



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4111380/2021

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Held by Cloud Video Platform on 3-6 May 2022

Employment Judge Sangster

Ms L Bulloch

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Claimant
Represented by:
Mr G Heron -
Lay Representative

South Lanarkshire Council

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Respondent
Represented by:
Mr S O'Neill -
Solicitor

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

20 The judgment of the Tribunal is that the claimant's complaint of unfair dismissal does not succeed and is dismissed.

REASONS

Introduction

1. The claimant presented a complaint of constructive unfair dismissal.
- 25 2. The respondent denied that the claimant was unfairly dismissed.
3. The claimant gave evidence on her own behalf and led evidence from:
 - a. Marie Feeney (**MF**), Social Worker employed by the respondent; and
 - b. Kirsty Roy (**KR**), Social Worker employed by the respondent.
4. The respondent led evidence from:
 - 30 a. Gail Robertson (**GR**), Personnel Officer for the respondent;
 - b. Michelle McConnachie (**MM**), Service Manager Adults and Older People for the respondent;

- c. Julie Stewart (**JS**), Adult Support and Protection Lead Officer for the respondent;
- d. Caroline Murray (**CM**), Personnel Officer for the respondent; and
- e. Andrea Tannahill (**AT**), Service Manager Adults and Older People for the respondent.
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5. The parties agreed a joint bundle of documents extending to 452 numbered pages, and a supplementary bundle extending to 136 pages, in advance of the hearing. An agreed chronology and cast list were also lodged by the parties.
- 10 6. At the outset of the hearing the respondent's representative requested that the hearing be restricted to liability only for the following reasons:
- a. The respondent received a report from the claimant 2 weeks prior to the final hearing in relation to pension loss, prepared by a third party. There was no notice from the claimant prior to this that they intended to instruct an expert report in relation to pension loss and the respondent has not been able to have their own experts review the terms of the report, and to provide comments, prior to the commencement of the hearing.
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- b. The claimant has not complied with the order issued by Employment Judge Bradley on 2 December 2021 in relation to remedy. While a schedule of loss has been produced by the claimant, the claimant has not provided to the respondent the following details, nor the supporting documentation, all as required by the order:
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- i. Details of any benefits received;
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- ii. A summary of jobs applied for;
- iii. Details of any interviews attended or jobs obtained;
- iv. Details of any income whether from temporary, casual or permanent employment or self-employed work; or

- v. Details of any other efforts made by the claimant to minimise her loss.
7. Taking these points into account, as well as the fact that the claimant had not made any arrangements for the author of the pension report to attend the Tribunal to give evidence, the Tribunal confirmed that the hearing would be restricted to liability only, it being in accordance with the overriding objective to do so.

Issues to be Determined

8. Was the claimant dismissed, i.e.
- a. Did the respondent breach the implied duty of trust and confidence by, without reasonable and proper cause, conducting itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between it and the claimant?
 - b. If so, did the claimant affirm the contract of employment before resigning?
 - c. If not, did the claimant resign in response to the respondent's conduct?
9. The claimant relied upon a course of conduct, from around January 2020, including:
- a. The disciplinary process, which she stated was vindictive, unfounded or unsupported by evidence;
 - b. The involvement of the police;
 - c. The key allegation in the disciplinary process being that the claimant caused the deaths of the service users;
 - d. The claimant's final written warning being extended; and
 - e. The content of, and comments made by JS during, a training session on 23 March 2021, which was the final straw.

10. If the claimant was dismissed, what was the principal reason for dismissal, was it a potentially fair one in accordance with sections 98(1) and (2) of the Employment Rights Act 1996 (**ERA**); and, if so, was the dismissal fair or unfair in accordance with s98(4) ERA.

5 **Findings in Fact**

11. The Tribunal found the following facts, relevant to the issues to be determined, to be admitted or proven.

12. The claimant's employment with the respondent commenced on 28 June 1995. She was latterly employed by the respondent as Social Work Team Leader. In that role she supervised, and was line manager for, a number of Social Workers, including MF and another social worker Sime Keswa (**SK**).

13. The claimant's role as Social Work Team Leader was regulated by SSSC and, as such, both the claimant and the respondent required to comply with SSSC's Code of Practice.

