Claim No. 1401959/2018

EMPLOYMENT TRIBUNAL

BETWEEN

CLAIMANT	AND	RESPONDENT
Mrs M. Blackwell		North Somerset Council

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

Held at: BRISTOL

On Tuesday, the 28th May 2019,
Wednesday, the 29th May 2019
Thursday, the 30th May 2019

Employment Judge: Mr D. Harris (sitting alone)

Representation:

For the Claimant: Mr Simon Emslie (Counsel)
For the Respondent: Mr Spencer Keen (Counsel)

JUDGMENT

1. There shall be judgment for the Claimant in her claim of constructive unfair dismissal.

2. The Claimant's claim of breach of contract shall be dismissed.

3. The claim shall be relisted on the first available open date after the 22nd July 2019, with a time estimate of 1 day, for a remedies hearing in relation to the claim of constructive unfair dismissal.

REASONS

The claim

1. By her Claim Form received by the Tribunal on the 5th June 2018, the Claimant claimed compensation for constructive unfair dismissal and damages for breach of contract against the Respondent.

The factual background

2. The following facts were not in dispute in the claim. The Claimant commenced employment with the Respondent on the 12th December 2005. She was employed as a Senior Practitioner Occupational Therapist (referred to by the parties, and, for that reason, by the Tribunal, as a 'SPOT').

3. The Claimant was provided by the Respondent with a statement of the particulars of her contract of employment. The statement of particulars was issued on the 9th December 2005 and was signed by the Claimant on the 15th December 2005. Under the heading 'location', the statement of particulars provided as follows:

> **"You will be located at Weston-super-Mare or at such other locations as required by your service, within the geographic area of the Council.**
> **The Council refers the right to transfer you to such alternative posts appropriate to your grade and/or to alternative work places as is considered reasonable. Any such transfer would be subject to relevant consultation."**

4. Under the heading 'hours of work', the statement of particulars provided as follows:

> **"Your normal working week is one of 37 hours from Monday to Friday. Normal office opening hours are from 8.45 to 5.00 pm Monday to Thursday and until 4.30 on Fridays. A Flexitime Scheme has been agreed for the Council and where the Scheme operates working arrangements will be in accordance with the rules as set out in the Staff Handbook.**
> **You would not normally be expected to work additional hours but if you are required to do so then extra hours should be taken as time off in lieu."**

5. Under the heading 'collective agreements', the statement of particulars provided as follows:

> **"Your terms and conditions of employment will be in accordance with collective agreements negotiated from time to time by the National Joint Council for Local Government Services, set out in the Scheme of Conditions of Service (the Green Book) and the South West Provincial Employers, as adopted by the Council and supplemented by local collective agreements reached with Trade Unions recognised by the Council and by the personnel policies and practices adopted by the Council as set out in the Staff Handbook.**
> **A copy of the Green Book is kept by Corporate Human Resources and will be available for your inspection during normal office hours upon request. From time to time variations in terms and conditions will result from consultation and negotiation. You will be notified of**

any such changes and/or advised of a change and the relevant documents made available for inspection. Any changes apply regardless of whether or not you are a member of a Trade Union."

6. In addition to the statement of particulars, the Claimant was also provided with a written job description. The date on which she was provided with the job description was not clear on the evidence. A copy of the job description was provided in the hearing bundle. The document is undated. It refers to the number of referrals made to the Respondent's Occupational Therapy Service in the tax year 2003/2004, which would suggest that the job description was created in the tax year 2004/2005. There was no dispute that the Claimant was provided with this job description at an early stage in her employment with the Respondent but there was a dispute as to the contractual status of the document. The Claimant contends that the job description set out contractual terms as to the scope of the caseload that she would be responsible for (up to 10 cases, including complex cases) and the number of occupational therapy staff that the Claimant would be required to supervise (up to 6 occupational therapy staff). The Respondent, on the other hand, contends that the job description did not have contractual status and that, in any event, it was out of date by the time of the events that culminated in the Claimant's letter of resignation dated the 8th December 2017.

7. Notwithstanding the dispute concerning the contractual status of the job description, there was no dispute as to the role of a SPOT. The following description of the work of a SPOT, taken from the witness statement of Martin Hawketts, the Service Manager for the Respondent's Adult Services, (a witness for the Respondent) was not challenged:

"Community OT work involves using particular activities as an aid to recuperation from physical or mental illness; prescribing equipment and assessing adaptations required to the home. Cases are prioritised according to need with P1s given priority, who were clients with a significant need or at risk of harm.

…

As a SPOT, Mekdes:

- **allocated P1s;**

- **had her own caseload (SPOTS and OTs self-selected cases from the waiting list);**
- **supervised OTs and unqualified OT staff; and**
- **dealt with team CPD [Continuing Professional Development].**

8. The way in which the Respondent organised its team of Occupational Therapists and Occupational Therapist Assistants is important to the case. The geographical area in which occupational therapy services were provided by the Respondent was divided into two regions, referred to as the North and the South. There were two SPOTs allocated to the North and two SPOTs allocated to the South, making a total of 4 teams providing occupational therapy services. The two teams in the North were based at Clevedon and Nailsea and the two teams in the South were based at Weston-super-Mare and Worle.

9. Before changes that occurred in January 2014, the Clevedon team (later referred to as the Gordano team) was line-managed by a SPOT called Claire Howells and the Nailsea team (later referred to as the Rurals team) was line-managed by a SPOT called Jo Penny. In the South, the Weston-super-Mare team was line-manged by the Claimant and the Worle team was line-managed by a SPOT called Caroline Hall.

10. In or about August 2013 it was decided that the SPOT based at Worle, Caroline Hall, would be seconded to the Respondent's Contracts and Commissioning service for an initial period of 6 months commencing in January 2014. It was also decided that Caroline Hall's position as the SPOT responsible for the Worle team would not be filled during her absence by the appointment of a new SPOT. At page 34 in the Hearing Bundle was an email from Martin Hawketts dated the 29th August 2013 in which it is stated: "*As the senior role in Worle is not being replaced in Caroline's absence,* [the Claimant] *will be providing cover to the Worle team (alongside Bernadette) …*"

11. On the 13th January 2014 a meeting took place attended by the three remaining SPOTS (namely, the Claimant, Claire Howells and Jo Penny) and Martin Hawketts. The outcome of the meeting was set out in an email from Martin Hawketts dated the 14th January 2014 (at page 111 in the Hearing Bundle). The contents of the email are relevant to the case and so I quote the email in full:

> **"Thank you for meeting with me yesterday.**
> **We agreed that for the interim, Mekdes will manage both the Worle and Weston teams, with support from the seniors from Clevedon and Nailsea to cover leave absence, and an agreement to support with any complex cases.**
> **This means it is likely that Mekdes may drop her own caseload to accommodate this, and divide her week between the two teams.**
> **We agreed that there needs to [be] time set aside to conduct an exercise across the waiting list in the South (Worle and Weston) – to check the older cases still require assessment – this work will be done between administrators and OT aide.**
> **There was a feeling in the group that should the situation continue a business case for a fourth senior should be presented. However, should Caroline [Hall] return to her substantive role in June of this year there is little or no value in pursuing this in the meantime given the short timescales. This will be confirmed with Contracts with regard to the plans, which will better inform the way forward.**
> **Joint visits should be considered only where appropriate."**

12. The Claimant's documented response to the above-quoted email from Martin Hawketts is informative. On the 15th January 2014, the Claimant emailed Mr Hawketts in the following terms:

> **"The seniors have always covered for each other's absence and leave regardless of the circumstances.**
> **The support should be not only with complex cases, but also with the urgency.**
> **It is not the case of "Mekdes may likely drop her own cases", but I must."**

13. Mr Hawkett's response to the Claimant's above-quoted email, was as follows (in an email dated the 15th January 2014):

> **"The comment about your caseload is that whilst supervision and management of staff does take up significant time; I do not wish to be, nor consider it appropriate to be, directive about you not being**

able to hold any cases at all – you will at the maximum be taking on an additional 4 staff compared to the other seniors – 2 at the moment, and 2 more when the winter pressures come on-line – it may be that the immediate demands for example are not as significant in terms of workload – and it is also dependent on the support required by the individual staff. This will be discussed in ongoing supervision. It was my understanding that this reflected the nature of our discussion on Monday."

14. In response to the above-quoted email, the Claimant replied (in an email dated the 15th January 2014):

> **"Currently I hold 10 cases and I've been closing cases. When Claire was asked to cover two teams recently either you or George agreed for her to get rid of her caseload and concentrate on doing the additional work. Is the current situation any different?"**

15. The above-quoted email from the Claimant was responded to as follows by Sarah Walker, an Early Intervention and Prevention Manager, on the 15th January 2014:

> **"Mekdes, can I suggest you discuss with Kaml [the Claimant's line manager] if you are concerned and if there are any outstanding issues she can link with Martin to address as needed.**
> **We are all aware that capacity in the OT service is an ongoing tension but hopefully your concerns can be allayed."**

16. The above email exchange represents the sum total of email correspondence in January 2014 (that was provided to the Tribunal) concerning the arrangement that involved the Claimant covering the Worle team in Caroline Hall's absence.

17. Enclosed within the hearing bundle were some supervision records for the Claimant dated the 2nd May 2014, the 6th June 2014 and the 3rd November 2015.

18. The record for supervision dated the 2nd May 2014 contains the following passages:

> **"Mekdes said she is alright. She has been to the 5 day Manual handling training and has decided to write the essay. Initially she has decided not to do it, however now the department has offered 2 days of study time to do this, so she has decided to do it.**
> **Mekdes is still holding a number of cases. She wanted to know if there was any update on the SPOT situation for Worle team. Since I have not had any information, I am not able to advise her.**
> **…**
> **Mekdes and I discussed the future SPOT arrangements and the lack of OT hours in the South. If any urgent referrals come in, sometimes there is no one available to allocate this piece of work. At the meeting a few months ago with all the team managers and SPOTS, the teams in the North agreed to support the South teams at such times, but this has not happened. Kaml will take this up with Martin. I have advised [the Claimant] to send the email with the request to the SPOTS in the north and copy Martin in it."**

19. The record for the Claimant's supervision dated the 6th June 2014 contains the following passages:

> **"… Mekdes said her time is taken up with supporting staff in the two teams. Sometimes it is difficult to allocate the urgent referrals in the team. Last week there were 5 urgent referrals and there was not enough staff to take on all of them. She managed to distribute most of them and took one herself."**

20. The record for the Claimant's supervision dated the 3rd November 2015 contains the following passages:

> **"Mekdes said she is alright, getting over the cold she has had since last week.**
> **Mekdes is currently holding 16 cases – all have been referred as 'Urgent' and there seems to be no one to take them on. Only 3 of these are dormant, the rest need daily input. She will try to reduce the caseload to 10. 3 referrals came from a Care Home as Priority 1 – re the slings.**
> **Mekdes gets 3-5 queries on daily bases. Referrals from the care homes is on the increase.**
> **There are concerns how the admin support is going to be managed in the team. Are the SPOTS now clerical Assistants? Mekdes is**

doing the duty work every day. Printing and filing the new referrals is not appropriate use of the senior's time.
…"

21. The above-quoted records of supervision represent the sum total of the Claimant's records of supervision in the Hearing Bundle.

22. The Hearing Bundle also contained some records of the Claimant's annual appraisals. There were two Appraisal Forms dated the 11th September 2015 and the 10th June 2016.

23. The Claimant's recorded comments in her September 2015 Appraisal Form were as follows:

"I have worked hard to manage two separate teams for the last two years despite a number of changes and difficulties. I have successfully completed a Best Interest Assessment course and look forward to putting theory in to practice.
Working in two different teams. Though there was no difference in the basic work in the two teams the expectation of staff and their process differed. I successfully managed the staff's expectation and accommodated changes necessary for service delivery.
…
Deputizing for absent team managers and senior social workers.
Despite lack of support from the previous Weston integrated care team (currently at Worle integrated team) managing to carry out my professional duties and responsibilities.
My working relationship with colleagues, partner agencies both internal and external (statutory and non-statutory) is excellent. The co-location of health and social services team has led to better collaborative work. I'm often asked by health colleagues to authorise equipment orders and discuss clinical cases. The collaboration is a benefit for both parties as it allows better understanding of each other roles, and professional development.
I also have a very good working relationship with my current team manager and it has made a huge difference having her as a manager for my health and wellbeing as the previous manager's action and behaviour had an impact on my wellbeing.
Recently I successfully completed a Best Interest Assessment course and I look forward to putting the theory in to practice. Taking time out to complete the BIA assessment and the required paper

work will take me away from my substantive role. However, this has been agreed by the department.
IT transformation, lack of staff, managing staff and service user's expectation is challenging and creates difficulties for effective and efficient service delivery."

24. There is the following recorded comment from Martin Hawketts on the Appraisal Form dated the 11th September 2015: "*Mekdes, Thank-you for your ongoing work in supporting and managing OT services in both Weston and Worle*".

