



EMPLOYMENT TRIBUNALS (SCOTLAND)

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Case No: 4100263/2018

Held in Glasgow on 28, 29 and 30 August 2018

Employment Judge: Ms M Robison

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Mrs K Leonard

**Claimant
Represented by
Ms D Flanagan**

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South Lanarkshire Council

**Respondent
Represented by
Mr S O'Neill
Solicitor**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Employment Tribunal is that the claim for unfair dismissal does not succeed and therefore is dismissed.

REASONS

Introduction

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1. The claimant lodged a claim with the Employment Tribunal on 12 January 2018, claiming unfair constructive dismissal. The respondent entered a response resisting the claim.

2. At the outset of the hearing, Ms Flanagan confirmed her intention to refer only to events referred to in the ET1 following the appointment of the claimant to the post of head of establishment at Ballerup Nursery Centre.
3. I noted that Ms Flanagan made one reference to the claimant's previous service with the respondent, in paragraph 3 of the ET1, where she had alleged that she had "previously been made a scapegoat in a former role".
4. The respondent had, understandably, denied that and had made reference in their ET3 to evidence which they said supported that, and lodged documentation relating to events in previous roles. After considering his position, Mr O'Neill agreed that those events were relevant background information, but he was not relying on them to support his defence, given that the claimant is not relying on those previous events to establish breach of contract.
5. During the Hearing, the Tribunal heard evidence from the claimant. For the respondent, the Tribunal heard from Ms Natalie Dalbeck, early years' team leader; Ms Tracey McHugh, depute head of establishment; Ms Janice Tod, early learning and childcare lead locality officer (ELCLLO); and Ms Morag McDonald, early years manager.
6. The Tribunal was referred by the parties to a number of productions from a joint bundle of productions, with several productions being added during the hearing. These documents are referred to by page number.

Findings in Fact

6. On the basis of the evidence heard and the productions lodged, the Tribunal finds the following relevant facts admitted or proved:

Background

7. The claimant commenced employment with the respondent on 16 June 1992. Since that date she has worked for the respondent in early years education in

various roles. She resigned by letter dated 14 August 2017, giving four weeks' notice, and her last day of employment was 13 September 2017.

8. On 5 April 2017 the claimant was redeployed into a new post at Ballerup Nursery Centre as head of establishment, on a part-time, 0.5 FTE (full-time equivalent) basis.
9. Prior to that she had been employed as part-time head of establishment at Rigside Community Nursery. However, following certain complaints, the claimant and a colleague who shared the role of head of establishment were investigated (page 39 to 42). That investigation commenced on 17 April 2015 and the outcome is recorded in a report dated 15 October 2015 (pages 39 to 42). Pending the outcome of the subsequent disciplinary investigation, the claimant was transferred to Halfmerke Nursery Centre, although she was not assigned a formal role. After a disciplinary hearing which followed the investigation, by letter dated 19 May 2016 (pages 46 and 47), the claimant was issued with a final warning and demoted. By letter dated 18 August 2016, the claimant was advised that her appeal against that decision was upheld to the extent that she was reinstated to her substantive position, although the final written warning remained on her record (page 56), and she was required to undertake training. It was decided that she was not to return to Rigside Community Nursery.
10. Following a meeting with her then line manager, Mairead Maxwell, Ms Maxwell confirmed in a letter dated 2 November 2016 (page 57) that the claimant was to be placed within Cathkin Community Nursery, during which time she undertook shadowing and appropriate update training.
11. Once the respondent was satisfied that the claimant had completed appropriate training, she was offered a choice of three nurseries to resume her previous role. In or around late February/early March 2017, she chose Ballerup Nursery Centre because she considered this to be the most appropriate for her.
12. The claimant had since around 2006 been engaged on a part-time 0.5 FTE role. She was asked if she wanted to take on the role of head of establishment on a

full-time basis but she declined, partly because she had previously been turned down for a full-time role, but principally because she also worked part time as a lecturer in early years education at South Lanarkshire College and it suited her to continue in that role.