14. The Adult Support and Protection (Scotland) Act 2007 (the **Act**) gives Councils, and in particular Social Work Services, lead responsibility for inquiring into and investigating the circumstances of adults at risk of harm. The respondent has defined procedures to support social work staff to comply with the Act (the **ASP Procedures**). The ASP Procedures set out the procedures to be followed where there are 'Adults at Risk', as defined by the Act. Section 3(1) of the Act defines adults at risk as individuals, aged 16 years and over, who:

- a. are unable to safeguard their own well-being, property, rights or other interests;
- b. are at risk of harm; and
- c. because they are affected by disability, mental disorder, illness or physical or mental infirmity, are more vulnerable to being harmed than adults who are not so affected.

This is known as the three point criteria. All three elements of the three point criteria must be met. The ASP Procedures set out 9 key stages which must be followed, whatever the nature of the adult protection concern, until it is clear that the adult either does not meet the three point criteria and is not therefore an 'Adult at Risk', or that they no longer do so. The 9 key stages are as follows: raising a concern; referral process; inquiry process; planning meeting; investigation; case conference; protection planning; monitoring and reviewing; and closing and recording the adult protection process.

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15. On or around 5 December 2019, in accordance with the respondent's normal practice to audit a number of cases each month, with one being picked at random from each Team Leader, Laura Arthur (**LA**), Social Work Fieldwork Manager, audited a case which the claimant was responsible for. She noted that an ASP referral in relation to the service user had been closed within two days of receipt, on the basis that the service user did not meet the three point criteria. LA disagreed with this assessment. She noted that the ASP referral had been made by the Home Care team who were concerned that the service user, who had dementia, was declining personal care, was not engaging with support and was refusing meals and medication. There were also concerns that her skin may breakdown as a result of poor personal hygiene. LA concluded that those risks had not been adequately investigated or addressed prior to the closure of the ASP referral. In LA's opinion, it was clear that the service user met the three point criteria and was an Adult at Risk, so the ASP Procedures remained applicable. LA also felt there was a lack of multi-agency engagement in the inquiry stage.
 16. LA asked the claimant to re-open the case under the ASP Procedures and to arrange a multi-agency planning meeting, for the case to be discussed. That planning meeting was arranged for 23 December 2019.
 17. In January 2020, following a Care Inspectorate report which was critical of the respondent, particularly in respect of their Home Care provision within Adult Support and Protection (**ASP**), LA conducted a review of ASP referrals. During the review she identified an ASP referral, relating to a male service user, which the claimant had closed the day after the referral was made,

indicating that no further input was required by Social Work under ASP Procedures. The service user had subsequently died. LA's view, from reviewing the referral and the respondent's case records, was that the three point criteria were met at the time of the ASP referral and the service user was an Adult at Risk. The service user was wheelchair dependant and had mental health and substance misuse issues. He had used his emergency alert alarm 26 times in November 2019. The ASP referral was made by the Home Care team as he was declining support and had informed his carer that he wanted to end his life. An ambulance was called on the day the ASP referral was made, as the service user had been drinking excessively, had jaundice and was vomiting blood. LA's opinion was that the case ought not to have been closed. She felt the risks identified within the ASP referral had not been mitigated before the case was closed, so significant concerns remained.

18. In relation to the female service user, the multi-agency meeting which had been arranged for 23 December 2019 did not take place. It was cancelled on the day of the meeting by the claimant, as one of the attendees could not attend. No steps were taken to rearrange the meeting. While the claimant did take annual leave over the festive period and into January 2020, she was working on 23, 24 & 27 December 2019 and 6-9 and 20-23 January 2020 inclusive. On 23 January 2020 at 14:01, LA sent an email to the claimant stating that she could not see the minutes for the planning meeting on the respondent's system. She requested a copy and confirmation of the outcome. She also asked if a significant occurrence form had been completed, given that the service user had passed away, and requested a copy of that also. The claimant responded at 16:31 stating '*Just found them signing and will get uploaded.*' When LA further chased the claimant, as she could still not see the minutes on the respondent's system, the claimant informed LA that the minutes she had found in fact related to a different service user. She stated no meeting had taken place on 23 December 2019 in relation to the female service user as LA had requested, no steps were taken to rearrange this and no significant occurrence form had been prepared by the claimant as she had been unaware, prior to LA's email, that the service user had passed away.