25. The Claimant's recorded comments in her June 2016 Appraisal Form are as follows:

> **"I am an efficient and effective worker. I managed the two locality Occupational Therapy teams successfully. I take my role and responsibilities seriously. My working life had been directly enhanced since a change of line manager."**

She gave the following examples of her successes:

> **"Managing two teams.**
> **Accommodating the culture of each team.**
> **Responding to urgent referrals on time.**
> **Responding to queries from staff, service users, carers and other agencies."**

Under the heading 'objectives for the year ahead', the Claimant stated:

> **"For over two years I have been doing two people's jobs and managing two Occupational Therapy teams effectively. The work is pressurised and demanding therefore keeping my head above water and my sanity is important over the coming year.**
> **As I'm doing two people's jobs I strongly feel that I've saved North Somerset Council a lot of money (possibly contributed in some way to meet the budget deficit?)."**

26. It was not in dispute that Caroline Hall returned from her secondment in July 2015 and resumed, to some degree, her job as a SPOT based in Worle. She remained in that role, with some absences due to ill health, until she retired in March 2016. During the period that Caroline Hall was back at work as a SPOT in Worle, the Claimant reverted, primarily, to her role as the SPOT for Weston, though she also continued to cover the Worle team as and when required. That arrangement changed in February 2016 when Caroline Hall went on long term sick leave and subsequently retired. At that time, February 2016, the Claimant went back to covering the Weston and Worle teams on a full-time basis.

27. The following year, in April 2017, the Claimant learned that two Social Care Coordinators (Martin Chacku and Susie Hook) had received a pay rise. The precise circumstances in which the pay rise was awarded was not made known to the Claimant but she was informed by Mr Chacku that he had received a pay rise for doing the same job. It was understandable that the Claimant, upon hearing that news, would reflect on her own position and the fact that she had not had a pay rise whilst covering the Worle team.

28. Unbeknownst to the Claimant in April 2017 was the fact that Martin Chacku and Susie Hook had been promoted to act-up in the position of Integrated Care Team Managers and, as a result of the acting-up, they have moved from pay scale JM3 to JM4 (evidenced at pages 135 to 138 in the Hearing Bundle).

29. The Claimant's discovery of the pay rise for Martin Chacku and Susie Hook set in train the series of events that ultimately led to her resignation some 8 months later on the 8th December 2017.

30. Upon hearing the news about the pay rise, the Claimant sought an urgent meeting with the Respondent's Interim Assistant Director, David Jones. The meeting with Mr Jones took place on the 20th April 2017. What was discussed at the meeting can be gleaned

from the following email sent by the Claimant to Mr Jones on the 21st April 2017:

> **"Further to our brief conversation yesterday afternoon I'll contact Becky Keating with the view to formally submit a letter regarding the issue of role, responsibilities and pay grade. However, I'd be most grateful if you would clarify the following points for me.**
>
> **1) The process followed to raise the paygrade of Martin C & Susie (Social Care Coordinator role) in order to cover the role temporarily vacated by Deborah (Integrated Manager role).**
> **It is my understanding that the role and responsibility Martin & Susie currently have has not changed i.e. they will still fulfil their substantive post's role as social care coordinators, but as they are covering for Deborah their pay will increase and they will now be called Integrated team managers (though as acknowledged at various manager's meetings integration isn't going to take place).**
> **You informed me that Deborah's salary is being utilized to give the additional pay to Martin and Susie. You are of course aware that I have been covering two teams for almost three years and saving NSC the salary of a full time SPOT for that period.**
>
> **2) During our conversation you mentioned honorarium payment. Did the two Social Care coordinators have to ask for the payment as a consequence of covering for a colleague on secondment? If they haven't why do I need to go through it."**

31. The reference to an honorarium payment is a reference to a discretionary payment, payable under the Respondent's 'Acting-Up and Honorarium Payments Policy", which will be considered in more detail in relation to the Claimant's claim for damages for breach of contract.

32. Mr Jones' response to the Claimant's email was as follows (in an email dated the 12th May 2017):

> **"I am responding to your email of 21 April 2017 making representations for an honorarium.**
> **The branch management team appreciates the work pressures you are facing and that the number of staff you are currently supervising has increased. We recognise your continuing and valued support to the Occupational Therapy service.**

I acknowledge your workload has increased but understand that Becky has been working with you on prioritising requests and ways of re-arranging the work as part of the management support to enable you to cope with the pressure. I also understand you have been able to take some TOIL. As you know from your participation in the OT engagement meetings, the directorate is committed to developing proposals which will improve the service and should reduce some of the pressures you and colleagues have been facing.
Each request for an honorarium payment has to be considered against council policy and conclusions should not be reached based on any other arrangements within the directorate.
An honorarium payment is only payable in circumstances where an employee, for any reason other than annual leave, is asked to undertake part of the duties and responsibilities of a higher graded post for a continuous period of four weeks or more. Increases in the volume of work or the number of staff is not covered by the "Honorarium and Acting up Policy". I, therefore, must inform you that it is not possible to support your request for an honorarium payment.
Details of the policy can be found on the council's intranet:
…
I realise you will both be very disappointed by this response but reiterate that we very much appreciate your continuing support to the Occupational Therapy service and hope you will understand that the policy precludes a different decision."

33. Then, on the 15th May 2017, the Claimant received an email from Hayley Verrico who had taken over as Assistant Director from David Jones. Ms Verrico's email was in the following terms:

"Dear Mekdes,
There is a set procedure for raising paygrades and as reiterated to you previously, it is dependent on the changes associated with a colleagues scope and management responsibilities, it is not simply about doing 'more of the same'. To this end I can assure you that due processes have been followed. I would further add that, it may be your understanding that the role and responsibilities of the 2 staff concerned have not changed but this is more around your perception and not in full knowledge of the scope and nature of the duties your colleagues are being asked to fulfil."

34. On the 22nd May 2017 the Claimant submitted a "Stage 1 Grievance" to the Respondent (at page 61 in the Hearing Bundle) in the following terms:

> **"<u>Detail of Grievance</u>**
> **…**
> **For at least three years I have been sole Senior Occupational Therapist for the South Occupational Therapy team.**
> **I have taken on extra duties and responsibilities at no extra cost to the council.**
> **I have been discriminated, treated unfairly and differently from my counterparts in the North team.**
> **For more than a year I didn't receive any kind of formal supervision.**
> **The email response I received from the new Assistant Director Hayley Verrico in reply to the query I raised with the Interim Assistant Director David Jones has undermined and devalued me.**
> **The cumulative effect of unfair treatment and discrimination has had a negative impact on my mental health and well being.**
> **<u>Detail of any Informal Action Taken</u>**
> **…**
> **Email communication with Hayley Verrico.**
> **<u>Resolution of Grievance</u>**
> **Please state what would resolve your grievance i.e. what you consider to be a satisfactory outcome.**
> **Investigation of appointment, increase in pay to two Social Care Coordinators (Susie Hook & Martin Chacku)**
> **Recompense for doing two people's job for at least three years.**
> **Revaluation of the Senior Practitioner job description.**
> **Investigation of the unjust and unfair treatment I received over the years."**

35. A senior HR Advisor, Jacqueline Collins, was given the task of investigating the Claimant's grievance. After interviewing the Claimant, Martin Hawketts, Martin Chacku, Sarah Shaw (a Service Leader) and Hayley Verrico, Ms Collins produced an investigation report dated the 21st June 2017 (to be found at pages 44 to 50 in the Hearing Bundle).

36. Ms Collins' recommendation was that the grievance concerning the lack of supervision be upheld and that the grievance that the Claimant had been treated unfairly and differently from her SPOT colleagues by covering work left by the vacant SPOT role in Worle at no extra cost to the Council and without recompense and

support be 'partially' upheld. The remainder of the Claimant's grievance was rejected. Ms Collins' overall recommendation was as follows in respect of the complaint that the Claimant had covered the Worle team without recompense and adequate support:

> **"Partially upheld insofar as MB has greatly helped the OT service by covering the SPOT role in Worle that might otherwise have been backfilled, coupled with the fact that she has not had the benefit of formal supervision to support this. This should be acknowledged along with the continued contributions of her peers. However, there is insufficient evidence to conclude that the additional work required is excessive or unsafe and there are insufficient grounds for HR to recommend further compensation within current pay policies. There is also no evidence that Mekdes has been treated unfairly or differently as a result of covering the work. The plan beyond October, with respect to current act-up arrangements needs to be considered and should of course be communicated as openly as it is reasonably possible to do so."**

37. Ms Collins' recommendation in respect of the grievance concerning Ms Verrico's email dated the 15th May 2017 was to reject the grievance.

38. Ms Collins' report was passed to a Director by the name of Sheila Smith and she wrote to the Claimant on the 25th August 2017 with the outcome of the Stage 1 Grievance. In short, Ms Smith simply adopted the recommendations made by Ms Collins in her report and she cut and pasted those recommendations into her letter to the Claimant dated the 25th August 2017.

39. Unbeknownst to the Claimant (who was not provided with a copy of Ms Collins' report until much later on), Ms Collins' report contained the following passage:

> **"MH stated that his recollection at the start of the original secondment was that MB was asked to help support the team and that other SPOT's in the North were also helping. He agrees that the Worle SPOT post was never backfilled. However, MB is not required to travel to Worle and some cases have gone to the North. It is not clear how many cases were transferred, the basis of the transfers**

and at what point this might have happened. MH states that the number of staff being supervised by MB as a result of the reallocation of cases is no different to the number being supervised by SPOTS in the North. MH states that MB has never held her own caseload and this was deliberately withdrawn from MB so that she could extend her SPOT support to Worle. MH feels that in terms of supervision she is not overloaded.
MH feels that the increase in volume and complexity of caseload has been experienced across the OT service as a whole and is not unique to Weston.
…
SS agreed that MB had effectively been held 'in limbo' whilst covering the 2 teams. SS agreed with MH that there was no change in the scope or influence of her role by taking on the cover arrangements. However, she put forward the view that if there was the facility to do so, there could be some recognition that MB had been effectively 'plugging the gap'. In terms of workloads, SS stated that there is possibly a disparity in activity between the areas that is being looked at through the current development work. MB has been fully involved in this work. SS confirmed MH's statement that MB does not carry a caseload while the other SPOT's did and this was an element of the current job description. In terms of the levels of authority, SS confirmed that SPOT's will sign off on OT and OTA work. SS accepted that there is likely to be a certain degree of stress attached taking on the additional cover without having a counterpart in the South to share the burden and that while it may be manageable, it should nonetheless be acknowledged."

40. The Tribunal found that the information provided by Mr Hawketts and Ms Shaw to Ms Collins in respect of the Claimant's caseload whilst covering the Worle team was factually wrong. The Tribunal's finding was that the Claimant's caseload was not removed from her, as stated by Mr Hawketts, and that she had continued to carry a personal caseload whilst covering the team in Worle.

41. Ms Collins' report also contained a factual error in respect of the number of occupational therapy referrals to the South and to the North during the period October 2015 to September 2016. Ms Collins recorded that there were 178 more occupational therapy referrals to the South than to the North and 84 more occupational therapy assistant referrals to the South than to the North. The corrected figures showed that there were 12 more 'OT' and 'OTA' referrals to the South than the North over the stated period.

42. Unhappy with the outcome of her Stage 1 Grievance, the Claimant submitted a Stage 2 Grievance on the 31st August 2017 in which the Claimant, in effect, sought a review of Ms Smith's decision. The grounds on which the Claimant sought the review were as follows:

> **"When I met with Jacky Collins on June 21/06/2017 I clearly and unambiguously outlined discrepancies between my employment contract and duties. However, there was no reference to these discrepancies, or my contract, in the letter I received from Sheila Smith on 25/08/2017.**
> **I was one of four Senior Practitioner, Occupational Therapists appointed in 2005: one for each locality team (2 in the North & 2 in the South). However, between January 2014 & the 12th of April 2017 (give or take a few months) I was the only senior OT managing the 2 locality teams in the South. Moreover, the job description & contract I was employed under clearly states "to provide up to 6 staff, including a minimum of two qualified staff", but during this time I have been responsible for supervision of 8-10 people.**
> **Thus, I maintain that there has been a breach of my employment contract, and I have been discriminated against, systematically treated unfairly and differently from my counterparts who were employed under the same contractual terms.**
> **I have asked for a copy of Jacky's report. It is essential I receive an entire copy of the report and the information gathered to reach the recommendations. Reviewing what has been "upheld, partially upheld and not upheld" in the letter dated 25/08/2017 suggests to me that either it is not within Jacky's scope to address employment contracts or she has chosen to ignore the most important issues.**
> **I submitted detailed notes when we met on 21/06/2017. In addition I copied and pasted these notes to the amendments I made to notes/minutes of the meeting with Jacky.**
> **I asked David Jones (Interim Assistant Director) several questions before I decided to initiate the grievance process. I also asked several questions at the meeting with Jacky Collins. However, none of the questions were answered by either David or Jacky.**
> **I am more than happy to meet with Hayley Verrico at any time. However, until I receive an evidence-based and objective reason for her response to my reply to David Jones' email I will maintain, as I previously stated, that her email to me was a "put down designed to diminish a person".**
> **<u>Re-confirm what would resolve your grievance i.e. what you consider to be a satisfactory outcome</u>**
> **Acknowledgement that there has been a breach of my employment contract.**
> **Appropriate financial recompense for the period I managed two locality teams as the sole Senior Occupational Therapist, to reflect the additional responsibility."**

43. The Claimant's Stage 2 Grievance was dealt with by Paul Morris, Head of Performance Improvement and HR. His decision, which was sent to the Claimant on the 22nd September 2017, was as follows:

> **"I have now had an opportunity to consider your Stage Two grievance appeal and my findings are set out below.**
> **From my review of the documentation provided to me I do not agree that there is ambiguity between your employment contract and the duties you had been asked to undertake whilst covering across the two teams. However, it is widely recognised that the commitment you have given to the service and the council generally has been invaluable and everyone is appreciative of the flexibility you have shown in undertaking and providing support, guidance and oversight of the services.**
> **My review has also concluded that the work you have been undertaking in relation to the Worle team is the same level work as your previous role focussing on the Weston team.**
> **Regarding your query over the dimensions in your job description and the volume of work you have been undertaking more recently, please be aware that job descriptions are not intended to be restricted in regards duties and responsibilities required. Given that your job description appears to be at least twelve years old it is not surprising that it is not entirely up to date with the current requirements. I understand that your service area is being reviewed and I would expect job descriptions to be amended as necessary to reflect the service going forward following this review.**
> **Regarding your complaint that you 'have been treated unfairly and differently from your colleagues', I understand that there are two other colleagues undertaking a similar role as yourself as Senior OT's. An analysis of work load across all three roles, including your own, confirmed no difference in terms of caseload and supervision responsibilities. On that basis, I am unable to agree with your view that you are being treated unfairly.**
> **I enclose a full copy of the initial grievance investigation report as requested.**
> **I am sorry if you have not been satisfied with the outcome of your grievance. However from my review I can see that a full and thorough investigation was undertaken and consideration was given to all the matters you raised.**
> **Your help and co-operation is appreciated and despite the outcome not being as you had hoped, I do hope you continue with your valuable contribution.**
> **I hope that my response and having sight of the full investigation report helps you bring this matter to a conclusion and I would like to take this opportunity to thank you again for the support and commitment you have demonstrated to the service.**
> **If you are still dissatisfied with the outcome and you wish to pursue your grievance further, you have the right to refer the matter to the**

Employment Committee. In order to do so you must submit a 'Notification of Stage 3 Grievance Appeal' form to me within 10 working days of the receipt of this letter."