- 5 13. The claimant was aware when she chose that option that there would be a requirement to take steps to fill the other half of the post. She was aware that it would take some time to recruit given the requirement for that post to go through the usual procedures of approval and advert and that a part-time role might be more difficult to fill, an issue she had raised with Ms Maxwell.
- 10 14. With a view to filling the role on an interim basis, by e-mail dated 3 April 2017, Ms Maxwell wrote to all 12 of the respondent's nursery centres advising that there were four permanent vacant posts within standalone establishments, namely Ballerup Nursery Centre – head of centre (0.5 jobshare); Larkhall Children's Centre – head of centre (full-time); ELU head of integrated unit (full-time) and
15 Early Years Depute St Paul's (full-time). The e-mail stated that "if any permanent heads or deputes have an interest in these posts in terms of a move at your current grade or to down size or job share within an establishment please contact your ELCLLO by Thursday 13 April".
15. On 3 April 2017, these posts were also advertised on "My Job Scotland", with a
20 closing date of 13 April. That failed to result in any appointment, there being no candidates with the appropriate qualifications who were suitable to interview. A second advert was placed on the "My Job Scotland" website, with a closing date of 28 May (page 81). Although two candidates were identified as suitable to interview, both withdrew their applications.
- 25 16. The claimant commenced employment at the beginning of April. April, May and June are the busiest months in a 52 week nursery like Ballerup. At the time, the management structure consisted of a full-time head of establishment, two part time (job-share) depute head of establishment and a team leader. The claimant worked the second half of the week, from Wednesday at 1 pm. Until the claimant
30 joined, the vacant head of establishment post had been filled by Jackie Fleming,

who was acting up full-time from her substantive role of part-time depute head of establishment (that role having been covered on a temporary basis). The role of depute was undertaken for the first half of each week by Tracey McHugh. Both Ms McHugh and Ms Fleming (who worked the second half of the week alongside the claimant) were approached to temporarily fill the 0.5 head of establishment but neither wished to take on that role for personal reasons.

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17. The claimant was kept apprised of developments regarding the attempts to fill the role by her line manager Janice Tod. The claimant met Ms Tod on a regular basis, at least once a fortnight, and they spoke on the telephone at least once a week and exchanged e-mails regularly. The claimant frequently sought reassurance from Ms Tod regarding the decisions she was intending to make in respect of the running of the nursery.

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18. When it became clear that the efforts to fill the other half of the post had been unsuccessful, in June 2017 Morag Macdonald, early years manager for the relevant area, had a discussion with her line manager, Stewart Nicolson, head of service for early years, about what steps might be taken in these circumstances. Approval was obtained from the director of service, Tony McDade to seek budget approval to recruit a full-time post, unique to the organisation, to undertake the part-time role as head of establishment at Ballerup and the other half being a peripatetic development role to give support to the early years and education service across the council. Mr McDade in turn required to obtain approval from the director of corporate services for allocation of budget and for a joint accelerated report to be put to the leader and the CEO to approve the creation of that full-time post, which was given in July 2017. The claimant was advised of this development as soon as budgeted approval was given at the beginning of August.

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19. In the meantime, towards the end of June 2017, as the claimant was returning from annual leave, and Ms Fleming was about to commence annual leave for a fortnight, Ms Fleming was taken ill and subsequently diagnosed with life-limiting cancer.

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20. This meant that only half of the depute head of establishment continued in post during the first half of the week, and the claimant felt the pressure all the more keenly. She continued to raise her concerns about the fact that the post was not filled with Ms Tod. Unknown to Ms Tod the claimant was by this time was under considerable stress.
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21. There was a short delay in it being confirmed that Ms Fleming was likely to be absent for longer than 4 weeks which meant that a REC1 form could be completed seeking authorisation to recruit on a temporary basis. The claimant completed that form on 28 July 2017 (page 145) and Ms Tod approved it on 1 August 2017.
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22. On 31 July 2017, the claimant sent a letter to a senior manager, Ms Carole McKenzie, setting out her concerns (page 66). This letter reached her by e-mail on 1 August 2017 at 17.28. (page 68). Ms Mckenzie responded by e-mail dated 3 August 12.11 stating "I am sorry to hear things are tough for you.....I'm sorry I can't offer assistance on this issue, but I do hope you get things resolved", asking her to redirect the enquiry to Mr Nicolson. Unfortunately, she advised the wrong e-mail address, suggesting his surname was Nicholson.
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23. The claimant amended the letter slightly and addressed it to Stewart Nicolson, without adjusting the date 31 July in error. The e-mail sent to Mr Nicolson with the letter bounced several times, until the claimant obtained confirmation of the correct address.
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24. In that letter she stated as follows (page 66): "I was part of a very stressful and lengthy investigation and disciplinary procedure regarding Rigside Community Nursery, culminating in an appeal to a panel of councillors, at which my appeal was upheld in part. At the time the allegations were made I was managing the nursery's three establishments and was working 2.5 days, with little or no support, which damaged my mental health and impacted on the quality of my work. The subsequent protracted process also caused me immense stress...."
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I have been [at Ballerup] the last 17 weeks and now find myself in the same position, with no one covering the other 2.5 days of the post. I'm aware that adverts and interviews have taken place but were unsuccessful in finding a suitable candidate for the post. However there has been no suggestion that it will be covered in the meantime even on a temporary basis until it is filled. This has left me in a position where I cannot possibly complete a full week's work in 2.5 days and support and develop the service as required. I'm in regular contact with my quality link officer, Janice Tod, who has informed me that she is unable to tell me when this will be resolved and that cover is not available. Although Janice will provide cover for the nursery when no management is in the building this does not support me in completing the work. I feel that this is putting me in another stressful situation that leaves me vulnerable to further accusations. I was given assurances previously about support, which I was grateful for as my confidence was low when I returned to work after being put through such a distressing procedure and I am disappointed that I have been left in this situation again. I also realise, having been out of nurseries for a considerable time, that there are areas where practice has changed and developed and it has taken time to update my skills and knowledge to allow me to implement these changes with confidence.

