EMPLOYMENT TRIBUNALS (SCOTLAND)

Case Number: 4107313/2017

Held in Glasgow on 16 & 17 December 2019

Employment Judge: N Buzzard
Members Mrs F S Paton
Mr D Frew

Ms Lorraine Thomson	**Claimant** **Represented by:** **Mr G Booth - Consultant**
The Board of Directors of St Mary's Kenmure	**Respondent** **Represented by:** **Mr F McCormick - Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Tribunal is that the claimant's claims are not well founded and are all dismissed.

REASONS

The Claims

1. The claimant in this case made pursued only four claims at the hearing as follows:

    i) A claim of constructive unfair dismissal;

    ii) A claim that there had been an unlawful deduction from her wages;

    iii) A claim of disability discrimination by the respondent failing to make reasonable adjustments; and

iv) A claim of discrimination arising from disability.

2. A further claim relating to unpaid holiday pay was not pursued by the claimant at hearing. No evidence or submissions to support that claim were referred to by any witness or either representative. At the conclusion of the hearing, when this absence was identified to the claimant's representative, he confirmed the claim was withdrawn.

The issues and the law

Unfair Dismissal

3. The respondent did not accept that the claimant had been dismissed. A claim of unfair dismissal cannot succeed unless there has been a dismissal. The burden of proof to establish there has been a dismissal falls on the claimant.

4. Section 95(1)(c) of the Employment Rights Act 1996 states that:

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

5. Therefore, the claimant can bring an unfair dismissal claim based on her own resignation, a situation which is commonly known as constructive dismissal.

6. To establish that she has been constructively dismissed, the claimant must show, following **Western Excavating (ECC) Ltd v Sharp** [1978] IRLR 27 that there has been a breach of contract, either actual or anticipatory, that it was a fundamental breach and that she resigned in response to that breach without having affirmed her contract after the breach and prior to her resignation. This authority was referred to by both representatives in their respective written submissions.

7. The fundamental breach can be of an express or implied term. An implied term commonly relied upon, as in this case, is the implied term of trust and confidence, a fundamental term of every contract. **Malik v**. **BCCI** [1997] IRLR 462 considered how to determine whether this has been breached. Again, both representatives specifically referred the Tribunal to this authority, and the guidance set out by the House of Lords that when determining this the Tribunal must look at:

    i) What was the conduct complained of?

    ii) Did the employer have reasonable and proper cause for the conduct?

    iii) If not, was the conduct complained of calculated and likely to destroy or seriously damage the employer-employee relationship of trust and confidence.

8. The claimant's representative confirmed at the outset of the hearing that the conduct complained of was the disciplinary process the claimant was subjected to. The respective submissions of the parties were made on the basis that the respondent did not seek to argue that disciplinary action for alleged gross misconduct would not be conduct that met part iii) of the test above, but that the focus of the dispute was whether the respondent had reasonable and proper cause for the disciplinary steps taken.

9. In **Buckland v. Bournemouth University Higher Education Corporation** [2010] CA which affirmed the **Malik** test, it was clarified that the range of reasonable responses test (borrowed from unfair dismissal) does not apply to the **Malik** Test.

10. The claimant's representative referred the Tribunal to **Sharfudeen v TJ Morris Ltd t/a Home Bargains** EAT 0272/16, which confirmed that the test for a breach of trust and confidence is not purely subjective. Even if the claimant's trust and confidence in the respondent was undermined there is no breach if the respondent's conduct, when viewed objectively, was not unreasonable. It further confirmed that there is no place for the range of reasonable responses test in this context.

11. In **Claridge v Daler Rowney Ltd** [2008] IRLR 672 EAT, it was reiterated that an employer's unreasonable conduct must amount to a breach of contract fundamentally undermining the employment relationship for there to be a constructive dismissal. Unreasonable conduct by itself is not sufficient. The respondent's representative referred in written submissions to **BCCI v Ali (No 2)** [2000] ICR 1354 in support of a submission which was substantively the same as this point.

12. If a claimant succeeds in a constructive dismissal case it is open to the respondent to establish that it was still a fair dismissal within the meaning of Section 98(4) Employment Rights Act 1996 (the 1996 Act). The respondent's representative confirmed that no such alternative argument was relied on this in this case.

Unlawful Deductions from Wages

13. The right not to suffer an unlawful deduction from wages is set out in s13 of the Employment Rights Act 1996. This states that an employer shall not make a deduction from an employee's wages unless one of two criteria are satisfied:

    i) The deduction is required of authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract; or

    ii) The worker has previously signified in writing his agreement or consent to the making of the deduction.

14. In this case the respondent argues that the claimant was demoted, and following her demotion was paid in accordance with her contract of employment. Further, and in the alternative, the respondent argues that the claimant was subjected to a disciplinary policy that permitted the demotion and therefore consequent reduction in salary, making it authorised.