19. On 23 and 24 January 2020, LA submitted significant occurrence forms in relation to the service users, in relation to their deaths and raising concerns that the ASP Procedures were not followed in each case.
20. On 24 January 2020 the claimant attended a meeting with Scott McNeil (Service Manager) and a representative from the respondent's HR Department. The claimant was informed that a review of ASP cases had been conducted and that 2 cases she was responsible for, where the service users had died, had been highlighted in the review. She was advised that the police had been notified of the cases. This is the normal procedure where an adult dies suddenly, or when they are deemed to be an Adult at Risk at the time of their death. The claimant was informed that a fact find investigation would be carried out in relation into her alleged failure to follow ASP Procedures in the two cases. She was informed that she would be given alternative duties to undertake whilst the investigation was ongoing. She was provided with details of the Employee Support Team.
21. The SSSC were informed of the allegations against the claimant, in accordance with the respondent's obligations to do so.
22. The claimant did not attend her relocated workplace. Instead, she commenced a period of long term absence from work due to work related stress.
23. On 31 January 2020, GR received a Dignity at Work complaint submitted by the claimant, which was dated 23 January 2020. The complaint arrived in the internal mail. On receipt, GR wrote the date of receipt on the top right hand corner of the first page, namely '31/1', with her initials. The complaint related to the actions of the claimant's line manager, Elaine O'Neill (**EO**). It was not linked, in any way, to the circumstances being investigated in the fact find investigation. GR discussed the complaint with the claimant on receipt and the claimant agreed that it should be addressed following the conclusion of the fact find investigation. Given this agreement, GR simply filed the complaint, pending the conclusion of the fact find investigation. She did not

discuss it with EO, as she was aware that that would be the role of the investigating officer, when subsequently appointed.

24. On 17 February and 27 April 2020, the claimant attended fact finding interviews conducted by CM. The claimant was accompanied by her trade union representative. A note taker was also present.
25. CM conducted a full and thorough fact find investigation. During the course of her fact find investigation, CM also interviewed LA, MF and SK. She reviewed the ASP referrals, the significant occurrence forms, the records on the respondent's internal electronic case files (SWIS) in relation to each individual, the claimant's training and annual leave records and other relevant evidence provided to her during the course of the investigation. At the conclusion of her investigation, she compiled a fact find report, extending to 15 typed pages plus appendices, which included the notes of meetings and relevant evidence.
26. By letter dated 25 June 2020 the claimant was informed that the fact find investigation had been completed and that the claimant would be invited to a formal disciplinary hearing to consider the following allegations:
- a. Failure to follow guidance and procedure in relation to Adult Support and Protection and reporting the deaths of two adults subject to Adult Protection processes;
 - b. Failing to assess and manage risk to service users to an adequate professional standard; and
 - c. Not following the reasonable instructions of LA, Field Work Manager.
27. The letter stated *'An audit of Adult Protection conducted by Laura Arthur Fieldwork Manager found that you had failed to follow Adult Protection Procedures and in doing so had also failed to manage the risk to two service users appropriately. Ms Arthur also identified that both service users had died in the immediate period following the ASP concerns being raised which in turn highlighted a concern that harm had occurred as a consequence of your failure to take steps to protect them.'*