The situation is impacting on my health and requiring me to be monitored by my GP and practice nurse on a regular basis. If the council does not fulfil its duty of care to me with regard to supporting me and my mental health at work then I will be forced to pursue a grievance rather than risk becoming a target for further discipline.

I would be grateful for your support and advice regarding this matter and if you need any further information or would like to meet with me to discuss, please don't hesitate to contact me".

25. Between 4 and 11 August, the claimant received a response to that e-mail from Mr Nicolson's secretary advising that he was on holiday and would reply on his return.

26. Not having received a response from Mr Nicolson to her letter, the claimant sent an e-mail on 13 August 2017 (a Sunday) at 20.19 to the correct e-mail address in the following terms (page 77): "I had written the attached letter a couple of weeks ago to raise concerns within my workplace with regards to my workload and covering a full-time post in 2.5 days with little or no support. I initially sent this letter to Carole McKenzie who was unable to help due to early years not being within her remit and she directed me to yourself. I sent it to you however it kept coming back to me with the delivery failure notice and therefore it has taken me additional time to get this delivered to you. Since I wrote the letter I have been informed within the last few days that the early years management team are advertising a full-time head's post who will effectively work in Ballerup 2.5 days and be responsible for development work the rest of the week. Where I am pleased that a solution has been suggested it still leaves me in the same predicament with no cover being put in place till the post is advertised and hopefully filled which can take a number of weeks hence the reason for me continuing to raise my concerns that are noted in the attached letter with you".
27. Also on 13 August, the claimant e-mailed Ms Tod asking her to phone her the next day. Ms Tod telephoned at 8.30 am on 14 August, and agreed a time to meet, having adjusted her diary. Ms Tod was very surprised to hear from the claimant of her intention to resign. The claimant was very upset during that meeting.
28. The claimant confirmed her decision to resign to Ms Tod by letter dated 14 August 2017 (page 72 and 73) as follows: "I wish to inform you of my resignation as part-time head of establishment in Ballerup Nursery Centre. In line with my contract I will work four weeks' notice as of 16 August 2017 with the intent to end my employment on the 13 September 2017.

The reasons behind my resignation are that in 2014 I was left in a situation where, due to the long-term illness of my job share colleague, and head and depute of establishment (sic) at Rigside and Rural Communities Nursery was not covered for six months. I was left to carry the full-time workload in two and a half days. This was compounded by my other depute being on long-term sick leaving little

management in the nursery. Eventually in January 2015 an acting head/depute was put in place however, rather than support me she encouraged the discontented and similarly overworked staff to raise an anonymous grievance against me while I struggled on with the outstanding workload issues. I then had
5 to endure a long and protracted fact-finding and disciplinary process that breached the council's procedures and subsequently damaged my health, career and reputation. This resulted in my demotion and then after an appeal hearing my reinstatement as an early years head of establishment. This process has led to my trust in South Lanarkshire, in particular, early years to be undisputedly
10 damaged even though I had hoped that it could be repaired and returned to work after reinstatement. After more stressful delays management had advertised my post without consultation and therefore did not leave a vacant post for me to return to.

I was eventually appointed as head of Ballerup Nursery on a part-time basis in
15 April 2017. After now being in post for over 17 weeks I find myself in exactly the same position as before trying to carry out a full-time job in part-time hours as the other half of the post has not been filled. I'm aware that it has been advertised but unsuccessful in filling the post, however this does not mean that it could not have been filled on a temporary basis as has happened previously within other
20 establishments within the Council. More recently my depute has been diagnosed with a life-threatening illness and I have been using all reserves to support her and the rest of the staff during such a difficult time. All of which has had a negative impact on my health and well-being.

As you are aware I have regularly enquired about the staffing situation and when
25 it will be resolved only to be informed that all staffing even on a temporary basis must be advertised and follow the Council's recruitment procedures, even though this has very recently not been the case in other establishments. I find it untenable that the early years manager has put me in the same situation leaving me feeling anxious and having no trust that I will be treated fairly due to my previous
30 experiences. I feel in jeopardy of discipline and remain anxious as I still have a SSSC hearing hanging over me because of my employer's failure to conclude

their own processes in a reasonable timescale. This has led to a volume of paperwork that piled up during the case that SSSC is now working through.