44. On receipt of Ms Collins' investigation report, the Claimant was able to see, for the first time, that a mistake had been made regarding the question whether she had maintained a caseload whilst covering at Worle. The Claimant was naturally concerned as to how such an error could have been made and what impact it might have had on the outcome of Stages 1 and 2 of the grievance process.

45. The Claimant promptly sought a meeting with Sarah Shaw, which led to the following email from Sarah Shaw to the Claimant on the 26th September 2017:

"Mekdes I have raised your concern with Jacky Collins today following our discussion.
She has provided me with notes of my brief conversation with her. Nowhere does it state that I have said you have 'never held a caseload'. However, I do recall you raising concerns about supporting a caseload and both teams at SPOT meetings on occasions.
I have asked that Jacky review the entry in the report to reflect the following:
It was my understanding that Mekdes was currently unable to support a clinical caseload given the level of demands from covering both SPOT roles in terms of line management and clinical guidance. However, I am not linked to her daily operational work and her Operational Manager and Service Leader would be able to advise on her level of caseload for certainty.
I have also indicated the following:
Note: Mekdes has since advised that she continued to support a caseload throughout the duration of the additional role and therefore the service leader comment about not carrying a caseload warrants review. I have also been in discussion with Mekdes recently about a number of cases she is involved with.
I trust this rectifies the position and HR will be in contact with the necessary corrections."

46. On the same date, the 26th September 2017, Ms Shaw sent an email to Ms Collins in the following terms:

> **"Jacky, I have just had Mekdes extremely irate and ranting at me about a comment that I had apparently made and was captured in your investigation notes.**
> **Apparently the comment was to the effect that Mekdes 'has never had a caseload' and I had agreed with Martin about this.**
> **I do not recall stating this. I do not know whether Mekdes has ever held a caseload – I would assume as a Senior OT she will have done.**
> **The issue was, as I understand it, whether Mekdes has carried a caseload since she took on both the Worle and the Weston SPOT role.**
> **It was my understanding that she was unable to do this given the level of demands from both roles in terms of line management, however, I am not linked to her operational work and her Team Manager and Service Leader would be able to advise on this for certainty. Mekdes advised me that she has always carried cases.**
> **Mekdes was understandably upset as she states the statement was not true. I have asked that she challenge it as a false statement – as is her right. She did state that this was peripheral to the bigger issue.**
> **Can you let me have a copy of your statement from my perspective please – so I may check it for accuracy? I am concerned my understanding is not portrayed accurately."**

47. Ms Collins responded to Ms Shaw by sending her the handwritten notes of her interview by Ms Collins. Ms Shaw's response is significant. She replied as follows in an email dated the 26th September 2017:

> **"Jacky, I'm sorry but I do not recognise some of that as our conversation. It might be though!**
> **The signing off less than other SPOTS would be due to a lack of standardisation across team but I wouldn't necessarily know the detail for sure. That information would have to come from AIS data – which her Ops manager can provide (Becky Keating).**
> **I do recall Mekdes raising difficulty carrying a caseload and supporting two teams on occasions (I believe raised at SPOT meetings) but in terms of what her caseload is I wouldn't know – this would have to be information from Becky too – from the AIS data or diary. I understand Deborah Greenfield also advised on routes to identify caseload etc.**
> **To be honest I wouldn't expect her to carry a full caseload and support both teams (I'm not sure how we could expect her to do**

this given she was effectively doing two roles – she wouldn't carry twice as many cases as another SPOT) – albeit with Worle as a smaller team – something would have to give for her to have capacity to support additional staff in her usual working hours.
I haven't seen the report but if it could please be amended to reflect the following, I would appreciate it:
It was my understanding that Mekdes was currently unable to support a clinical caseload given the level of demands from covering both SPOT roles in terms of line management and clinical guidance. However, I am not linked to her daily operational work and her Operational Manager and Service Leader would be able to advise on her level of caseload for certainty.
Note: Mekdes has since advised that she continued to support a caseload throughout the duration of the additional role and therefore the service leader comment about not carrying a caseload warrants review. I have also been in discussion with Mekdes recently about a number of cases she is involved with."

48. It is clear from the email correspondence around that time that there then followed a period of internal discussions involving Ms Collins, Ms Shaw, Ms Verrico and Miranda Alsop (a senior HR Advisor) as to how to deal with the error made in Ms Collins' report regarding the Claimant's caseload.

49. Ms Collins took a sensible pragmatic approach. It is evident that she wanted to get to the bottom of whether the Claimant had had a caseload whilst covering the Worle team or not, and, if she did, the extent of that caseload. On the 27th September 2017, Ms Collins sent the following email to those managers who might be able to assist her with her inquiry:

"Dear all
Following a recent investigation into a grievance raised by Mekdes, there now appears to be some confusion about a point made about whether Mekdes carries or carried a caseload whilst covering both Worle and Weston teams as SPOT.
In order to address this fairly, I'd be grateful if you could liaise with each other and provide a management response to the following-
1.Did Mekdes continue to carry a usual caseload as SPOT when she undertook to cover Worle.
Was this caseload reduced at any point in order to accommodate the additional work involved in covering Worle.

If Mekdes carries a caseload now, how does it compare with e.g. Claire Fletcher in the North? – More, less or the same?
2.What is the management view about whether Mekdes should receive some financial recompense for her undertaking to cover the Worle SPOT work?
Could you please let me have one definitive response to these questions. I will need to feed this back to Paul Morris, who reviewed the stage 1 grievance outcome. He will then be able to consider whether a further response to Mekdes is needed."

50. Ms Collins did not receive the definitive response that she was after. The responses that she received varied quite considerably.

51. Mr Hawketts' response was short and unhelpful: "*I have already sent my views to Deborah, but I have neither significant additional information to add, nor any alternate view to those expressed by my colleagues."*

52. Ms Alsop's response was as follows:

"Thanks but what is needed is a response to these questions which is one shared view. (I assume the response given below is just your view). It would be helpful if you could respond to the question (with your agreed shared view) please.
An email that was received from Sarah earlier in the week suggested a different view from yours below and that it warranted a review along with the fact that Mekdes was effectively doing two roles.
It would not be good to pursue this at Employment Committee (stage 3) if a manager is not supportive of the initial findings and had advised her to challenge it.
It may also be your shared view that consideration should be given to her being rewarded financially in some way …. then these points could be put to Paul to reconsider."

53. Ms Shaw's response was as follows:

"Miranda et al, just for clarity:

I have not advised Mekdes (nor would I) to challenge the findings. That is for her to decide and discuss with her union rep if needed.
I agree with Deborah that the current HR position as I understand it was that what was being asked of Mekdes was not above and beyond the scope of her role as a Senior Occupational Therapist and therefore an honorarium did not apply.
I am aware that the OT development has been delayed by a year or so – which led to Mekdes having an extended period supporting two teams.
Mekdes has not undertaken two roles – In my view she couldn't do that in its entirety within 1 FTE hours. She has had an increase in her sphere of influence and responsibility in terms of staff numbers and teams but I am not sure how this equates to the north numbers – if it was significantly more than the others. I'm not sure she has provided additional hours of support above her contracted hours – without taking it back as toil. She certainly wouldn't have been able to provide the caseload equal to 2 Seniors – she had raised the issue of difficulty supporting any caseload. I'm not sure where we stand in recognising any additional strain etc with a financial payment – equally we don't pay 'danger money' – the strain should have been managed and supported.
I understand her main gripe to be that the two JM3 managers were recently upgraded as an interim solution and both had advised Mekdes they had not change to their roles.
I would support a token financial payment for the extended period providing cover for two teams until the time Claire took on the two in the north – if the strain/demand was more than the other (equal seniors). However, if there is no formal policy or route or agreement to support this, I am happy to support the line of not above scope and therefore not eligible for additional payment.
Hope that helps clarify my viewpoint."

54. Ms Verrico's response was as follows:

"This has come to my attention and I am unhappy that my service leaders are being asked the 3 questions below. The outcome of the grievance concluded that Mekdes had not undertaken additional or enhanced duties and so the questions asked tend to suggest that the outcome is now being questioned? This opens the door for further grievances to be overturned despite robust processes being undertaken. It is for the panel to decide if the original decision should be upheld and therefore I don't think it is appropriate to gain further views from the service leaders."

55. The next material event appears to have been the hearing of the Stage 3 Grievance, which took place before two counsellors on the 2nd November 2017. The Respondent's position at the appeal was presented by Ms Verrico. The Claimant was supported by a trade union official.

56. The basis of the Claimant's grievance was set out in a "Notification of Stage 3 Grievance Appeal" dated the 26th September 2017. The Claimant stated:

> **State the grounds on which you wish to appeal**
> **My duties and responsibilities have been massively expanded beyond those stipulated in my contract of employment, which as Paul Morris (Head of Performance Improvement & Human Resources) acknowledges has not been amended since I started working as a Senior Practitioner Occupational Therapist.**
> **The Data provided in the North Somerset Adult Occupational Therapy Service overview clearly shows during the period chosen for comparison (Oct 2015-Sept 2016) the two teams I managed handled substantially more OT referrals (505 versus 237) & OTA referrals (343 versus 256) than the two teams in the North (headed by two senior OTs) combined. On this basis, I have been overseeing almost three times as many referrals as my colleagues.**
> **Moreover, the assertion that I have never held a caseload is untrue, and there is ample documentary evidence of its untruth.**
> **The situation, which was supposed to be temporary arrangement, is manifestly unfair. It has been very stressful, and I'm seeking appropriate recompense for the unilateral and unfair variation of my conditions beyond the terms of my contract.**
> **Re-confirm what would resolve your grievance i.e. what you consider to be a satisfactory outcome**
> **Appropriate recompense for the unilateral and unfair variation of my conditions beyond the terms of my contract."**

57. On the 29th September 2017, the Claimant provided the following addendum to her appeal:

> **"In the response to my Stage Two grievance appeal that should be challenged is that there was no significant difference in the numbers of staff employed in OT/OTA positions that I and my colleagues in the North supervised. This statement, based on data analysed by Laura Cresser, is misleading because her figures refer solely to permanent staff members, and I was supervising three**

locums. Thus, I was supervising 9 OT/OTAs while each of my colleagues in the North were supervising six. Moreover, supervising locums is more time-consuming than supervising permanent staff because of the induction required when they start and the need to re-assign work and allow time for other staff members to engage with their caseload when they leave. For these reasons I frequently asked for permanent staff to be appointed, and was consistently ignored."

58. In advance of the appeal hearing, Ms Verrico produced a written opening submission (at pages 210 to 213 in the Hearing Bundle). In respect of the error that had been made in Ms Collins' regarding the Claimant's caseload, Ms Verrico's written submission stated as follows:

> **"There was some confusion that Mekdes had never had a caseload this has been resolved."**

The handwritten note of the hearing, which is difficult to decipher, indicates that the Claimant asked Ms Verrico for the grounds on which it had been asserted that she did not carry a personal case load and the note of Ms Verrico's answer is: "*has been resolved now*".