28. A disciplinary hearing took place over the course of 2 and 11 September 2020, lasting the full day on each occasion. It was chaired by MM. The claimant was accompanied by her trade union representative. A note taker was also present.
- 5 29. The disciplinary hearing was reconvened 13 October 2020, for MM to inform the claimant of her decision, and the basis for this, in relation to each allegation. She found that each of the allegations were established, other than an element of the first allegation, which related to failure to report the deaths of two adults subject to ASP Procedures. She found that the claimant's actions breached the respondent's Code of Conduct and the Social Work Resources Code of Conduct. In both cases, her view was that the service users clearly met the three point criteria and were 'Adults at Risk', so the cases should not have been closed and the ASP Procedures ought to have been continued and followed. She concluded that there was insufficient diligence at the inquiry stage and a lack of engagement with the other agencies involved. This led to ASP Procedures being brought to a conclusion prematurely, at the inquiry stage, in each case. She felt this was 'incomprehensible' in respect of one of the cases and demonstrated 'complacency' and 'inevitability' in relation to the other. These were findings which were open to MM, based on the evidence presented.
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30. Having reached these conclusions, MM took into account the mitigation presented by the claimant, namely that she had 25 years' unblemished service, had held a team leader role for a number of years and had been supervising staff working in a high-volume demanding service. Having done so she concluded that the appropriate sanction was that the claimant should be issued with a written warning, which would remain on the claimant's file for six months. She also concluded, given some of the ASP consideration deficits demonstrated in the claimant's management of the two situations, that she would benefit from, and required to undertake, refresher training in Adult Support and Protection, before she resumed any direct management function in ASP.
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31. The written warning was issued on 13 October 2020. It was confirmed that the written warning would be noted on the claimant's personal record and remain live for a period of six months from the date of the letter, namely until 13 April 2021. It was also confirmed that the claimant would require to undertake ASP refresher training. The claimant was advised of her right to appeal and the procedure for doing so.
32. The claimant did appeal and an appeal hearing took place on 1 December 2020. The appeal hearing was chaired by Liam Purdie (**LP**), Chief Social Work Officer. At the appeal, the claimant raised that she was being accused of causing the deaths of the service users. LP stated to her in response that she was not being accused of harming anyone. The allegations were that she had failed to follow the ASP Procedures, failed to assess and manage risk appropriately and failed to follow a reasonable management instruction.
33. The claimant was advised verbally on 3 December 2020 that her appeal had been rejected. This was confirmed by letter dated 10 December 2020.
34. By letter dated 22 December 2020, the SSSC confirmed that they had concluded their investigation and decided that the claimant's fitness to practice was not impaired. They confirmed that no further action would be taken and that the case would accordingly be closed.
35. The respondent operates a Strategic Significant Case Review sub-group (the **SSCR**). The SSCR considers any significant occurrence forms submitted to the respondent. They meet approximately every 6 weeks. Any agency can make a referral to the SSCR by completing a significant occurrence form. The SSCR then consider whether the case should be considered under the respondent's significant case review process, or whether some other action is appropriate, such as directing that a reflective learning review be undertaken, to ascertain what can be learnt from the scenario and whether processes could be improved going forward.
36. The cases which were discussed in the disciplinary proceedings against the claimant were brought to the attention of SSCR by LA completing significant occurrence forms in January 2020. They were discussed at the SSCR on an

anonymous basis. The SSCR concluded that they did not warrant a formal significant case review, however they believed that there would be a benefit in conducting reflective learning reviews in relation to these cases, as well as another case, which was similar on the facts. The conduct of the reflective learning reviews fell within JS's remit. The reflective learning reviews took place in early December 2020. Prior to the reflective learning reviews, JS obtained the names of all of the respondent's staff and other agencies involved, so they could be invited to participate. The claimant was absent due to illness and was not therefore invited to participate.

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10 37. Following the reflective learning reviews, it was agreed that it was appropriate to cascade the learnings from the cases to all social work staff, and to inform them of the new processes introduced as a result. Social Workers are trained to be reflective learning practitioners, who recognise that it is very beneficial to share learnings from other cases, either through informal or formal discussion. This is done on an anonymous basis and social work staff are aware that sensitivity and confidentiality is required in these circumstances

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20 38. The claimant was certified as fit to return to work in December 2020, following an absence of over 10 months. She took accrued holidays and resumed work, on a phased basis, in January 2021. The claimant indicated that she did not wish to return to her previous role or office location. Her request was accommodated on a temporary basis and she returned to a temporary role, focusing solely on hospital discharges, under the supervision of a new line manager, AT. Return to work meetings took place between the claimant and AT, in which it was agreed that the claimant would be supported in her return to work, and remain in the temporary role, for a period of six months, during which time she could seek an alternative, permanent, role within the Council. AT also held regular supervision meetings with the claimant, once she started doing casework. At one such meeting on 24 February 2021, the claimant advised AT that she was considering resigning when the written warning expired from her record. Despite this, AT continued to support the claimant in her efforts to secure an alternative role on a permanent basis, which she would be happy undertaking.

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39. At the supervision meeting on 24 February 2021, it was also noted that the claimant was on the waiting list for ASP refresher training and would complete this as soon as it was available.
40. The claimant applied, but was unsuccessful for, an alternative role at Hairmyres Hospital. On 22 March 2021, AT discussed with the claimant an alternative role at Wishaw Hospital, as a Team Leader. The claimant was interested in the role and felt it would be suitable for her. She indicated that she would consider it.
41. On 23 March 2021 a training event took place in one respondent's 4 localities. The event took place remotely by Microsoft Teams and was chaired by JS. The training event had already been presented in two other locations. The training event covered:
- a. ASP Procedures generally;
 - b. The results of a staff survey regarding ASP;
 - c. The initial case review and significant case review processes; and
 - d. Learnings from the reflective learning reviews conducted in December 2020, and information related to the new processes introduced as a result.
42. In relation to the significant case review process, JS stated that, at the end of significant case reviews an executive summary is produced and all the staff involved get the opportunity to read this and give their views.
43. In relation to the learnings from the reflective learning reviews, background to the cases was provided, on an anonymous basis. It was noted that the three cases discussed at the reflective learning reviews had similarities, in that the service users all resided in their own homes; were older adults; had complex health needs; services were involved and the service users were not engaging with services; there was self-neglect and multiple hospital admissions; and each of the service users died. JS stated to the attendees that staff involved in the cases had been invited to participate in the reflective