My trust in South Lanarkshire's early years is shattered and I believe they have breached a fundamental duty of care to me as an employee. As well as my notice
5 of resignation I will be submitting a grievance against South Lanarkshire Council who failed to fulfil their duty of care to me as an employee. The stress and pressure I feel whilst working in a full-time post on a part-time basis with no support has greatly affected my health physically emotionally and mentally. I therefore feel I have no option but to resign".

10 29. Following intimation of her resignation, Ms Tod offered to allow the claimant to withdraw her resignation. During her period of notice, she extended annual leave which she had already intimated, taking leave from 23 August to 8 September. The claimant's last day of work was 13 September. The day before, Ms Tod visited with a bunch of flowers and gave her another opportunity to withdraw her
15 resignation.

30. In the meantime, Mr Nicolson had forwarded the claimant's e-mail of 13 August on 15 August at 09.26 to Ms McDonald asking for an update about the claimant's position and "what options we have for supporting Karen" (page 77). Ms MacDonald responded as follows at 11.10 on 15 August 2017 (page 76): "Janice
20 Tod has been supporting Karen throughout her time at Ballerup. Karen met with Janice yesterday morning and intimated her resignation which she confirmed in writing to Janice this morning. She has intimated that she will be submitting a grievance. As her leaving date will be 16th September she would be in work this week, on leave for two and her final week will be the week beginning 11th
25 September. I think the best solution to supporting Karen and the nursery would be to temporarily move Liz Hotchkiss currently head of Halfmerke to Ballerup until the vacant post is filled. The advert is going live imminently...."

31. The claimant completed a grievance form dated 15 August 2017, which included a reference to the situation post-resignation (page 74 and 75): "within 24 to hours
30 of my resignation I am informed that full-time cover is being put in place prior to

my resignation date, an action that if applied when requested could have resulted in a different outcome”.

5 32. Ms McDonald was assigned the grievance to deal with and she met with the claimant and her trade union representative on 12 November to discuss the grievance and the issues of concern and appropriate interviewees. At that meeting, Ms McDonald again gave the claimant the opportunity to withdraw her resignation. They met again on 22 November to communicate the outcome of the grievance which was confirmed in writing by letter dated 27 November 2017 (page 84 to 87). She did not uphold the grievance concluding that “all reasonable steps had been taken to ensure there was support put in place whilst recruiting for the 10 0.5 Head and Depute at Ballerup”.

15 33. The issue of temporary or interim cover was considered as part of the grievance (page 86). Consideration was given by Ms Tod and Ms Macdonald to the question of interim cover. No attempt was made to seek interim cover either before or after Ms Fleming went absent on sick leave. This was an operational decision made by Ms Macdonald because she considered that even without the other half head of establishment interim cover was not required. This was because it was considered that Ballerup had a robust management structure and a very experienced management team, who shared delegated roles. Such a move would 20 require another member of a management team from one of the other 12 nurseries in the council to transfer, leaving that nursery short staffed. It was considered that operational requirements did not necessitate such a move.

25 34. When the claimant resigned, different considerations came into play, as Ballerup then would be without a head of establishment and only a half time depute. For these reasons, steps required to be made to ensure temporary cover at Ballerup. It was originally intended that cover would be provided by Ms Hotchkiss who took immediate steps to meet with the claimant during her notice for a handover. She did not however fulfil that role because she became ill and that role was filled by other experienced heads of establishment seconded temporarily from other 30 nurseries where the management structure was robust.

Relevant law

35. The law in relation to unfair dismissal is contained in the Employment Rights Act 1996 (the 1996 Act). Section 94(1) states that an employee has the right not to be unfairly dismissed by his employer. Section 95(1)(c) states that an employee
5 is dismissed if 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. This is commonly known as "constructive dismissal".
36. In **Western Excavating Ltd v Sharp 1978 IRLR 27**, the Court of Appeal set out
10 the general principles in relation to constructive dismissal. Lord Denning stated that "An employee is entitled to treat himself as constructively dismissed if the employer is guilty of conduct which is a significant breach going to the root of the contract of employment; or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract. The employee in
15 those circumstances is entitled to leave without notice or to give notice, but the conduct in either case must be sufficiently serious to entitle him to leave at once. Moreover, he must make up his mind soon after the conduct of which he complains: for, if he continues for any length of time without leaving, he will lose his right to treat himself as discharged. He will be regarded as having elected to
20 affirm the contract".
37. The duty of mutual trust and confidence is a term which is implied into every contract of employment. This means that an employer must not, without proper and reasonable cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between the
25 employer and the employee (**Mahmud v Bank of Credit and Commerce International SA 1997 IRLR 462 HL, Baldwin v Brighton and Hove City Council 2007 IRLR 232 EAT**).
38. The question whether the employer has committed a fundamental breach of the contract of employment is to be judged according to an objective test and not by
30 the range of reasonable responses test (**Tullett Prebon plc v BGC Brokers**

[2011] EWCA Civ 131; **Bournemouth Higher Education Corporation v Buckland 2010 ICR 908 CA**). The EAT has since confirmed in **Leeds Dental Team v Rose 2014 IRLR 8** that it is not necessary to show a subjective intention on the part of the employer to destroy or damage the relationship to establish a breach.