59. The Claimant also produced a written submission (at pages 93 to 98 in the Hearing Bundle). At the end of her written submission, the Claimant set out the amount of the compensation she was seeking from the Respondent:

> **"According to MH, my workload "should be comparable to her peers". As it was double that amount, and much more than maxima stipulated in my job description, I am seeking appropriate recompense for the additional work and lack of support. As I have been effectively doing two jobs since January 2014, I am seeking a *minimum* of three years and 9 months salary (£140,587)."**

60. On the 3rd November 2017, Councillor Charles Cave sent the outcome of the Stage 3 Grievance Hearing to the Claimant. The decision was as follows:

> **"I am writing to confirm the outcome of the grievance appeal hearing held on Thursday 2nd November 2017. The hearing was chaired by myself, with Councillor Andy Cole also acting as a panel member. Su Turner, Service Leader – Corporate HR, attended to give HR advice to the panel and Heather Sanders, Democratic & Registration Officer, was also in attendance and took minutes of the hearing. The hearing was convened to consider your Stage 3 grievance appeal as submitted by you and dated 26th September 2017.**
>
> **You presented your appeal with support from Pat McCulloch of Unison. After a short discussion about witnesses you confirmed that you were not calling witnesses but that you may wish to do so should your case proceed to a claim.**
>
> **The evidence in defence of the Stage 1 and Stage 2 outcomes was presented by Hayley Verrico – Assistant Director (Adult Support & Safeguarding) who called two witnesses, Martin Hawketts – Service Leader (Learning Disabilities & Mental Health) and Jacky Collins – Senior HR Adviser and Stage 1 grievance investigator.**
>
> **Following the hearing and adjournment, taking all the written and verbal evidence into account, and with due regard for the need for reasonableness and fairness, the panel reached the conclusion that your grievance appeal was not upheld and that the original decision was correct.**
>
> **Whilst the panel was sympathetic to some of the points you raised, such as the length of time that you were providing cover to a second team, it did not feel that you demonstrated that the work was in any way excessive or unfair. In fact, the evidence put forward showed that you had not worked any excessive hours and have been able to manage your workload successfully. In addition, although you stated that the extra work has caused you undue stress and worry that this had not resulted in any absence or negative impact on you that the panel could determine.**
>
> **The panel did not feel that you were doing twice as much work or the work of two people, nor did you put forward any evidence to contradict that of the management case – for example you agreed that you had not worked additional hours but that the extra work was more centred around 'thinking' about cases you did that occurred during non-work time. The panel did not agree that this demonstrated you carried out two roles or that it was appropriate that this time should be recompensed.**
>
> **The panel did agree that your job description from 2005 was not reflective of the number of staff you had supervised (referring to paragraph 2.1 in the job description) and that this needed to be updated urgently, however the panel did not agree that this was either a breach of contract or that the council had unilaterally varied**

your contract of employment. The work was manageable and consistent with the duties described, this difference did not amount to a contradiction that was significant in terms of your contract of employment, in addition, your caseload was also manageable and there appeared to be no detriment to you.
It was not agreed that you had been treated in a discriminatory fashion or unfairly. During the grievance investigation you confirmed that you did not mean this in terms of the protected characteristics within the Equality Act, nor did the panel find that you had been treated in favour of, or against, you because of a particular or perceived characteristic.
In addition to the above you raised issues regarding the process followed since you lodged your Stage 1 grievance. It is not within the remit of this panel to consider this part of your grievance and therefore Su Turner agreed to look at this matter separately to this hearing, in line with the council's Grievance Policy.
Although the panel did not uphold your grievance, it was clear to us that you were passionate about your work and held in high regard by your colleagues. The panel did feel that these matters should have been resolved a long time ago and understands why you feel so strongly about the issues you have raised. We understand from you that you intend to make a claim against the council and it was disappointed to hear that. The panel would like not to reiterate their view that you are a valued employee and it hopes that regardless of your intentions you will continue to engage positively with your work and colleagues.
We thank you for your time at the hearing and are sorry that this is not the outcome you were hoping for."

61. Following the outcome of the hearing of the appeal, the Claimant pursued a further grievance that there were procedural irregularities with the grievance process. That grievance was investigated by Su Turner and on the 22nd November 2017 she emailed the following decision to the Claimant:

"Further to the grievance appeal held on 2nd November and my agreement to consider the procedural elements of the grievance process that you raised I confirm that I have now completed my review.
I found that the majority of procedural requirements were met, however, I did find that some were not met. I have attached the notes I made during my review to this email for your information, my notes show my conclusions in more detail and I am happy to share them with you.
Although there were issues on either side, I did not consider that any of these had any detrimental impact on either the process or

the outcomes, however for those that were caused by the council I apologise to you."

62. Those findings made by Ms Turner that were adverse to the Respondent concerned the meeting of time limits imposed by the Respondent's Grievance Policy.

63. On the 27th September 2017, the Claimant received the following email from a Director, Sheila Smith:

> **"I have been kept updated on the progress of your grievance appeal and the subsequent outcome. I am also informed that you have expressed your unhappiness with some of the process and the outcome. In order to move forward positively I believe it is necessary for you and I to have a short meeting to clarify your outstanding issues and possible resolutions. To that end I have checked our diaries and see that we can meet, with Su Turner from HR on Wednesday, 29th November, for 30 minutes from 2.00 p.m. I have booked Room 1.07 and would be grateful if you could confirm this time is acceptable to you."**

64. The meeting with Ms Smith eventually took place on the 4th December 2017. A note of the meeting is to be found at pages 260 to 262 in the Hearing Bundle. It's clear from the note of the meeting that the Claimant and Ms Smith were at cross purposes in terms of their understanding of the reason for the meeting. Ms Smith stated her position early on in the meeting. She explained to the Claimant that she wanted an assurance from the Claimant "*that whilst she may be hacked off that she will do her job abiding by the values and behaviours framework*". The Claimant, on the other hand, took the opportunity of repeating the grounds of her grievance.

65. Following the meeting on the 4th December 2017, Ms Smith sent the following email to the Claimant on the 8th December 2017 at 1.55 pm:

> **"Thank you for attending the meeting with myself and Miranda earlier this week.**
> **Whilst it is recognised that you are disappointed with the outcome of your grievance, it is important that you are able to work positively in your role going forward. At our meeting I discussed with you the need to work in a way consistent with the Council's behaviours framework. This framework outlines the attitudes and approach we expect from all staff regarding how we do things, how we treat others, what we say, how we say it and how we can expect to be treated.**
> **With regard to the email you sent dated 30th November 2017, your grievance has been considered through a robust process, the outcome of which has been decided upon by a Members' panel. I am not in a position to offer solutions that would change that outcome but the purpose of our meeting was so that we could acknowledge your continuing unhappiness and agree that you would continue to work positively and professionally in the future, notwithstanding that you are pursuing an external process with your legal advisor.**
> **However, I am concerned that you advised that this process had made you feel unwell. I therefore urge you to consider the Employee Assistance Programme scheme we have available for employees which offers a confidential impartial service providing advice and support. It is intended to help employees deal with personal problems that might adversely impact on their work performance, health and wellbeing. Should you feel you would benefit from this, please contact Health Assured via the freephone number …"**

66. Some 4 hours after receiving the above email from Ms Smith on the 8th December 2017, the Claimant sent the following resignation email to Ms Smith:

> **It is not clear to me who is currently my line manager, so I am sending this letter of resignation to all of you.**
> **For four years I have been doing two people's jobs, while being paid for doing one, with imposed duties that have substantially exceeded those of my SPOT colleagues and maxima stipulated in my Job Description. As acknowledged by various passages in Management's submission at the Stage 3 hearing of my recent grievance process (hereafter Management's Submission), I have made strenuous protests throughout this period about the unfair**

treatment. However, these protests have been ignored, or I have been promised support that did not materialise.

Naturally, this situation left me stressed and exhausted, but I saw little option except to soldier on or resign, comforting myself with the thought that it was a short-term arrangement – but that proved to be illusory because it was gradually extended under various, shifting pretexts. Eventually, as my frustration grew, I leant that a SPOT position in the 'North' *would* be backfilled, unlike the one I had been covering in Worle for four years, thereby avoiding one of my colleagues being left in the same position as me. I also learnt that two other people had been given additional payments for far less onerous additional duties than I had been shouldering for all this time. I had reached the end of my tether and initiated a grievance procedure, despite deep misgivings that it was unlikely to be swift or fair.

These misgivings proved to be well founded on five grounds. Firstly, the procedure took much longer than stipulated by the relevant rules, with management stalling, prevaricating and delaying at every stage. Secondly, only management representatives with potentially vested interests in rejecting the grievance were interviewed during the investigation. Thirdly, I was not asked if I had any evidence to counter claims made by managers. Fourthly, Management's submission raised six identified, conflicting defences. Fifthly, I believe the process to be deeply and grievously unfair. This is partly because while management allowed themselves the luxury of stalling at every stage it was made very clear that I, the appellant, had to meet tight deadlines. Moreover, the process takes no account of the imbalance in power. Appellants in such cases are inevitably already stressed, and dealing with a highly unfamiliar procedure that may have profound effects on both themselves and their families. Thus, for example, I was aware at some points that I should have presented evidence in my submission for the hearing, but I did not because I was rushing, in a highly stressed manner, to marshal my arguments. Allowances should have been made for this, particularly as Hayley Verrico mentioned information during the hearing that had not been presented in Management's submission. Either she should have been stopped by the panel (I was not sure if I was allowed to raise objections), or I should have been given a waiver to present my evidence. Without precautions such as rigorously ensuring that the appellant fully understands the procedure, and (for instance) is reminded of the need to present evidence at a certain point, there can be little intrinsic fairness.

As I expected, points in my grievance of no financial consequence for the council were partially or fully upheld, while those with potential financial consequences were rejected.

I have now exhausted all internal procedures regarding these matters. I am deeply unhappy about both the outcome and my treatment during the past four years. I feel that I have no reason to trust or have confidence in NSC management, partly because:

Managers clearly believe that even key clauses in my job description can be summarily ignored.
Even in a Stage 3 Grievance Appeal they presented six wildly conflicting defences, *inter alia* that: I did not have a heavier workload than the other SPOTS; I did have a heavier workload, but I was given commensurate support; I was 'plugging the gap', 'left in limbo' and overburdened, but everyone is doing more work now.
On Monday the 27th of November I was invited to attend a meeting with Sheila Smith (Director, People and Communities, NSC) and an HR representative, ostensibly to "clarify my outstanding issues and possible resolutions". The meeting was held on Monday the 4th of December, and I delayed further action until hearing the outcome of, which proved to be highly unsatisfactory as there was no attempt to resolve any aspect of my outstanding grievance or associated issues. Rather, the letter I received following the meeting (today, Friday the 8th of December) largely consisted of insulting admonishments for me to (for example) "work positively in your role going forward … in a way consistent with the Council's behaviours framework". None of the issues I raised were addressed at all.
Thus, it is impossible for me to trust, have confidence in, or rely on, anything that management says, I construe that I have been constructively dismissed, and I hereby tender my resignation. I will continue to work for a 2-month period of notice, and finish my employment with NSC on Friday 2nd February.

The issues in the case

67. There was agreement between the parties as to the issues in the case. The agreed issues, with which the Tribunal also agreed, were identified to be as follows:

Constructive unfair dismissal

1. **Did the Respondent commit a repudiatory breach of contract such that the Claimant was entitled to treat herself as constructively dismissed? The Claimant relies on the implied term of trust and confidence.**

2. **Did the Respondent, without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between the parties? The conduct of which the Claimant claims is:**

a. Failing to increase the Claimant's salary or give her any additional payment despite the fact that, whilst covering the Worle SPOT role, the Claimant had to take on considerably more responsibilities and duties than was set out in her job description (paragraphs 6-12 of the Grounds of Complaint[1]). This included having to supervise more than the maximum 6 Occupational Therapists and carrying a personal caseload in excess of the maximum of 10 cases as stated in her job description (paragraphs 13-14 of the Grounds of Complaint);

b. Treating the Claimant differently to her SPOT colleagues in that, without additional recompense or support, she had to cover the work left by the vacant SPOT post in Worle in addition to her contractual duties (paragraph 17 of the Grounds of Complaint). The Claimant alleges that this effectively left her with double her normal workload and double that of her fellow SPOT colleagues line-managing the North teams (paragraph 10 of the Grounds of Complaint);

c. When the Claimant protested about her unfair treatment and told management that the level of cover in the South was unsustainable, her protests and repeated requests for assistance were either ignored or met with bland assurances that the issue would be addressed shortly or she was promised support that never materialised (paragraph 15 of the Grounds of Complaint);

d. Failing to address the Claimant's concerns that a different process had been followed in respect of her covering the Worle SPOT role from that which was applied in deciding to give additional pay to Martin Chacku and Susie Hook (paragraphs 18-20 of the Grounds of Complaint);

e. Hayley Verrico's email to the Claimant dated 15/05/17, which the Claimant found to be a put-down that undermined and devalued her (paragraph 21 of the Grounds of Complaint);

f. In considering the Claimant's grievance, the grievance review and her grievance appeal:

i. failing to recognise that for a number of years the Claimant had taken on a significant amount of

[1] References to the "Grounds of Complaint" in this summary of the issues are references to the Grounds of Complaint attached to the ET1 (at pages 16 to 23 in the Hearing Bundle).

additional duties and responsibilities at no extra cost to the Respondent;

ii. **failing to acknowledge that what had been intended to be a temporary arrangement had continued for over three years without the originally planned support having materialised;**

iii. **failing to acknowledge that the Claimant had been undertaking two people's roles; and**

iv. **failing to recognise the unfair workload that had been placed upon her and the strain she had experienced as a result of undertaking two jobs for so long (paragraphs 22-33 & 37 of the Grounds of Complaint);**

g. **The conduct of the grievance process and investigation (paragraph 35 of the Grounds of Complaint);**

h. **Inviting the Claimant to a meeting with Sheila Smith to clarify the Claimant's outstanding issues and possible resolutions but when that meeting took place, on 04/12/17, making no attempt to resolve any aspect of the Claimant's outstanding grievance or associated issues (paragraphs 36 & 38-40 of the Grounds of Complaint);**

i. **Failing to properly consider and/or make an award to the Claimant of a payment under section 4 of the Respondent's Acting-Up and Honorarium Payments Policy (paragraphs 38-39 of the Grounds of Complaint); and**

j. **Sheila Smith admonishing the Claimant and warning her to toe the line in an email dated 08/12/17 (paragraph 39 of the Grounds of Complaint).**

3. **If the Respondent did commit a fundamental breach of contract, was such breach an effective cause of the Claimant's resignation?**

4. **If so, had the Claimant affirmed her contract of employment before resigning or did the Claimant accept the Respondent's repudiatory breach such that she was constructively dismissed?**

5. **If the Claimant was constructively dismissed, can the Respondent show that the reason for the dismissal was a potentially fair reason within section 98 of the Employment Rights Act 1996?**

6. **If so, did dismissal for that reason fall within the range of reasonable responses and was it fair having regard to the**

factors set out in section 98(4) of the Employment Rights Act 1996?