learning reviews and stated that, while each of the service users had died, this was not due to the staff involvement and there was no evidence to suggest this.

- 5 44. The claimant did not attend the training. Her wife, Anne Marie Coyle (**AMC**) was present, as was MF and KR.
- 10 45. Towards the end of the training event, AMC stated to those in attendance that two of the three anonymised cases being discussed were cases the claimant had been involved with and that disciplinary action had been taken against the claimant in connection with them. She was noticeably upset and animated. JS was shocked at the disclosure and felt it was very unprofessional of AMC to have stated this to the group, even if she suspected this was the case (which she had no way of knowing for certain).
- 15 46. After the training, KR approached the claimant and told her that the cases she had been involved in had been discussed at the training.
- 20 47. AT heard about what had occurred during the training. She felt it was inappropriate for AMC to have stated to the group that the claimant had been involved in the cases. She asked AMC's manager to speak formally speak to AMC in supervision about the fact that she had disclosed the identity of the Social Worker involved in the cases during the training session. It was fed back to AT thereafter that AMC's manager had raised this with AMC and that AMC had stated that she was sorry for doing so and recognised that she should not have.
- 25 48. On 25 March 2021 the claimant met with AT and Andrea Tallis, (Operations Manager). She indicated that she had made a decision to resign from her post with immediate effect because of the training session. AT tried to change the claimant's mind, offering mediation, external counselling or anything else which the claimant may find of assistance. She discussed and agreed with the claimant that she could take holidays until 13 April 2021, when the written warning expired, so that she could leave with no blemish on her record. The claimant felt supported by AT, but did not wish to change her mind. Attempts were made by various senior management to persuade the claimant to take
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the time spent on annual leave to reflect and change her mind over her decision to resign. Personnel also wrote to the claimant asking her to reconsider. She declined to do so and her employment terminated on 11 May 2021.

5 **Respondent's submissions**

49. The respondent, in summary, submitted that:

- a. Where evidence conflicted, the evidence of the respondent should be preferred.
- b. The claimant relies upon a culmination of events as amounting to a fundamental breach of the implied duty of trust and confidence, but none of those events have been established in evidence.
- c. The cases of *Western Excavating (ECC) Ltd v Sharp* [1978] ICR 221, *Omilaju v Waltham Forest London Borough Council* [2005] IRLR 35 and *Sheridan v Stanley Cole (Wainfleet) Ltd* [2003] ICR 297 were referred to.
- d. The written warning given to the claimant was not unmerited or disproportionate. The respondent did not breach the implied term of trust and confidence. The respondent had reasonable and proper cause for their actions. The training event is the last straw relied upon. There was no blameworthy conduct on the part of the respondent. It was innocuous and should be disregarded as a last straw.

Claimant's submissions

50. Mr Heron for the claimant, in summary, submitted that the respondent's actions, from 24 January 2020 onwards, amounted to a breach of contract. There was no evidence to support the imposition of a written warning, LA's position was simply accepted at face value; audits were not completed, or were incomplete; the police were informed of the cases when there was no basis to do so; the claimant's written warning was continued beyond the 6 month period; lies were told at the training day; and the claimant was humiliated by the reference to

cases she had been involved with. All of this was done because the claimant had the audacity to lodge a grievance against her line manager.