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39. When considering whether there has been a breach of the implied term, “the Tribunal’s function is to look at the employer’s conduct as a whole and determine whether it is such that its effect, judged reasonably and sensibly, is such that the employee cannot be expected to put up with it” (**Wood v WM Car Services Ltd 1982 ICR 666 EAT**, per Mr Justice Browne Wilkinson).

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40. There may be a series of individual actions on the part of the employer which do not in themselves amount to a fundamental breach, but which may have the cumulative effect of undermining the mutual trust and confidence term implied into every contract of employment. A course of conduct can cumulatively amount to a fundamental breach of contract entitling an employee to resign and claim constructive dismissal. This is commonly referred to as “the last straw” (**Lewis v Motorworld Garages Ltd 1985 IRLR 465 CA**).

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41. The last straw must contribute something to the breach (even if relatively insignificant) (**Waltham Forest v Omilaju 2004 EWCA Civ 1493**).

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42. Where there is a breach of the implied term of trust and confidence, that breach is “inevitably” fundamental (**Morrow v Safeway Stores plc 2002 IRLR 9 EAT**).

Claimant’s submissions

43. Ms Flanagan set out the relevant law relying on the well-known test of Lord Denning in **Western Excavating v Sharp**; the principles relating to the mutual trust and confidence duty articulated in **Malik**; and the cases of **Woods** and **Lewis**; as well as **Omilaju** and **GAB (Robins v Triggs UKEAT/0111/07** in support of her submissions regarding a course of conduct.

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44. She relied on the case of **Associated Tyre Specialist v Waterhouse 1976 IRLR 386** to support her submission that a failure to give adequate support can be a

breach of the implied term; and she relied on the cases of **Cockcroft v Trendsetter Furniture 1973 IRLR 6** and **Woodward v Beston Boiler Co Ltd 1073 IRLR 7** to rely on her submission that a failure to provide adequate staffing can result in a breach of the implied term.

5 45. She argued that the tribunal must make an explicit finding of unfair dismissal and it is for the employer to show the reason and if a potentially fair reason that dismissal fell within the band of reasonable responses.

46. While the broad facts are not in dispute, she submitted that there are significant disputes about certain aspects of the evidence, in particular a dispute over the
10 extent to which the claimant made her concerns about the failure to fill the post; whether she had actually asked them to provide interim cover; and whether it was a particularly busy time at the nursery.

47. She submitted that in respect of these and other issues in dispute that the Tribunal should find the respondent's witnesses were not credible or reliable. In particular,
15 she argued that the assertions of Ms Tod and Ms McDonald that the nursery ran without issue while the post was unfilled was implausible, and their claim that the claimant was under no pressure to do additional work disingenuous.

48. This was in contrast with the claimant, whom Ms Flanagan submitted was a credible and reliable witness who gave her evidence in a clear and cogent way,
20 and was prepared to make appropriate concessions, for example that she had received additional support from the other staff. It was clear that she honestly and earnestly believed that the circumstances had had an impact on her mental health and well-being. She was clear that she didn't make the decision to resign lightly, after a career of 31 years.

25 49. Ms Flanagan thereafter set out proposed findings in fact in some detail. The respondent's witnesses made it clear that they had no concerns about her ability to do her job. Ms MacDonald conceded that if the grievance had been submitted before the resignation it would not have made any difference to the outcome. She

submitted that the failure to provide cover for the other half of the head of establishment job was a fundamental breach of the implied term.

50. In the alternative she argued that there was a breach of the term of mutual trust and confidence based on the last straw doctrine. That related to the following course of conduct: the failure of management to provide interim cover for the half head of establishment post; the failure of management to provide the depute post cover when Ms Fleming went off sick; the failure of management to take her concerns seriously; culminating in the failure of Stuart Nicolson to respond to her letter outlining her concerns.
51. Ms Flanagan submitted that the claimant did not delay in resigning once it was clear that she had not received a response and by then her trust was shattered. Ms Flanagan submitted that contrary to the pleadings in the ET3, the respondent had failed to establish that dismissal fell within the range of reasonable responses.
52. Ms Flanagan accepted that the test to establish breach is objective. Despite the fact that the claimant's previous experience had impacted on her confidence levels, she submitted that the failure to provide interim cover for such a long period was, objectively speaking, a breach and that no employee at that level would be able to put up with such a situation.
53. Ms Flanagan submitted that the evidence did not support Mr O'Neill's submission that the timing of the claimant's resignation coincided with her having received a permanent contract from South Lanarkshire College, referring to the claimant's evidence that she had been given a permanent contract the year before. Rather, subsequent to her dismissal, she had sought further hours from the college, in order to mitigate her losses.