7. **If the Claimant is found to have been unfairly dismissed, what compensation should be awarded?**

Breach of contract

1. **Who took the decision that the Claimant should not be awarded a payment under section 4 of the Respondent's Acting-Up and Honorarium Payments Policy?**

2. **Did section 4 of the Respondent's Acting-Up and Honorarium Policy apply to the Claimant?**

3. **If so, considering whether to award the Claimant a payment under section 4 of its Acting-Up and Honorarium Payments Policy, did the Respondent breach an implied term of the Claimant's employment contract that it would exercise its discretion genuinely and rationally? In ascertaining whether the Respondent did not breach such implied term, the Tribunal should apply both limbs of the public law *Wednesbury* rationality test (*Braganza v. BP Shipping Ltd* [2015] IRLR 487, SC; *IBM United Kingdom Holdings Ltd v. Dalgleish* [2018] IRLR 4, CA);**

    a. **Did the Respondent's decision-maker take relevant matters and no irrelevant matters into account?**
    b. **Was the Respondent's decision not to make any payment so outrageous that no reasonable employer could have reached it?**

4. **If the Respondent is held to have breached the implied term, what damages should be awarded? Damages should be assessed, on reasonable assumptions, as the level of payment that would actually have been awarded had the Respondent complied with its good faith obligation, i.e. if a bona fide exercise of discretion had taken place (*Horkulak v. Cantor Fitzgerald International* [2004] IRLR 943, CA).**

The Tribunal's findings of fact

68. The Tribunal heard oral evidence from the Claimant and from six witnesses called by the Respondent: namely, in the order in which

they were called, Martin Hawketts, Sheila Smith, Hayley Verrico, Jacqueline Collins, Paul Morris and Susan Turner.

69. The Tribunal also read and considered a 276-page Hearing Bundle. It will be evident from the summary of the agreed facts set out above that the Tribunal derived considerable assistance from the Hearing Bundle in discerning the history of the dispute.

70. In addition to those facts not in dispute (as set out in paragraphs 2 to 66 in this judgment), which were accepted by the Tribunal, the following findings of fact were made.

71. The Claimant agreed to cover the Worle team when Caroline Hall began her secondment in January 2014.

72. At the time when the Claimant agreed to cover the Worle team, it was presented to the Claimant by Martin Hawketts that the arrangement would be an interim arrangement and that there was the prospect of Caroline Hall returning to her role as the SPOT for the Worle team in June 2014.

73. The reason why a new SPOT for Worle was not appointed in or about January 2014 was because it was believed by the Respondent that Caroline Hall's secondment would be temporary and would probably come to an end in June 2014.

74. It follows that at the time the Claimant agreed to cover the Worle team, she would reasonably have believed that the arrangement would not be a long-term arrangement.

75. The Claimant was given no clear instruction from those responsible for her management as to how she was to manage the work involved in covering the Worle team alongside her existing work covering the Weston team.

76. Though it was suggested by Mr Hawketts in January 2014 that the two SPOTs in the North would cover leave absence and provide support in complex cases, there were no steps taken by the Respondent to ensure that the SPOTs in the North provided that cover or support.

77. There was no convincing evidence produced by the Respondent to show that the SPOTs in the North provided any cover or support for the Claimant in her role as the SPOT for the Worle and Weston teams. In the absence of such evidence, the Tribunal accepted the Claimant's evidence that she did not receive support from the two SPOTs in the North.

78. The Tribunal rejected Mr Hawkett's evidence that the Claimant's work was reduced to allow her to provide cover for the Worle team. The evidence did not show that active steps were taken by the Respondent to reduce the Claimant's work to allow her to provide cover for the Worle team. The Tribunal found that it was left to the Claimant as to how she managed the Worle team and the Weston team.

79. The Tribunal found that the Claimant's role as a SPOT for the Worle team lasted much longer than was anticipated when the so-called interim arrangement was devised by Mr Hawketts in January 2014. The arrangement lasted until July 2015, when Caroline Hall returned to her role as the SPOT for the Worle team, and the arrangement was renewed in February 2016 shortly before Ms Hall retired in March 2016. The arrangement was still persisting at the time when the Claimant commenced her grievance process in May 2017.

80. The Tribunal was far from convinced that the Respondent's witnesses knew much about the work that the Claimant was doing to cover the Worle and Weston teams from January 2014 to July 2015 and from February 2016 to May 2017. The clear impression given to the Tribunal from the witness evidence that it heard was that the Claimant was left to her own devices to carry out her duties in respect of the Worle team and the Weston team.

81. The fact that the Respondent's witnesses knew little about the work that the Claimant did in covering the Worle and Weston teams was evidenced by the information given to Ms Collins during her investigation into the Stage 1 grievance by Mr Hawketts and Ms Shaw to the effect that the Claimant did not have her own caseload.

82. It was surprising to the Tribunal that Mr Hawketts informed Ms Collins that the Claimant had never held her own caseload and that it had been deliberately withdrawn from the Claimant so that she could extend her SPOT support to Worle. Both of those factual assertions made by Mr Hawketts to Ms Collins, the Tribunal so finds, were untrue. The Claimant had had her own caseload and continued to have her own caseload whilst providing cover to the Worle team. It was of concern to the Tribunal that Mr Hawketts could give such a misleading representation to Ms Collins. On balance, the Tribunal decided that it was not dishonesty on the part of Mr Hawketts but it was more likely to be due to his lack of knowledge as to what the Claimant was actually doing at work. It nevertheless should have been apparent to Mr Hawketts that he did not know that the information he was giving to Ms Collins was correct. It was a serious misrepresentation of the truth because it gave Ms Collins the false impression that the Claimant's workload had been reduced by removing her caseload. It was impossible for the Tribunal to assess what Ms Collins's views or recommendations would have been, if she had been given the factually correct information about the Claimant's caseload by Mr Hawketts. The Tribunal did note, however, Ms Shaw's following comment in her email to Ms Collins dated the 26th September 2017: "*to be honest I wouldn't expect her to carry a full caseload and support both teams (I'm not sure how we could expect her to do this given she was effectively doing two roles …*").

83. The Tribunal found it to be regrettable that Ms Shaw gave Ms Collins, in the course of her investigation into the Stage 1 Grievance, corroboration for the false information from Mr Hawketts that the Claimant did not carry a caseload whilst covering the Worle team in addition to covering the Weston team. It was a further instance of a manager giving inaccurate information to Ms Collins as part of an investigation into a grievance raised by the Claimant concerning the nature and extent of her work. As in the case of Mr Hawketts, the Tribunal was prepared to find that Ms Shaw had not deliberately misrepresented the position regarding the Claimant's caseload to Ms Collins. On the basis of subsequent emails from Ms Shaw, when the error regarding the Claimant's caseload came to light, it appeared to the Tribunal that Ms Shaw was genuinely of the view that it would not have been possible for the Claimant to carry a significant caseload and provide the necessary cover for the Worle and Weston teams.

84. The Tribunal found that the Claimant continued to carry her own caseload whilst covering the Worle team. The basis for that finding was the record of the Claimant's supervisions on the 2nd May 2015, the 6th June 2014 and the 3rd November 2015. Though the latter record of supervision occurred after Caroline Hall's secondment had come to an end, the Tribunal accepted the Claimant's evidence that Caroline Hall had not returned to her full duties in the Worle team following the end of her secondment and that she had been absent from work for periods of time up until she permanently stopped work in February 2016. The Tribunal found that the Claimant continued to provide some level of cover to the Worle team between July 2015 and February 2016 due to Ms Hall's periodic absences from work and the fact that she had not returned to her full duties in the Worle team at the end of her secondment.

85. The Tribunal found that the Claimant was effective at managing her roles in covering the Worle and Weston teams. A consequence of her efficiency was that when Ms Collins came to look at the Claimant's diary and her time records, it appeared that the Claimant's hours of work had not significantly changed whilst she was covering the Worle team in addition to the Weston team. That finding by Ms Collins was used to challenge the Claimant's case

that her workload had increased as a result of the arrangement that she cover the Worle team in addition to the Weston team.

86. The Tribunal found that the scope of the Claimant's role as a SPOT increased as a result of the arrangement that she take on the role of SPOT for the Worle team in addition to her pre-existing role as SPOT for the Weston team. The workload emanating from the Worle team did not fall outside the scope of her normal role as a SPOT but there was nevertheless an increase in her workload. It was striking that the Respondent's witnesses, in their oral evidence, were not prepared to accept that the scope of the Claimant's job had increased when she began to provide cover for the Worle team. There were a number of references, however, in contemporaneous emails by managers that showed that there was recognition, effectively on behalf of the Respondent, that the scope of the Claimant's role had increased when she began to provide cover for the Worle team in January 2014. It was implicit in Mr Hawkett's initial view, in January 2014, that the Claimant would require support from the SPOTs in the North and may have to drop her caseload that the Claimant's role would materially change as a result of the arrangement that she provide cover for the Worle team. David Jones, in his email to the Claimant on the 12th May 2017, stated: "*I acknowledge your workload has increased*". In an email dated the 28th September 2017, whilst not accepting that the Claimant had undertaken two roles, Ms Shaw stated: "*She has had an increase in her sphere of influence and responsibility in terms of staff numbers and teams …*". In the same email, Ms Shaw stated that she would support a token financial payment to the Claimant "*for the extended period providing cover for two teams*". In an earlier email dated the 26th September 2017, Ms Shaw had stated that something would have had to "*give*" in order for the Claimant to have capacity to support additional staff at Worle within her usual working hours. The Tribunal also noted that Ms Shaw had informed Ms Collins, when interviewed for the investigation report, that she accepted that there was likely to have been a certain degree of stress attached to the taking on of additional cover at Worle without having a counterpart in the South to share the burden. The data concerning OT referrals also confirmed that the Claimant was dealing with a greater workload than the SPOTs in the North. There were more referrals in the South in 2015/2016 (where there was only one SPOT) than in the North (where there were two SPOTs).

The evidence also indicated that the Claimant had to supervise more staff than her counterparts in the North, during the time that she covered the Worle team, as a result, in part, of the number of locum Occupational Therapists based in the South.

87. The Tribunal found that the circumstances in which Martin Chacku and Susie Hook received pay rises in April 2017 were quite different from the Claimant's circumstances whilst covering the Worle team. Mr Chacku and Ms Hook were acting-up to the positions of Integrated Care Team Managers with the result that their pay band changed from JM3 to JM4. The Tribunal found that the arrangement under which the Claimant provided cover for the Worle team did not change her job as a SPOT and did not lead to a change, for the Claimant, in the pay bands operated by the Respondent. The Tribunal was satisfied, however, that at the time when the Claimant learned about the pay rises for Mr Chacku and Ms Hook, she did not know of the basis upon which the pay rises had been authorised and paid. Given the information she had received from Mr Chacku, it was understandable for the Claimant to believe that he and Ms Hook had received a pay rise without there being any material change to their roles.

88. The Tribunal found that the grievance process that the Respondent embarked upon in response to the Stage 1 Grievance came to be fundamentally flawed because of the misinformation given by Mr Hawketts and Ms Shaw to Ms Collins about the Claimant's caseload. The fact that misleading information had been given to Ms Collins was not discovered until the Stage 3 appeal was reached. The outcomes of Stages 1 and 2 were contaminated, to some degree, by the false information that the Claimant had not carried a caseload whilst covering the Worle team and that her caseload had been taken away from her. Ms Collins' response when the error was discovered was noteworthy. Her instinct was to get to the bottom of how much of a caseload the Claimant had carried whilst covering the Worle team with a view to giving Mr Morris, the Stage 2 decision-maker, the opportunity of reconsidering his decision. Ms Verrico's instinct was quite different. In her email dated the 10th October 2017, she expressed herself to be unhappy that her service leaders were being asked questions

about the Claimant's caseload. Ms Verrico was adamant that the outcome of the grievance had been the conclusion that the Claimant had not undertaken additional or enhanced duties. It was of concern to the Tribunal that Ms Verrico did not appear to be at all troubled by the fact that potentially false and misleading information had been presented on behalf of the Respondent to the Stage 1 and Stage 2 decision-makers. It was of further concern to the Tribunal that when it came to the Stage 3 appeal, at which Ms Verrico represented the Respondent, that she did not inform the Councillors hearing the appeal that incorrect information regarding the Claimant's caseload had been presented to the Stage 1 and Stage 2 decision-makers. Ms Verrico informed the Councillors that there had been some confusion as to whether the Claimant had ever held a caseload but that that had been "*resolved*". That, of itself, was misleading to the Councillors. There was no explanation from Ms Verrico as to what the confusion had been, what the true position was and what she meant by saying that the confusion had been "*resolved*". It appeared to the Tribunal that the grievance process, from beginning to end, had proceeded on the uncorrected basis that the Claimant did not have a caseload whilst covering the Worle team.