Relevant Law

51. Employees with more than two years' continuous employment have the right not to be unfairly dismissed, by virtue of s94 ERA. 'Dismissal' is defined in s95(1) ERA to include what is generally referred to as constructive dismissal. Constructive dismissal occurs where the employee terminates the contract under which he/she is employed (with or without notice) in circumstances in which he/she is entitled to terminate it by reason of the employer's conduct (s95(1)(c) ERA).
52. The test for whether an employee is entitled to terminate his contract of employment is a contractual one. The Tribunal requires to determine whether the employer has acted in a way amounting to a repudiatory breach of the contract, or shown an intention not to be bound by an essential term of the contract (***Western Excavating (ECC) Ltd v Sharp*** [1978] ICR 221). For this purpose, the essential terms of any contract of employment include the implied term that the employer will not, without reasonable and proper cause, act in such a way as is calculated or likely to destroy or seriously damage the mutual trust and confidence between the parties (***Malik v Bank of Credit and Commerce International Ltd*** [1998] AC 20).
53. Conduct calculated or likely to destroy mutual trust and confidence may be a single act. Alternatively, there may be a series of acts or omissions culminating in a 'last straw' (***Lewis v Motorworld Garages Ltd*** [1986] ICR 157).
54. As to what can constitute the last straw, the Court of Appeal in ***Omilaju v Waltham Forest London Borough Council*** [2005] IRLR 35 confirmed that the act or omission relied on need not be unreasonable or blameworthy (although it will usually be so), but it must in some way contribute to the breach of the implied obligation of trust and confidence. Necessarily, for there to be a last straw, there must have been earlier acts or omissions of sufficient significance that the addition of a last straw takes the employer's overall

conduct across the threshold. An entirely innocuous act on the part of the employer cannot however be a final straw, even if the employee genuinely, but mistakenly, interprets the act as hurtful and destructive of their trust and confidence in the employer.

- 5 55. In order for there to be a constructive dismissal, there must be a breach by the employer of an essential term, such as the trust and confidence obligation, and the employee must resign in response to that breach (although that need not be the sole reason - see **Nottinghamshire County Council v Meikle** [2004] IRLR 703). The right to treat the contract as repudiated must also not
10 have been lost by the employee affirming the contract prior to resigning.
56. The Court of Appeal in **Kaur v Leeds Teaching Hospital NHS Trust** [2018] EWCA Civ 978 set out guidance on the questions it will normally be sufficient for Tribunals to ask in order to decide whether an employee has been constructively dismissed, namely:
- 15 a. What was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, his or her resignation?
- b. Has he or she affirmed the contract since that act?
- c. If not, was that act (or omission) by itself a repudiatory breach of contract?
- d. If not, was it nevertheless a part (applying the approach explained in
20 Omilaju) of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a (repudiatory) breach of the Malik term?
- e. Did the employee resign in response (or partly in response) to that breach?
- 25 57. If an employee establishes that they have been constructively dismissed, the Tribunal must determine whether the dismissal was fair or unfair, applying the provisions of s98 ERA. It is for the employer to show the reason or principal reason for the dismissal, and that the reason shown is a potentially fair one within s98 ERA. If that is shown, it is then for the Tribunal to determine, the

burden of proof at this point being neutral, whether in all the circumstances, having regard to the size and administrative resources of the employer, and in accordance with equity and the substantial merits of the case, the employer acted reasonably or unreasonably in treating the reason as a sufficient reason to dismiss the employee (s98(4) ERA). In applying s98(4) ERA the Tribunal must not substitute its own view for the matter for that of the employer, but must apply an objective test of whether dismissal was in the circumstances within the range of reasonable responses open to a reasonable employer.

Observations on Evidence

- 10 58. In her ET1, and in submissions made on the claimant's behalf, reference was made to the disciplinary action taken against the claimant being vindictive and as a result of the claimant raising a dignity at work complaint against EO. At its highest, the claimant's evidence to the Tribunal however was that she felt it was a coincidence that the fact find followed two days after she lodged her dignity at work complaint.
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59. In relation to the date the dignity at work complaint was received, the Tribunal accepted GR's evidence that this was received by her in the internal mail on 31 January 2020. While the claimant stated in evidence that it was sent by email on 24 January 2020, she was not able to produce an email to demonstrate this and GR's evidence was that, if it had been received by email then she would have saved the email. In addition, GR stated that, if it had been sent by email on a date earlier than 31 January 2020, even if she was not in the office that day, the date she wrote on the top would reflect the date of the email, not the date GR first saw the email. GR confirmed that she was not away from the office at that time, so if the grievance had been sent by email on 24 January 2020, she would have seen it that day, marked that date on the top of the document and saved that document, with the cover email. She stated, in any event, that on receipt of the complaint her first step was to discuss and agree with the claimant that it would be dealt with after the fact find investigation. The complaint was then simply filed as a result. She did not discuss it with anyone, including EO, as that was not her role but that of the investigating officer, when appointed. The Tribunal accepted this evidence.
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The claimant indicated repeatedly in evidence that she was not suggesting that GR had acted inappropriately in any way. No evidence was led as to how EO, or LA who was stated to be a friend of EO, may be aware of the dignity at work complaint. In light of these points, the Tribunal concluded that there was no evidence to support any link between the claimant's dignity at work complaint and the instigation of the fact find investigation.