Respondent's submissions

54. Mr O'Neil accepted the claimant's analysis of the law. Mr O'Neill asked the Tribunal to prefer the evidence of the respondent's witnesses where there was a conflict, in particular that there had been no discussions with the claimant about

being stressed at the time; or that she had stressed to Ms Tod that the failure to fill the vacancy was having an impact on her; that the claimant was mistaken in her recollection of how the letter was sent to Mr Nicolson and when he got it; that the claimant was offered the full-time post formally (and not just informally as she suggested, although in any event she did not want it).

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55. Mr O'Neill then set out in some considerable detail the proposed findings in fact, which he said supported his submission that the respondent had taken all reasonable steps to ensure that the vacant post was filled and that the management structure was sufficiently robust in the meantime to cope with the absence of the other post.

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56. Mr O'Neill submitted that the respondent had acted thoroughly and properly and treated the claimant with the dignity which her post deserved. He submitted that there was no unreasonable behaviour and/or course of conduct which could be said to be calculated or likely to destroy or seriously damage the relationship.

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57. This was particularly because the claimant chose to work part-time at Ballerup, and when she commenced she was aware that it would take up to 8 weeks for the other half of her post to be filled. Further, no one could foresee the vacancy created by Ms Fleming's illness and in any event the claimant was kept informed throughout.

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58. While what was happening may well have been a source of annoyance and frustration for the claimant, the respondent was reacting to circumstances and going through the proper procedures. Notwithstanding the cause of the claimant's frustrations, the actions of the respondent were not likely far less intended to breach trust.

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59. While the claimant may not agree with the steps that were taken, from an objective standpoint the respondent's senior staff were entitled to look at the wider picture and take a decision based on the resources. Ms MacDonald considered and concluded that interim cover was not required but for the reasons she gave in evidence. Account was taken of the management structure at Ballerup and

compared with the needs of other nurseries and the decisions were made about interim cover on the basis that the management team at Ballerup was one of the strongest teams across the council.

5 60. Given the timeframe over which events took place, the claimant resigned only four months after commencing her new role. Given the resources and the strength of the management team at Ballerup and the short time between the claimant making her complaint known in writing to Stuart Nicholson once she had the correct email address, she did not allow any time for feedback before she emailed Ms Tod that same evening and met her the next day to advise of her decision to resign.
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61. Mr O'Neill said that this coincided with the claimant obtaining a permanent position at the college and he submitted that was the real reason why the claimant had resigned. He relied on the evidence of Ms Tod, Ms McHugh and Ms Dalbeck, all of whom were very surprised that the claimant had resigned and who all understood that at least one of the reasons was because she was seeking further hours at the college.
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62. Mr O'Neill submitted that there was no conduct upon which the claimant could rely and if there was, there was reasonable and proper cause for the actions, which were following procedures in order to address the claimant's concerns. Consequently there was no breach upon which the claimant could rely. After
20 some consideration, Mr O'Neill withdrew his argument relating to unfair dismissal.

Tribunal's discussion and decision

Observations on the witnesses and the evidence

25 63. I found all of the witnesses in this case to be credible. Where there was a conflict in evidence, I found that this was down to a difference in perception or mistaken recollection, rather than that any of the witnesses was not telling the truth.

64. The claimant gave her evidence in a clear and straightforward manner. It was
30 clear to me that she is a committed professional and I had no doubt that she was

well capable of doing her job, as was confirmed by the respondent's witnesses. While I have no doubt either that she felt under considerable pressure and indeed stress in the new role given the fact that the other half of her post was not filled, I have found that she did not communicate this to the respondent until the end of July/beginning of August. Indeed, the claimant's own evidence was that she took a professional stance at work and did not allow her concerns to impact on how she presented herself to her staff or the parents or children.

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65. With regard to the respondent's witnesses, I accepted the evidence of Ms McHugh and Ms Dalbeck as credible and reliable, and essentially confirming that the nursery was running well in the circumstances.

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66. I found Ms Tod to be a credible and reliable witness. While I accept that the claimant was raising concerns about the delays in the post being filled, and that these were being communicated to Ms Tod, Ms Tod believed she was doing everything she could to deal with those concerns and to fill the post.

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67. I got the impression that Ms Tod was a supportive and understanding manager, and that she dealt with the claimant with patience, and sought to reassure her regarding any misgivings she might have in her management decisions and any lack of confidence which she detected.

