLR 488 the EAT (Morison J presiding) articulated an important new general implied term in the context of employment... The EAT held that it was an implied term of the contract of employment that 'the employer will provide and monitor for his employees, so far as is reasonably practicable, a working environment which is reasonably suitable for the performance by them of their contractual duties... It may even extend to creating a working environment which is not*

psychologically damaging to the welfare of employees, such as one where bullying or harassment occurs." (Harvey, paragraph 471).

The Implied Term: Duty Promptly to Redress Grievances

8. *"In W A Goold (Pearmak) Ltd v McConnell [1995] IRLR 516 the EAT (Morison J presiding) accepted that there was an implied term in the contract of employment 'that the employers would reasonably and promptly afford a reasonable opportunity to their employees to obtain redress of any grievance they may have'. This is arguably merely a specific manifestation of the general duty of co-operation referred to above, but it is potentially an important application of it in the employment context." (Harvey, paragraph 466)*

The Nature of the Breach

9. *"This term not to undermine the trust and confidence is of potentially wide scope. It can extend to extremely inconsiderate or thoughtless behavior. For example, refusing to investigate complaints promptly and reasonably is capable of falling into this category (see British Aircraft Corpn v Austin [1978] IRLR 332, which can probably best be explained as a breach of this term)." (Harvey, paragraph 434).*

"Other conduct which might involve a breach of this duty will include serious breaches of the employer's internal disciplinary and grievance procedures, at both original and appeals stages (Blackburn v Aldi Stores Ltd [2013] IRLR 846, EAT). More generally in the employment context, there may be a breach through failing to give an employee reasonable support to enable him to carry out the duties of his job without disruption or harassment from fellow workers (Wigan Borough Council v Davies [1979] IRLR 127 [1979] ICR 411, EAT)... undermining the position of a supervisor by upbraiding him in the presence of his subordinates; reprimanding in a degrading, intimidating or humiliating manner (Hilton International Hotels (UK) Ltd v Protopapa [1990] IRLR 316; Wetherall (Bond St W1) Ltd v Lynn [1978] 1 WLR 200, [1977] IRLR 333)... Moreover, a failure properly to investigate allegations... or to treat such incidents with sufficient gravity will constitute a breach of this term (see Bracebridge Engineering Ltd v Darby

[1990] IRLR 3)." (Harvey, paragraph 436). [Removal of words 'of sexual harassment' from last sentence].

The "Last Straw" Doctrine

10. In cases where an employee does not leave in response to a single incident, or a single breach of contract, but instead resigns in response to a series of incidents, the final incident that causes the employee to resign may in itself not amount to a repudiatory breach. However, when viewed against a background of the previous 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' that causes the employee to terminate a deteriorating relationship.

11. In the case of Lewis v Motorworld Garages Ltd [1985] IRLR 465, [1986] ICR 157, CA, Glidewell LJ expressly commented that:

"... 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?"

Lynsey Wilson
Claimant
16th February 2019