60. A great deal was made of the fact that the respondent's audit template was only partially completed for one service user and no completed audit template document was produced in respect of the other. The Tribunal accepted MM's evidence that this was irrelevant to her decision as she was able to establish the position in relation to the service users via the other evidence presented, in particular the ASP referral documents, the respondent's case records on SWIS and the oral evidence presented.

61. One of the key issues in dispute was what occurred at the training session on 23 March 2021. The Tribunal heard evidence from three witnesses in relation to this: MF, KR and JS. MF had very limited recall of the training event, stating that she did not recall who first recognised the cases and stated this to JS, her or AMC, or what was said in relation to this. KR gave limited evidence, but accepted under cross examination that no names had been used in the cases (despite the claimant referencing in further particulars that KR informed her that the content of the training was not fully anonymised) and that AMC raised the issue of the claimant's involvement in the cases. JS had a clear recall of the training event, stating that she had trained thousands of staff and she had never experienced anything of this nature before. She was shocked and taken aback. The Tribunal found her to be a credible witness and accepted her evidence as to what occurred at the training session, which was also supported by the slides of the Training session, which formed part of the joint bundle.

Discussion & Decision

62. The claimant claimed that the respondent was in breach of her contract of employment by their actions which, cumulatively, breached the implied duty of trust and confidence.

5 63. In considering the claimant's claim of constructive dismissal based on actions which she asserts cumulatively breached the implied duty of trust and confidence, the Tribunal considered the tests set out in ***Kaur v Leeds Teaching Hospital NHS Trust***. The Tribunal's conclusions in relation to each element are set out below.

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

64. The most recent act relied upon by the claimant was the training event on 23 March 2021.

Has he or she affirmed the contract since that act?

15 65. The claimant resigned on 25 March 2021. The Tribunal found that the claimant had not affirmed the contract since the most recent act on the part of the respondent, which the claimant stated caused, or triggered, her resignation.

If not, was that act (or omission) by itself a repudiatory breach of contract?

66. The claimant did not assert this to be the case, so there was no requirement to consider this.

20 *If not, was it nevertheless a part (applying the approach explained in Omilaju) of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a (repudiatory) breach of the Malik term?*

25 67. The Tribunal noted that the Court of Appeal in ***Omilaju*** stated that the act or omission relied upon need not be unreasonable or blameworthy, but it must, in some way, contribute to the breach of the implied obligation of trust and confidence. An entirely innocuous act on the part of the employer cannot be a final straw, even if the employee genuinely, but mistakenly, interprets the act as hurtful and destructive of their trust and confidence. The claimant relied on the training event in two respects: firstly that, as stated in her ET1 and evidence,

the respondent humiliated her in an open forum at the training event and secondly, as stated in her further particulars, that JS made three statements during the training which were untrue.

5 68. The Tribunal concluded that the respondent had reasonable and proper cause for referring to previous cases, on an anonymous basis, to cascade learnings and changes in processes implemented as a result of the reflective learning reviews to staff. This was in accordance with normal practice. The claimant herself accepted in evidence the benefits of reflective learning and that this was a practice adopted generally in social work. She confirmed that she had
10 attended numerous training events in the past where cases were discussed, on an anonymous basis, understood the benefit of this and was aware of the requirement to be sensitive and maintain confidentiality. The cases discussed in the training session were fully anonymised and, whilst the claimant gave evidence of feeling humiliated by the cases being used, no one would have been
15 aware that she was involved in the cases, and she would not have felt humiliated, had it not been for the disclosure made by the claimant's wife, to everyone who was present at the training, that the claimant was involved in the cases. It was not the respondent's actions which led to the claimant feeling humiliated. The respondent's actions cannot, viewed objectively, contribute to a
20 series of actions which constitute a repudiatory breach of contract.