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68. Ms Macdonald was also an impressive witness. She was well versed in the facts and details of this case and had conducted the grievance expeditiously and comprehensively. Although she was pressed in relation to the issue of interim cover, she was very clear in her evidence that she had taken the view that interim cover was not required, and she gave very clear business and operational reasons for that decision.

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69. It follows that I did not accept Ms Flanagan's submissions that the respondent's witnesses were not credible when they gave evidence that they had no concerns about the running of the nursery while the claimant was working part-time in the role. I accepted their evidence that they were confident given the strength and

experience of the management team at Ballerup, and given the relatively short period of time during which this situation pertained, that the risks were limited.

Constructive dismissal

5 70. The first and key question which the Tribunal must consider in this case is whether there was a breach of contract. In this case, the claimant argues that the implied term of trust and confidence was breached. Following the **Malik** formulation, the requirement is to consider whether the respondent had conducted itself in a matter which was calculated, or if not, which was likely, to destroy or seriously damage the relationship of trust and confidence between the employer and the
10 employee, where there was no proper and reasonable cause for the respondent's behaviour.

15 71. In submissions, the claimant made it clear that she was relying on the failure of the respondent to fill the other half of her post, failing which a course of conduct culminating in the failure of Mr Nicolson to respond to her letter alerting him to her concerns.

20 72. The respondent stressed that it was the claimant's choice to take the role part-time, that she knew that the other half would require to be filled, that she knew or ought to have known that it would take some time to fill. There was a dispute about whether the claimant was offered the role full-time, but the claimant admitted it had (informally at least). However, none of this is anything to the point.

25 73. From the claimant's perspective, she felt under increasing pressure the longer the post was not filled. I accepted that she was very anxious about the post not having been filled, and that anxiety would increase over time. I recognize that this was essentially a "job share" role, where the workload could not be halved or duties split, and there were issues arising at the start of the week which she would have to pick up in the latter part. I accept that she would at least feel some pressure to do additional work, even if she was not being required to, for example to attend in-service days on days when she was not due in. I accept too that she would be all the more anxious because of what happened previously, and that the time

spent out of her substantive role, notwithstanding the training, would have contributed to a loss of confidence. While I accept that to be the case, I do not accept that the claimant had communicated this to the respondent until she made formal complaints at the end of July.

5 74. The focus in a constructive dismissal claim, where it is argued that there has been a breach of trust and confidence, is on the conduct of the employer. From the respondent's perspective, they were of the view that they had done everything that they reasonably could to fill the post and deal with what they understood to be the claimant's concerns.

10 75. The claimant complains about the respondent's failure to fill the post. While I accept that the claimant had communicated her concerns to Ms Tod regarding the delays in filling the post, I am of the view that the respondent was taking all reasonable and speedy steps to seek to ensure that post was filled. I also accepted Ms Tod's evidence that she had been keeping the claimant informed,
15 and I did not understand the claimant to suggest in evidence that she was not aware of the developments, including the decision to create the full-time post which she was advised about at the beginning of August.

20 76. While the claimant believed that she had communicated the fact that she was under pressure and suffering from stress to Ms Tod, I accepted Ms Tod's evidence that that was not the case. This was particularly because from the evidence I heard, I got the impression that Ms Tod took her duty of care to her staff seriously, and that had she been under the impression that the claimant was suffering undue stress, that she would have referred the claimant to personnel in accordance with the requirements of the Stress at Work policy.

25 77. I have found that the first time the claimant made her concerns clear was in a letter dated 31 July 2017 originally to Ms Carole McKenzie (page 67). That letter did not reach Ms McKenzie until 1 August 2017 at 17.28, and she replied on 3 August at 12.11 expressing concern but stating that it should be redirected to Stewart Nicolson. Although the letter subsequently sent in very similar terms was
30 also dated 31 July 2017, it was common ground that this was not sent until after

3 August, and even then there was some difficulty in it reaching Mr Nicolson because of an error in the e-mail address. It was not clear from the evidence when it had reached Mr Nicolson's inbox, but the claimant did recall that she got a response from his secretary advising that he was on holiday and would reply on his return. Assuming that was just one day the earliest it would be 4 August (a Friday) or more likely Monday 7 August, when Mr Nicolson was on holiday. These are not the actions of an employer that does not take its duty of care to staff seriously.

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78. I have no doubt that the claimant's previous experiences impacted on her concerns about what might happen in this situation and how well she could cope with the absence of a "job-share" partner. While these experiences took their toll on her and clearly affected her confidence and her trust in the council, as Ms Flanagan rightly understood, she could not rely on the fact that she was perhaps particularly vulnerable where the other half of her role was not filled because of previous experiences.