89. The Tribunal noted that Ms Collins had wanted her investigation report to be corrected when the error was discovered regarding the Claimant's caseload. Ms Shaw also wanted the investigation report to be corrected. That was an entirely reasonable approach by Ms Collins and Ms Shaw. An error had been discovered in a report that had been used as the basis for the Stage 1 and Stage 2 outcomes and both Ms Collins and Ms Shaw wanted the error to be put right. Ms Collins was of the view that the correction may avoid the need for the Stage 3 appeal and Ms Shaw was of the view that a resolution of the Claimant's grievance might be achieved by making some sort of financial payment to the Claimant. In the event, Ms Verrico stopped Ms Collins and Ms Shaw in their tracks. It appeared to the Tribunal that it was Ms Verrico's intervention in October 2017 that stopped Ms Collins' report from being corrected and stopped all talk of the Claimant's grievance being resolved by some sort of financial payment.

90. The Tribunal found that Ms Shaw's indication to the Claimant, in her email dated the 26th September 2017, that HR would be in touch with the Claimant regarding the necessary corrections to the Stage 1 investigation report never materialised. Having been told by Ms Shaw that the investigation report would be corrected (in relation to the comments regarding the Claimant's caseload) no explanation was subsequently given to the Claimant as to why the investigation report was not to be corrected.

91. The Tribunal was also of the view that Ms Collins' investigation report was flawed because of the methodology that had been adopted to assess whether the Claimant's workload had increased as a result of her covering the Worle team. Ms Collins looked at the Claimant's diary and her time sheets and took the view that because the Claimant's hours of work had not changed, there was no force in the Claimant's case that her workload had increased. It is right to say that the diary and the time sheets did not show any increase in working hours by the Claimant but what appears to have been ignored is the possibility that that was due to the Claimant's skills in managing an increased workload. It appeared to the Tribunal that a more effective way of assessing the impact of covering the Worle team upon the Claimant's day-to-day work would have been for Ms Collins to interview some of the occupational therapists in the Worle and Weston teams but that step was not taken. Instead, Ms Collins placed reliance upon Mr Hawkett's and Ms Shaw's assessment of the Claimant's workload when the reality was that they both knew very little about the Claimant's day-to-day work.

92. That same approach to the assessment of the Claimant's workload was taken by Mr Hawketts, Mr Morris, Ms Smith and Ms Verrico in their evidence to the Tribunal. They were adamant in their view that the lack of an increase in the Claimant's working hours can only have meant that the Claimant's workload had not increased whilst she covered the team at Worle. It was apparent to the Tribunal, however, that the Respondent's witnesses had made no real effort to understand the way in which the Claimant's workload had changed once she had begun to cover the Worle team. In fact, it appeared to the Tribunal that a cynical and disbelieving view was

being taken by the Respondent to the Claimant's case that her workload had increased once she had started to cover the Worle team when the more contemporaneous documentary evidence indicated that the increase in her workload had been recognised. The Respondent's witnesses treated the Claimant's argument that she had performed two roles (covering the team in Worle and the team in Weston) in a very literal way. In the minds of the Respondent's witnesses, it could not be true that the Claimant was performing two roles because her hours of work had not doubled. In challenging the Claimant's case in that way, the Respondent's witnesses overlooked the obvious fact that the Claimant, as a result of covering the Worle team, had had to deal with an increase in OT referrals, an increase in the number of staff to supervise and manage her own caseload. The fact that she was able to do so within her contractual hours of work was not evidence that the Claimant was being untrustworthy in saying that she was performing two roles but was evidence of her efficiency at managing her role as a SPOT covering two areas.

93. The Tribunal found that the Claimant had complained at regular SPOT meetings about the difficulties presented by covering the Worle team but nothing was done by the Respondent in response to those complaints. The expectation on the part of the Respondent appeared to be that it was down to the Claimant to manage her roles at the Worle team and the Weston team as best as she could.

94. The Tribunal did not find that the Claimant's health had been adversely affected by the stresses and strains of covering the Worle team at the same time as the Weston team. There was no medical evidence to support such a finding and the Appraisal Forms did not support the Claimant's case that her health had been adversely affected.

95. The Tribunal found that the Claimant's proposed resolution of her Stage 3 Grievance Appeal (namely, the payment to her of the sum of £140,587) was not something that she expected to happen. The Tribunal accepted her evidence that she had put forward that figure

because it was consistent with her case that she had covered two roles but she had intended the figure to be the start of a negotiation between herself and the Respondent. The Tribunal found that by Stage 3, the Claimant had become more and more frustrated with the difficulty that she was experiencing in getting the decision-makers in the grievance process to believe that her workload had increased as a result of the arrangement under which she covered the Worle office. The Tribunal noted that the figure of £140,587 had not appeared at Stages 1 or 2 in the grievance process. It was only at Stage 3 that that figure first appeared and that was at a time when the Claimant had just discovered what Ms Collins had written in her Stage 1 investigation report, including the false information that the Claimant did not have a caseload. It was not at all surprising to the Tribunal that the Claimant took what appeared to be a robust and extreme stance to the resolution of her grievance in the face of a Respondent that seemed to have set its face against the possibility that the Claimant's workload had increased when she began to cover the Worle team.

96. The Tribunal found that the Claimant had been given an opportunity to say everything that she wanted to say at the Stage 3 appeal hearing. The Tribunal was not persuaded that the Claimant was prevented from adducing evidence at the hearing or that Ms Verrico produced fresh evidence at the hearing.

97. The Tribunal found that Ms Turner's review of the grievance process was fundamentally flawed. The fact that a serious misrepresentation as to the Claimant's caseload had been made in the Stage 1 investigation report and the fact that the author of the report had wanted it to be corrected before Stage 3 was reached, was not commented upon by Ms Turner in her review of the grievance process. Ms Turner took a very superficial view as to whether the grievance process had been conducted in a fair manner. She noted where time limits had not been observed but ignored the fact that Ms Verrico had put a stop to the author of the Stage 1 investigation report being given an opportunity to correct her report and that Ms Verrico had proceeded to give an odd explanation to the Councillors at the Stage 3 appeal that there had been "*confusion*" about the Claimant's caseload that had now been

"*resolved*". The confusion had not been resolved in the sense that the true picture regarding the Claimant's caseload had been properly and thoroughly assessed (as Ms Collins had wanted) and the true picture then given to the Councillors at the Stage 3 appeal.

98. The Tribunal found that Ms Smith's email to the Claimant on the 27th November 2017 was unfortunately worded because it gave the impression to the Claimant that there may still be ways of resolving the Claimant's outstanding issues, notwithstanding the outcome of the grievance process. What Ms Smith in fact wanted to achieve by her meeting with the Claimant was to convey to the Claimant that she must not allow her disappointment and frustration at the outcome of the grievance process (or being "*hacked off*" to use Ms Smith's terminology) to show itself at work. How it did not occur to Ms Smith that that would have been rubbing salt into the Claimant's wounds was not clear to the Tribunal. It was only three weeks since the outcome of the Stage 3 Grievance Appeal had been communicated to the Claimant. The Tribunal found it to be insensitive on the part of Ms Smith to call the Claimant in for a formal meeting at that time to remind the Claimant to behave herself at work, it having been reported to Ms Smith that the Claimant had not been her usual self in the way that she behaved towards work colleagues following the outcome of the grievance process. The allegations appeared to the Tribunal to be very vague but Ms Smith nevertheless thought it appropriate to call the Claimant in for a formal meeting to discuss her behaviour. Though that was Ms Smith's intention in arranging the meeting, her email to the Claimant would have led the Claimant to believe that there was still some hope in convincing somebody that there was merit in her grievance. It therefore came as a shock when the Claimant discovered the true purpose of the meeting when she was at the meeting.

99. In an email to Ms Smith on the 30th November 2017, it is to be noted that the Claimant made reference to the Respondent's Acting-Up and Honorarium Payments Policy in the following terms:

> **"… I am very happy to attend a meeting with you and with HR to discuss the issues and possible solutions on 4th December.**

The grievance process has not resolved my grievance, which relates to workload pay and conditions. In the course of the grievance I don't think proper consideration has been given by my Director and by the Director of HR to clause 4 of the Acting-Up and Honorarium Payments Policy. A decision to disregard this policy in its other clauses has been made at a junior level, whereas clause 4 calls for decisions at Director/Assistant Director level.
I find it incredible that NSC can think it is in order to issue me with a job description, proceed to depart from it by doubling my workload, repeatedly do nothing in response to my complaints of a lack of support and then add insult to injury by indicating that because I bore up under the strain where others might have taken time off sick I can't have been working all that hard. If I can't rely on the job description as setting out NSC's expectations of me, then it is pointless issuing it in the first place.
If you are able to offer solutions to me at our meeting I would be very interested to discuss them with you."

100. The notes of the meeting with Ms Smith on the 4th December 2017 were to be found at pages 260 to 262 of the Hearing Bundle. In her oral evidence to the Tribunal, when being cross-examined, the Claimant stated that she had no issue with the notes of the meeting. The Tribunal therefore accepted that the notes contained an accurate account of what was discussed at the meeting.

101. In her evidence to the Tribunal, the Claimant described the meeting with Ms Smith on the 4th December 2017 as the last straw. The Claimant's evidence was that she had attended the meeting to resolve issues, which, as the Claimant saw it, would have involved making a financial payment to her, but Ms Smith did not appear to want to resolve the issues that the Claimant wanted to discuss. The Tribunal found that the Claimant believed that she had been misled by Ms Smith as to the purpose of the meeting and that there were reasonable grounds for that belief.

102. The Tribunal was nevertheless unable to make a finding that there had been a discussion at the meeting on the 4th December 2017 concerning a discretionary payment under the Respondent's Acting-Up and Honorarium Payments Policy.

103. In paragraph 38 of her Grounds of Complaint attached to her Claim Form and in paragraph 43 of her witness statement, which stood at the final hearing as the Claimant's evidence-in-chief, the Claimant stated that she had asked Ms Smith at the meeting on the 4th December 2017 to consider that a payment be made to her under Section 4 of the Respondent's Acting-Up and Honorarium Payments Policy. The Claimant's evidence to the Tribunal was that she had asked Ms Smith for a payment of £18,644 under section 4 of the aforementioned Policy as that represented the difference, over a 4-year period, between pay at the top of the JM3 pay scale and pay at the top of the JM2 pay scale.

104. Ms Smith, in her evidence to the Tribunal, stated that the Acting-Up and Honorarium Payments Policy was not discussed at the meeting on the 4th December 2017.

105. Given that the notes of the meeting contained no reference to a discussion concerning the Acting-Up and Honorarium Payments Policy and given that the Claimant was clear in her evidence that she had no issue with the accuracy of the notes, the Tribunal was unable to find that the Claimant had made a request for a discretionary payment under section 4 of the Policy and was, accordingly, unable to find that such a request had been refused by Ms Smith. The Tribunal was fortified in making that finding by the fact that Ms Smith's email to the Claimant on the 8th December 2017, summarising the outcome of the meeting, made no reference to any request for a payment under the Acting-Up and Honorarium Payments Policy or any decision that such a request was refused.

106. In relation to the Claimant's allegation that the email from Ms Verrico dated the 15th May 2017 devalued and undermined the Claimant, the Tribunal found that the email was not intended to have that effect. The email was in fairly blunt terms but the Tribunal was not persuaded that it was an inappropriate or unreasonable email for Ms Verrico to have sent to the Claimant.

The law

107. The starting point for my review of the legal principles applicable to this case is the decision of the Court of Appeal in *Western Excavating (ECC) Ltd v. Sharp* [1978] IRLR 27, which made it clear that it is not enough for an employee to leave and claim constructive dismissal merely because the employer has acted unreasonably. The employer's conduct must amount to a breach of the contract of employment.

108. The Court of Appeal in *Western Excavating*, went on to make clear that in order for an employee to be able to claim constructive dismissal, four conditions must be met:

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

108.2 That breach must be sufficiently important to justify the employee resigning, or else it must be the last in a series of incidents which justify his leaving. Possibly a genuine, albeit erroneous, interpretation of the contract by the employer will not be capable of constituting a repudiation in law.

108.3 The employee must leave in response to the breach and not for some other, unconnected reason.

108.4 The employee must not delay too long in terminating the contract in response to the employer's breach, otherwise he or she may be deemed to have affirmed the contract (or waived the breach) and agreed to vary the contract.

109. If an employee leaves in circumstances where the above-stated four conditions are not met, he or she will be held to have resigned and there will be no dismissal within the meaning of section 95(1)(c) of the Employment Rights Act 1996, which provides:

95 Circumstances in which an employee is dismissed

(1) For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2) …, only if)-

…

(c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct.

110. When deciding whether there has been a breach of contract by an employer, a Tribunal must reach its own conclusion on the question. The test is not whether a reasonable employer might have concluded that there was no breach: it is whether, on the evidence adduced before it, the Tribunal considers that there was.

111. Whilst the test is contractual, reasonableness is not wholly irrelevant, as was made clear by the Employment Appeal Tribunal's following comment in the case of *Courtaulds Northern Spinning Ltd v. Sibson* [1987] ICR 329:

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

112. Reasonableness can also be relevant in determining whether an employer's conduct constitutes a breach of the implied terms of the contract of employment, including the implied term of trust and confidence alleged by the Claimant to have been breached by the Respondent in this case.