69. In relation to the claimant's position that *'the lies told by JS during the training session reignited feelings of hurt and betrayal'*, the Tribunal considered each asserted untruth in turn and reached the following conclusions based on the evidence presented:

25 a. The claimant asserted that JS stated that all staff involved with the cases were invited to and took an active role in the reflective learning review. The claimant stated this was not correct, as she had not been invited to participate. For the reasons set out above, the Tribunal concluded that JS simply stated that *'staff involved in the cases had been invited to and
30 took an active role in the reflective learning review'*, not **all** staff. This was not untrue.

5 b. The claimant asserted that JS stated at the training that all three adults in the cases referred to in the training had died, but reassured the group that the deaths were not due to the staff involvement and there was no evidence of this. The Tribunal accepted that this was said. This was not untrue. The claimant accepted that this was not untrue, stating instead that she had not been told this in writing previously, which is an entirely different point.

10 c. The claimant asserted that JS stated that when a report is finished an executive summary is produced and all staff involved get the opportunity to read the report and give their views. The claimant stated this was untrue as it did not occur in the cases she was involved in. The Tribunal accepted that this was said by JS, but in the context of the procedure for a significant case review. As indicated above, the cases which the claimant were involved in did not proceed to a significant case review. A reflective learning review was conducted instead. No report or executive summary was accordingly produced. What was stated was not untrue.

15 70. Given the above findings the Tribunal concluded that conduct relied upon by the claimant, namely JS making 3 statements that were untrue, has not been established. JS's comments during the training session were true. The statements were entirely innocuous and cannot, viewed objectively, contribute in any way to a series of actions which cumulatively constitute a repudiatory breach of contract. If the claimant interpreted JS's comments as being hurtful and destructive of her trust and confidence in the employer, she was mistaken in doing so.

20 71. The Tribunal accordingly concluded that conduct on the part of the respondent, capable of amounting to a last straw, has not been established.

72. Whilst there is no requirement to do so, given this finding, the Tribunal also wish to record its findings in relation to the other conduct relied upon by the claimant.

25 a. The Tribunal concluded that the respondent followed a fair disciplinary process and MM reached conclusions which were open to her, based on the evidence presented. Those conclusions were then upheld by LP.

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Whilst it is clear that the claimant disagreed with the outcome, a fair disciplinary process and the outcome reached having followed that process, cannot, viewed objectively, constitute a repudiatory breach of contract, or contribute to a series of acts which cumulatively constitute such a breach.

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b. For the reasons set out above, the Tribunal did not accept that the allegations against the claimant were vindictive, unfounded or unsupported by evidence.

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c. While the police were informed of the deaths of the service users, this was entirely appropriate and in accordance with the respondent's obligation to do so, which the claimant was aware of and accepted. At no stage was the claimant advised that **she** was being 'investigated by the police for criminal acts', as she stated in these proceedings.

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d. The letter of 6 June 2020 did state that the service users had died following the ASP concerns being raised which had 'in turn highlighted a concern that harm had occurred as a consequence of [the claimant's] failure to protect them'. That did not however form part of the allegations against the claimant. The allegations were expressly stated and it was clear that they did not include an allegation that the claimant caused the deaths of the service users. When she raised that she thought this was the case to LP, he clearly indicated to the claimant that she was not being accused of harming anyone. The allegations were that she had failed to follow the ASP Procedures, failed to assess and manage risk appropriately and failed to follow a reasonable management instruction.

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e. Finally, the written warning was not extended, as the claimant asserted. Rather, it was agreed that she would be supported in her phased return to work over a 6 month period. That is an entirely different process and was discussed and agreed with her as a means of supporting her to return to work and secure an alternative, permanent role. The written warning expired on 13 April 2021, as stated on the warning. It is correct that she could not return to a direct management role in adult support

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and protection until she had completed ASP refresher training. The evidence led indicated that she was on a waiting list for this and would complete this on the next available date. No evidence was led in relation to any earlier date on which this training could have taken place.

- 5 73. Accordingly, even if a last straw had been established, the Tribunal would have concluded that there were no previous actions established which, taken together with the last straw, could cumulatively constitute a repudiatory breach of contract.

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

- 10 74. Given the Tribunal's conclusions in paragraphs 67-73 above, this does not fall to be answered. The Tribunal's conclusion is that there was no breach.

75. Given these findings the Tribunal concluded that the claimant was not constructively dismissed by the respondent. Her claim of unfair dismissal is accordingly not successful and is dismissed.

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Employment Judge: Mel Sangster
Date of Judgment: 16 May 2022
Entered in register: 16 May 2022
and copied to parties

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