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79. While I accepted that from the claimant's perspective she may well have come to the view that trust and confidence was seriously damaged, I could not however say that the respondent's behavior was conduct which, viewed objectively, was likely to seriously damage the relationship of trust and confidence, or indeed that it was conduct which the claimant could not be expected to put up with, or even that it was unreasonable. In these circumstances, I have found that the employer's conduct, from an objective standpoint, could not be said to breach the implied term of mutual trust and confidence.

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80. Indeed, quite the contrary. I was very impressed with the impetus which the respondent maintained in taking steps to fulfil the other half of the post. I accepted that any apparent delays, if they could be called delays, were explained by the need for the council to implement appropriate and necessary procedures. Very shortly after it became clear that the post would not be filled after the second advert, the issue was raised at a management meeting, a creative solution was proposed, authority was obtained from Ms McDonald's line manager, who took it to his line manager, who required to get agreement from corporate services.

Rather than the matter being referred to the appropriate committee in the fulness of time, an accelerated report was put before the CEO. It seemed to me that the matter could not have been dealt with more speedily.

5 81. At the hearing, the claimant appeared to focus on the failure of the respondent to take steps to obtain interim cover, pending the filling of the post on a permanent basis. She was of the view that this had happened in other circumstances, and thought that it should happen for her. Although it came after her resignation, she was particularly aggrieved that the respondent had very quickly been able to require a colleague (Liz Hotchkiss) to attend to replace her after her resignation.
10 However, I fully accepted that the respondent made that decision for operational reasons, and indeed I accepted the rationale given for the decision not to do so in the particular circumstances of this case.

15 82. Although the claimant raised concerns about delays in being permitted to recruit temporary cover for Ms Fleming's role, and she had come to understand that she needed a medical certificate (rightly or wrongly), whatever the procedure, I could not say that there was any undue delay. Ms Fleming had gone off at the beginning of a period of two weeks annual leave at the beginning of July when her work would not have been covered by additional staff, and Ms Tod had approved the process to recruit temporary cover by 1 August.

20 83. I was also impressed by the support given by all of the respondent's members of staff in this case, not only her colleagues but also those in the management hierarchy. I accepted that there was no expectation that she should do a full-time role part-time. Ms Tod raised a concern about a failure to delegate or share certain tasks, but she did not make an issue of that either at the time or in the evidence
25 she gave. It was this in particular that made me accept Ms Tod's evidence that had the claimant made it clear to her that she was suffering from stress, that she would have immediately taken steps to seek to address the issue, and not only because the council's policy requires it. Indeed this is precisely what Ms Tod did, even though the claimant had by that time resigned.

84. It was apparent not only that the claimant had not make clear the pressures she was under to the respondent (and the fact that she managed, in her words, “not to show the cracks” is ironically to her credit), but that she acted far too quickly and hastily in resigning when she did and not giving the respondent any opportunity to support her through a stressful period.

85. In particular, she resigned before the applications for the temporary depute cover closed and she left just shortly after she was advised that there had been budget approval for the full-time role. Further, while there were delays in e-mails being sent because of errors in e-mail addresses, Ms McKenzie gave a sympathetic and speedy response; the claimant was made aware that Mr Nicolson was on holiday, his secretary having responded to her e-mail (and she made no attempt to ask for the matter to be forwarded to another manager); the follow up e-mail to Mr Nicolson was sent at 13 August 20.19, by which time as I understood the evidence, the claimant had also asked Ms Tod to meet her the next day, when she had more or less decided that she would resign. Although she was not aware of it, Mr Nicolson had taken action to deal with her complaint at 09.26 on Tuesday 15 August, having it seems just returned from holiday.

86. The claimant tried to suggest that Mr Nicolson had ignored her e-mail, but I did not accept that at all, and the fact that she was unaware of the fact that he had taken steps so quickly, rather underlines the fact that she acted too quickly after bringing her concerns clearly to the attention of management.

87. The claimant put in a formal grievance after she had resigned, again giving no opportunity for those issues to be considered before hand. The fact that Ms Macdonald said it would have made no difference to the outcome if she had done so is nothing to the point. It seems the claimant was particularly aggrieved when Ms Hotchkiss was brought in so quickly. However I accepted the respondent’s evidence that different considerations apply when there is no head and only a part-time depute, which warranted a different response.

88. In all these circumstances, I did not accept that the respondent had conducted itself in a manner which was intended or likely to seriously damage trust and

confidence. Although the test is objective, even if it did have that effect, there was reasonable and proper cause for the respondent's actions.

89. In all these circumstances, I find therefore that the claimant was not dismissed in terms of the relevant provisions of the Employment Rights Act, and so that her
5 claim for unfair dismissal cannot succeed and is dismissed.

Employment Judge: Muriel Robison
Date of Judgment: 06 September 2018
Entered in register: 07 September 2018
10 and copied to parties