113. The existence of the implied term of trust and confidence was affirmed by the House of Lords in *Malik v. Bank of Credit and Commerce International SA* [1997] IRLR 462. The term was held to be as follows:

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

114. In *Baldwin v. Brighton and Hove City Council* [2007] IRLR 232, the Employment Appeal Tribunal considered the issue as to whether, in order for there to be a breach, the actions of the employer had to be calculated and likely to destroy the relationship of confidence and trust, or whether only one or other of those requirements needed to be satisfied. The view taken by the Employment Appeal Tribunal was that this use of the word '*and*' by Lord Steyn in the passage quoted above was an error of transcription of the previous authorities, and that the relevant test is satisfied if either of the requirements is met. It follows, therefore, that '*likely*' is sufficient on its own and that it is not necessary in each case to show a subjective intention on the part of the employer to destroy or damage the relationship. As Judge Burke put it in the case of *Leeds Dental Team Ltd v. Rose* [2014] IRLR:

> **"The test does not require a Tribunal to make a factual finding as to what the actual intention of the employer was; the employer's subjective intention is irrelevant. If the employer acts in such a way, considered objectively, that his conduct is likely to destroy or seriously damage the relationship of trust and confidence, then he is taken to have the objective intention spoken of …"**

115. In her evidence to the Tribunal the Claimant spoke of her meeting with Sheila Smith on the 4th December 2017 as being the 'final straw' and in his closing submissions on behalf of the Claimant, Mr Emslie relied on the case of *Kaur v. Leeds Teaching Hospitals NHS Trust* [2018] EWCA Civ 978 in support of a submission that there had been no affirmation by the Claimant of the alleged breach of the implied term of trust and confidence. It is therefore necessary to consider the state of the authorities on the approach to be taken

where it is alleged that there has been a series of acts that cumulatively amount to a breach of the implied term of trust and confidence.

116. In *Omilaju v. Waltham Forest London Borough Council* [2005] EWCA Civ 1493, the Court of Appeal held that where the alleged breach of the implied term of trust and confidence constituted a series of acts, the essential ingredient of the final act was that it was an act in a series, the cumulative effect of which was to amount to the breach. It follows that although the final act may not be blameworthy or unreasonable, it has to contribute *something* to the breach even if relatively insignificant. As a result, if the final act does not contribute or add anything to the earlier series of acts, it is not necessary to examine the earlier history.

117. The point is illustrated in the Court of Appeal's decision in the case of *Kaur*, where the claimant relied on her being disciplined as the last straw to various earlier alleged instances of employer misconduct. The judgment contains the following passage:

> **"15. The last straw principle has been explained in a number of cases, perhaps most clearly in *Lewis v. Motorworld Garages Ltd* [1985] IRLR 465. Neil LJ said (p. 167C) that the repudiatory conduct may consist of a series of acts or incidents, some of them perhaps quite trivial, which cumulatively amount to a repudiatory breach of the implied term of trust and confidence. Glidewell LJ said at p 169F:**
>
> > **(3) The breach of this implied obligation of trust and confidence may consist of a series of actions on the part of the employer which cumulatively amount to a breach of the term, though each individual incident may not do so. In particular in such a case the last action of the employer which leads to the employee leaving need not itself be a breach of contract; the question is, does the cumulative series of acts taken together amount to a breach of the implied term? … This is the 'last straw' situation."**
>
> **16. Although the final straw may be relatively insignificant, it must not be utterly trivial: the principle that the law is not concerned**

with very small things (more elegantly expressed in the maxim "*de minimis non curat lex*") is of general application…

19. The quality that the final straw must have is that it should be an act in a series whose cumulative effect is to amount to a breach of the implied term. I do not use the phrase "an act in a series" in a precise or technical sense. The act does not have to be of the same character as the earlier acts. Its essential quality is that, when taken in conjunction with the earlier acts on which the employee relies, it amounts to a breach of the implied term of trust and confidence. It must contribute something to that breach, although what it adds may be relatively insignificant.

20. I see no need to characterise the final straw as "unreasonable" or "blameworthy" conduct. It may be true that an act which is the last in a series of acts which, taken together, amounts to a breach of the implied term of trust and confidence will usually be unreasonable and, perhaps, even blameworthy. Nor do I see any reason why it should be. The only question is whether the final straw is the last in a series of acts or incidents which cumulatively amount to a repudiation of the contract by the employer. The last straw must contribute, however slightly, to the breach of the implied term of trust and confidence. Some unreasonable behaviour may be so unrelated to the obligation of trust and confidence that it lacks the essential quality to which I have referred.

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

118. On the subject of affirmation of a contract of employment, in the *Western Excavating* case Lord Denning commented that an employee '*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*'. In those circumstances, the employee is said to have affirmed the contract of waived the breach. Even more fundamentally, where the conduct by the employer constitutes the unilateral imposition of new term, the employee may, by his or her conduct, be treated as having agreed to the variation. Thereafter, the conduct of the employer does not constitute a breach at all and the right to leave and claim constructive dismissal is lost.

119. Although the classic formulation by Lord Denning in *Western Excavating* speaks of the employee making his or her mind up '*soon*', there is no fixed time within which the employee must do so and so a delay per se will not amount to affirmation in law, albeit it will often be an important factor: *Chindove v. William Morrison Supermarkets Ltd* UKEAT/0201/13 (26th June 2014, unreported). A reasonable period is allowed. It depends upon all the circumstances including the employee's length of service. On the other hand, mere protest will not necessarily prevent an inference that the employee has waived the breach.

120. In a case involving the last straw doctrine, the question whether affirmation of a previous breach or breaches of the implied term of trust and confidence is permanently binding upon an employee can arise. Put bluntly, does the last straw have the effect of reviving an earlier breach of breaches of the implied term of trust and confidence that otherwise might appear to have been waived. That question was answered by the Court of Appeal in *Kaur*, where it was held that a later episode can be relied upon, if necessary, to revive earlier affirmed breaches. The Court of Appeal gave the following guidance as to how to approach the subject of affirmation in a case involving a final straw:

> **"I am concerned that the foregoing paragraphs may make the law in this area seem complicated and full of traps for the unwary. I do not believe that this is so. In the normal case where an employee**

claims to have been constructively dismissed it is sufficient for a tribunal to ask itself the following questions:

(1) 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?

(2) Has he or she affirmed the contract since that act?

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

(4) 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? (If it was, there is no need for any separate consideration of a possible previous affirmation …)

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

None of those questions is conceptually problematic, though of course answering them in the circumstances of a particular case may not be easy."

121. The issue of causation calls for separate consideration. Repudiatory breach or breaches by the employer need not be the sole cause of the employee's resignation provided that they are an effective cause. In the case of *Nottinghamshire County Council v. Meikle* [20014] EWCA Civ 859, the Court of Appeal held that what was necessary was that the employee resigned in response, at least in part, to the fundamental breach by the employer. The following passage appears in the judgment of Keene LJ:

> **"The proper approach, therefore, once a repudiation of the contract by the employer has been established, is to ask whether the employee has accepted that repudiation by treating the contract of employment as at an end. It must be in response to the repudiation but the fact that the employee also objected to the other actions or inactions of the employer, not amounting to a breach of contract, would not vitiate the acceptance of the repudiation. It follows that, in the present case, it was enough that the employee resigned in response, at least in part, to fundamental breaches of contract by the employer."**

122. In the case of *Abbeycars (West Horndon) Ltd v. Ford* UKEAT/0472/07 (23rd May 2008, unreported), it was held that the true question is whether the breach '*played a part in the dismissal*' and this means that if the employee resigns in response to several complaints about the conduct of the employer (some of which were not contractual breaches) it will not be necessary for the Tribunal to consider which was the principal reason for leaving.

123. The Tribunal also reminded itself that the burden of proof in the claims of constructive dismissal and breach of contract rests upon the Claimant. The standard of proof is the civil standard: namely, the balance of probabilities. In the constructive dismissal claim, it is for the Claimant to identify the alleged breach of contract, to establish the evidential basis of her claim and to satisfy the Tribunal that the facts as proven are sufficient in law to amount to a repudiatory breach of contract.

124. Lastly, when considering the legal principles applicable to the case, the Tribunal considered recent developments in contract law concerning the control of contractual discretions. The case of *Braganza v. BP Shipping Ltd* [2015] UKSC 17 affirmed that if what the claimant is objecting to is the way that an employer exercised a discretion under the contract of employment (to the claimant's detriment), it is not enough for the latter just to argue that the decision was unreasonable; he or she must show that it was irrational under the administrative law *Wednesbury* principles. In the context of consideration of the implied term of trust and confidence, it was made clear by the Court of Appeal in *IBM UK Holdings v. Dalgleish* [2017] EWCA Civ 1212 that if the term is being used to attack what is fundamentally an exercise of a discretion given to the employer by the contract of employment, then the claimant must establish *Wednesbury* unreasonableness/irrationality as mandated by *Braganza*.

Decision

125. Dealing first of all with the Claimant's contention that the undated job description at pages 51 to 55 in the Hearing Bundle had contractual status, the Tribunal's decision on that issue is that the job description had not been incorporated into the Claimant's contract of employment. The Tribunal's decision was that contract of employment was set out in the statement of particulars at pages 38 to 43 of the Hearing Bundle. That contractual document, signed by the Claimant on the 15th December 2015, specified that "*all the provisions set out above apply to this employment*" and that if there was any dispute by the Claimant that it did not set out the correct terms and conditions of her employment, then she must notify the Respondent within 14 days of receiving the statement of particulars. The document did not make any reference to the job description relied upon by the Claimant or to any job description.

126. The legal mechanism by which it was asserted that the job description had contractual status was not made clear by the Claimant. It was simply asserted by the Claimant that the job description set out contractual terms and conditions of her employment. The Tribunal did not accept that submission. It was not necessary, in order to give business efficacy to the statement of particulars to incorporate the job description into the contract of employment and there was no evidence to suggest that at the time when the statement of particulars was signed that the parties had in mind that the undated and unsigned job description was intended to set out further contractual terms and conditions of the Claimant's employment.

127. The Tribunal accordingly rejected the Claimant's contention that the work she was required to do whilst covering the Worle team amounted to a breach of express terms of her contract of employment relating to caseload and supervision levels (as set out in the job description).

128. The Tribunal accepted the Respondent's case that the job description did not have contractual status and that it was out of date by the time of the events with which the Claimant was concerned. That, of course, was the fault of the Respondent. It was down to the Respondent to update the Claimant's job description as and when necessary, through appropriate consultation and negotiation, and that had not occurred.

129. If the Tribunal was wrong in the approach it took to the status of the job description, the Tribunal would not have found that the work that the Claimant did in covering the Worle team from January 2014 onwards amounted to a breach of the express terms of her contract of employment. The job description specified that the Claimant's "*principle accountabilities*" included carrying a caseload of up to 10, including more complex cases and her "*supervisory responsibility*" involved supervising up to 6 OT staff. The Tribunal accepted that the Claimant's work when covering the Worle team involved a personal caseload that, at times, exceeded 10 and involved supervising more than 6 OT staff. The job description went on to say, however, that the postholder must be able to prioritise and work with competing deadlines and changing demands and will be responsible for providing professional supervision to other OT staff. The job description also made clear that it only contained the "*principle accountabilities*" and did not describe in detail all the duties required to carry them out. Bearing in mind that the Claimant's work in covering the Worle team was never intended to be a permanent arrangement, although it continued for a far longer period than had originally been anticipated, the Tribunal was of the view that the extra demands that it undoubtedly placed upon the Claimant did not amount to a breach of the express terms of the job description.

130. Even if wrong about that, the Tribunal was satisfied that the Claimant's consent to cover the Worle team amounted to a variation of the Claimant's contract of employment with the consequence that the extra demands placed upon the Claimant as a result of covering the Worle team did not amount to a breach of an express term of her contract of employment. The Tribunal was satisfied that the problems that the Claimant reported to the

Respondent at SPOT meetings and to her managers, regarding the extra demands arising from covering the Worle team, did not amount to a withdrawal by the Claimant of her consent to continue to cover the Worle team.

131. Turning to the other issues in the case, the Tribunal next considered whether there had been a breach of the implied term of trust and confidence as alleged by the Claimant (as set out in the issues that had been agreed between the parties).

132. On the basis of the evidence that it heard and read and applying the legal principles summarised above, the Tribunal was satisfied that the Respondent had breached the implied term of trust and confidence in the way that it dealt with the grievance process. In the judgment of the Tribunal, the presentation by the Respondent of incorrect information regarding the Claimant's caseload as part of Stages 1 and 2 of the grievous process was conduct, when discovered by the Claimant following the conclusion of the Stage 2 process, that was likely to destroy or seriously damage the relationship of confidence and trust between the Claimant and the Respondent.

133. The Respondent had an opportunity of remedying the problem that it had created during Stages 1 and 2 of the grievous process, as identified by Ms Collins following the Stage 2 outcome, but, through the actions of Ms Verrico, the Respondent did not embrace that opportunity. Instead, the Respondent proceeded to the Stage 3 appeal without properly correcting the errors that had been made in Stages 1 and 2 of the grievance process. Merely stating that there had been confusion regarding the Claimant's caseload that had been resolved was not sufficient. The appearance was that the Respondent was attempting to suppress and conceal a serious error that had been made at Stages 1 and 2 of the grievance regarding its assessment of the Claimant's caseload whilst she was covering the Worle team. The Claimant's central contention, at each stage of the grievance process, was that her workload had increased as a consequence of covering the Worle team. Central

to that contention was her assertion that she had been required to continue to carry a caseload in addition to supervising an increased number of OT staff. Through the error made by Mr Hawketts and Ms Shaw at Stage 1 of the grievance, regarding the Claimant's caseload, the Respondent was never in a position, at Stages 1 and 2 of the grievance, to properly assess the Claimant's contention that her workload had increased. The conclusions of the decision-makers at Stages 1 and 2 were, therefore, fundamentally flawed.

134. As mentioned above, the error could have been corrected, in one of the ways proposed by Ms Collins (which were rejected by Ms Verrico), or by transparency, on the part of the Respondent at the Stage 3 appeal. Regrettably, the Respondent took a different path with the result that the misinformation regarding the Claimant's caseload was not properly corrected at the Stage 3 appeal. Given the error that had been made at Stages 1 and 2 regarding the Claimant's caseload, it would not have been unreasonable to have expected the Respondent to have carried out a detailed investigation to establish precisely what the Claimant's personal caseload had been whilst she was covering the Worle team. Such an investigation, however, did not take place. The panel hearing the Stage 3 appeal were simply told by Ms Verrico that there had been confusion regarding the Claimant's caseload but that had been resolved.

135. The Tribunal was satisfied that the way in which the Respondent dealt with the Claimant's caseload, whilst covering the Worle team, at Stages 1, 2 and 3 of the grievance process was likely to destroy or seriously damage the relationship of confidence and trust between the Claimant and the Respondent. It would have appeared to the Claimant, as in fact was the case, that the Respondent had not properly taken into account, at any stage of the grievance process, her caseload when assessing her contention that her workload had increased whilst covering the Worle team.

136. Turning to the other allegations of breach of the implied term of trust and confidence, the Tribunal did not find that the Respondent's failure to increase the Claimant's salary or give her an additional payment amounted to a breach of the implied term. In January 2014 the Claimant had consented to cover the Worle team without any expectation that her salary would be increased or that she would receive some additional payment. Her position changed when she discovered, in April 2017, that Mr Chacku and Ms Hook had received a pay increase. It was clear from then on, that the Claimant felt that she was entitled to increased pay, back-dated to January 2014. The Claimant was quite open, in her evidence to the Tribunal, in saying that the only way she saw for resolving her grievance was for her to receive a lump sum payment. She did not say to the Tribunal what that lump sum should have been. She had requested a lump sum of £140,587 but her evidence to the Tribunal, which was accepted, was that she had only put that figure forward as a starting point for negotiations. The Tribunal was unable to find, however, that the failure to increase the salary (by an unspecified amount) or make an additional payment to the Claimant (of an unspecified amount) prior to, or as a result of, her grievance amounted to a breach of the implied term of trust and confidence. The Tribunal's finding has been that the grievance process was flawed to such an extent that a breach of the implied term occurred as set out above. The Tribunal, however, was not able to find that had the grievance process been conducted impeccably, the inevitable outcome would have been a back-dated increase in salary or an additional payment to the Claimant. Accordingly, the Tribunal was unable to find that the non-payment to the Claimant of an increase in her salary or an additional payment amounted to a breach of the implied term of trust and confidence.

137. Though the Tribunal accepted that whilst the Claimant was covering the Worle team, the scope of her role as a SPOT was greater than that of her two colleagues in the North, the Tribunal did not accept that that difference, involving as it did an increased workload for the Claimant without extra pay and without the support that had been promised, amounted to a breach of the implied term of trust and confidence. Central to this allegation of breach of the implied term of trust and confidence was the Claimant's contention that her workload had 'doubled' whilst she was covering the Worle

team. The Tribunal, however, was unable to find that the Claimant's workload had 'doubled' in the simplistic sense advanced by the Claimant. Her workload undoubtedly increased and her skills at managing the workload were tested and challenged but the Tribunal was unable to find that the amount of work that the Claimant performed was double that to which she had performed before covering the Worle team.

138. If the Tribunal was wrong that the increased workload emanating from the Worle team did amount to a breach of the implied term of trust and confidence from January 2014 onwards, as alleged by the Claimant, the Tribunal found that the Claimant had waived the breach by consenting to the arrangement under which she covered the Worle team and by undertaking the increased work for a number of years.

139. The Tribunal did not find that the Respondent's response to the Claimant's complaints about what she perceived to be her unfair treatment whilst covering the Worle team amounted to a breach of the implied term of trust and confidence. The Tribunal found that the Claimant did raise concerns about the increased workload arising from covering the Worle team but the Tribunal was not persuaded that the Respondent's response to those complaints was likely to destroy or seriously damage the relationship of confidence and trust between the Claimant and the Respondent. The increased demands arising from the work involved in covering the Worle team was a state of affairs, the Tribunal found, that the Claimant accepted and dealt with. It was entirely proper that she raise concerns about the workload to the Respondent but it could not be said, in the judgment of the Tribunal, that the continuing state of affairs, which was accepted by the Claimant without resignation and without raising a grievance until 2017, amounted to a breach of the implied term relied upon by the Claimant. Central to that finding by the Tribunal was its finding that the Claimant appeared to the Respondent to be managing very well in dealing with the increased workload from covering the Worle team and there was no indication to the Respondent that her health was being adversely affected by the increased workload. The signs were, evidenced by the Appraisal Forms, that the Claimant was

dealing effectively and efficiently with the work involved in covering the Worle team.

140. The Tribunal did not accept the Claimant's contention that the Respondent had failed to address her concerns that a different process had been followed in respect of her covering the Worle team than had been followed in the cases of Mr Chacku and Ms Hook when they received their pay rises in April 2017. It was evident to the Tribunal that the positions of Mr Chacku and Ms Hook, and the circumstances in which they received their pay rises, were not comparable to the Claimant's circumstances during the period that she covered the Worle team. The Tribunal was satisfied that the basis upon which Mr Chacku and Ms Hook received their pay rises did not apply to the Claimant. Further, the Claimant's concerns arising from her discovery that Mr Chacku and Ms Hook had received pay rises were, in the judgment of the Tribunal, adequately addressed by the Respondent. Accordingly, the Tribunal found that there was no breach of the implied term of trust and confidence arising from the circumstances in which Mr Chacku and Ms Hook received their pay rises.

141. In respect of the allegation that Ms Verrico's email to the Claimant dated the 15th May 2017 was a "*put-down that undermined and devalued her*", the Tribunal's finding was that the email was not inappropriate or unreasonable and was not intended to have the effect described by the Claimant. Accordingly, the Tribunal found that there was no breach of the implied term of trust and confidence arising from the email dated the 15th May 2017.

142. The Claimant's contention that the grievance process gave rise to a breach of the implied term of trust and confidence is accepted by the Tribunal for the reasons set out above. The breach arose from the misinformation supplied by the Respondent about the Claimant's caseload at Stages 1 and 2 of the grievance process and its failure to properly correct that misinformation at the Stage 3 appeal. The Tribunal accepted, however, that the Respondent, during the grievance process, and prior to the grievance process,

had recognised that the Claimant had taken on an increased workload when covering the Worle team. The Tribunal also noted that the Respondent had upheld the Claimant's grievance that she had not received appropriate supervision and had upheld the Claimant's grievance that she had assisted the Respondent by covering the Worle team for an extended period of time without the benefit of support through formal supervision. It follows, therefore, that a number of the aspects of the grievance process alleged by the Claimant to have amounted to a breach of the implied term of trust and confidence were not established. Where a breach was established, in the judgment of the Tribunal, and it was the only breach to be established in relation to the grievance process itself, was in relation to the way in which the Respondent dealt with the issue of the Claimant's caseload and the resultant flawed assessment as to the level of increased work for the Claimant arising from covering the Worle team.

143. In the judgment of the Tribunal, a further breach of the implied term of trust and confidence occurred as a result of Ms Turner's investigation into the fairness of the grievance process. Ms Turner's finding that the minor defects that she found in the grievance process had had no detrimental impact on the process or the outcomes was, in the judgment of the Tribunal, unsustainable. By appearing to concentrate on the minor defects in the process, Ms Turner had failed to identify that there was a major defect in the process concerning the misinformation provided by the Respondent about the Claimant's caseload when she was covering the team at Worle. That was a serious failing on the part of Ms Turner and, in the judgment of the Tribunal, it amounted to a breach of the implied term of trust and confidence.

144. The next allegation of breach of the implied term of trust and confidence concerned the meeting with Ms Smith. In the judgment of the Tribunal a further breach of the implied term occurred at that stage because of the information given by Ms Smith, in her email to the Claimant dated the 27th November 2017, as to the purpose of the meeting that ultimately took place on the 4th December 2017. There is no doubt that Ms Smith's invitation to the meeting was misleading. She stated, in her email, that the purpose of the

meeting was to clarify outstanding issues and possible resolutions. It should have been obvious to Ms Smith that such language would have given the Claimant hope and expectation that her issues about the increased workload arising from her covering the Worle team, that had been the subject of the grievance process, were going to be reconsidered in some way by Ms Smith. In fact, Ms Smith's purpose in calling the meeting was to correct some aspects of the Claimant's behaviour that had been noticed at work following the rejection of the Stage 3 appeal. That would not have been apparent to the Claimant on the basis of Ms Smith's email dated the 27th November 2017. The Tribunal was satisfied that Ms Smith's conduct in relation to the meeting that took place on the 4th December 2017 was likely to destroy or seriously damage the relationship of confidence and trust between the Claimant and the Respondent. That breach, however, did not extend to the email that Ms Smith sent to the Claimant on the 8th December 2017 following the meeting that had taken place on the 4th December 2017. Given what had been discussed at the meeting on the 4th December 2017, the contents of Ms Smith's email to the Claimant on the 8th December 2017 could not have come as a surprise to the Claimant. In the judgment of the Tribunal, the email from Ms Smith to the Claimant on the 8th December 2017 contained a fair summation based on what had been discussed at the meeting.

145. In relation to the allegation that there had been a failure on the part of the Respondent to consider making a discretionary payment to the Claimant under section 4 of the Acting-Up and Honorarium Payments Policy, the Tribunal was satisfied that the Respondent had considered such a payment in April 2017, when the Claimant raised her concerns that Mr Chacku and Ms Hook had received pay rises, but had decided, correctly in the view of the Tribunal, that the Claimant was not eligible for such a payment. Accordingly, the Tribunal was satisfied that no breach of the implied term of trust and confidence had been established in relation to the Respondent's approach to the question whether the Claimant was entitled to a discretionary payment under section 4 of the Policy.

146. Having found that the implied term of trust and confidence was breached in the manner described above, the Tribunal was further satisfied that the breaches of the implied term amounted to a fundament breach, by the Respondent, of the Claimant's contract of employment. The Tribunal was also satisfied that the breaches of the implied term of trust and confidence were an effective cause of the Claimant's resignation on the 8th December 2017. In the judgment of the Tribunal, the breaches of the implied term described above had not been waived, or the contract of employment otherwise affirmed, prior to the Claimant's resignation on the 8th December 2017.

147. The Claimant, as of the 8th December 2017, was entitled to treat her contract of employment as having been repudiated by the Respondent and she accepted that repudiation through her resignation. The Tribunal was satisfied, in the circumstances, that the Claimant had been constructively dismissed by the Respondent.

148. The Tribunal next considered whether the Respondent had shown that the reason for the Claimant's reason was a potentially fair reason within the meaning of section 98(1) and (2) of the Employment Rights Act 1996. On the evidence before it, the Tribunal found that the Respondent had not shown that the reason for the Claimant's dismissal was a potentially fair reason. Having failed to fulfil the requirements of subsection (1) of the Employment Rights Act 1996, the Tribunal was driven to the conclusion that the Claimant's dismissal was unfair within the meaning of section 98 of the 1996 Act.

149. To the extent that an assessment of the fairness or otherwise of the dismissal was necessary under section 98(4) of the 1996 and the matters set out therein, the Respondent having failed to fulfil the requirements of section 98(1), the Tribunal was satisfied that the Claimant's dismissal was unfair. The Tribunal was further satisfied that the dismissal of the Claimant did not fall within the

range of reasonable responses expected of a reasonable employer.

150. Accordingly, the Claimant succeeds in her claim of constructive unfair dismissal.

151. The Tribunal next considered the Claimant's claim of breach of contract. As stated above, the Claimant's pleaded case under this separate cause of action was based on the contention that Ms Smith had refused the Claimant's request for a discretionary payment under section 4 of the Acting-Up and Honorarium Payments Policy at the meeting that had taken place on the 4th December 2017 in circumstances that amounted to a breach of contract. In the judgment of the Tribunal that claim failed for two reasons. Firstly, the Tribunal was unable to find as a fact that the Claimant had made a request at the meeting on the 4th December 2017 that a discretionary payment be made to her under the Policy.

152. Secondly, the Tribunal found that section 4 of the Policy, being the section relied upon by the Claimant in her claim of breach of contract, did not apply to her circumstances in connection with covering the Worle team. Section 4 was headed "*Project work involving additional responsibility*". It applied where "*an employee is asked to undertake a new task or a range of duties and responsibilities outside the scope of their normal role … e.g. a short specific project involving additional responsibilities or more complex work*". In the judgment of the Tribunal, the work that the Claimant was required to undertake when covering the Worle team was not work that fell outside of her normal role as a SPOT. The work involved the same tasks and range of duties and responsibilities as the Claimant undertook in respect of the Weston team. For that reason, the Tribunal was not satisfied that Claimant's work when covering the Worle team fell within the ambit of section 4 of the Policy. Accordingly, the Claimant's breach of contract claim shall be dismissed.

153. The claim shall now be relisted on the first available date after the 22nd July 2019, with a time estimate for 1 day, for a remedies hearing arising from the finding that a constructive unfair dismissal occurred on the 8th December 2017.

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Employment Judge David Harris

Dated: 4th July 2019

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