Disability Discrimination

15. Part 5 of the Equality Act 2010 ("EqA") applies to employees and prohibits discrimination against employees in the workplace. Section 39 EqA states:

"39 Employees and applicants

(2) An employer (A) must not discriminate against an employee of A's (B)—

(d) by subjecting B to any other detriment."

16. This requires the claimant to identify a detriment, which is alleged to have been rendered unlawful because of discrimination. At the outset of the hearing the claimant's representative identified the detriment relied by the claimant was not permitting her to have the representative of her choice in the disciplinary process. The claimant's ET1 refers to additional potential detriments, specifically the "*disciplinary sanctions that were imposed*" and a failure to make adjustments prior to imposing those sanctions. The claimant referred to the following adjustments:

i) the provision of supervision, training and mentoring;

ii) allowing more preparation time for the claimant during the disciplinary process;

iii) ensuring she had paperwork well in advance of the disciplinary hearing;

iv) postponing the disciplinary hearing;

v) convening hearings or meetings in a neutral venue; and

vi) allowing written submissions or allowing a friend or helper from outside work to accompany her at the disciplinary hearing.

17. The right to make a claim in an Employment Tribunal in relation to a breach of these provisions of Part 5 comes from Chapter 3 of Part 8 of the Equality Act 2010. Specifically, s120 states:

"120(1) An employment tribunal has, subject to section 121, jurisdiction to determine a complaint relating to—

(a) a contravention of Part 5 (work);"

Under this a Tribunal has the jurisdiction to determine if prohibited discrimination has occurred.

18. The definitions of discrimination come from Part 2 of the Equality Act. This firstly creates the concept of protected characteristics, the relevant one here being disability. The respondent accepted that the claimant was at the relevant times a disabled person, but did not accept that they were aware of this at all relevant times, or that they had a reasonable basis to conclude that the claimant may be disabled at the relevant times.

19. Part 2 Chapter 2 goes on to define the various types of discrimination. In this claim the claimant pursued a claim of discrimination arising from disability and a claim of discrimination by breaching a duty to make reasonable adjustments.

Discrimination arising from disability

20. Discrimination arising from disability is defined by s15 of the Equality Act as when:

> *"15(1) A person (A) discriminates against another (B) if, A treats B unfavourably because of something arising in consequence of B's disability and A cannot show that the treatment is a proportionate means of achieving a legitimate aim."*

21. The claimant must still show that she has been treated unfavourably. This is a question of fact that does not require comparison to other persons.

22. Establishing unfavourable treatment is not however sufficient: for the claim of discrimination to be made out, the conduct complained of must be also be '*because of something arising as a consequence of*' the claimant's disability.

Reasonable Adjustments

23. The relevant provision relating to the duty to make reasonable adjustments is to be found in section 20 of the Act which sets out that where:

> *"a provision, criterion or practice applied by or on behalf of an employee places the disabled person concerned at a substantial disadvantage in comparison with persons who are not disabled it is the duty of the employer to take such steps as is reasonable in all the circumstances of the case, for him to have to take in order to prevent the provision, criteria or practice, or feature, having that effect."*

24. In determining whether it is reasonable for a person to have to take a particular step in order to comply with a duty to make reasonable adjustments, regard shall be had, in particular:

> *"to the extent in which taking the step would prevent the effect in relation to which the duty is imposed."*

The Burden of Proof

25. Considering the claimant's claims for discrimination the burden of proof is determined by s136 of the Equality Act. The relevant parts of this section state:

> *"(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.*
>
> *(3) But subsection (2) does not apply if A shows that A did not contravene the provision."*

26. This in effect reverses the traditional burden of proof so that the claimant does not have to prove discrimination has occurred, which can be very difficult. This reversal of the burden applies to *'any proceedings relating to a contravention of this [Equality] Act' (s136(1))*.

27. This is commonly referred to as the reversed burden of proof, and has two stages.

28. Firstly, has the claimant proved facts from which the Tribunal could conclude, in the absence of an adequate explanation, that the respondent committed an

unlawful act of discrimination? This is more than simply showing the respondent could have committed an act of discrimination.

29. If the claimant passes the first stage then the respondent has to show that they have not discriminated against the claimant. This is often by explanation of the reason for the conduct alleged to be discriminatory, and that the reason is not connected to the relevant protected characteristic. If the respondent fails to establish this then the Tribunal must find in favour of the claimant. With reference to the respondent's explanation, the Tribunal can take into account evidence of an unsatisfactory explanation by the respondent.

30. It is not necessary for the Tribunal to approach these two elements of the burden of proof as distinct stages. The court of Appeal in Madarassy v Nomura International plc [2007] EWCA Civ 33 gave useful guidance that despite the two stages of the test all evidence should be heard at once before a two-stage analysis of that evidence is applied.

Evidence

31. Evidence was not heard from the claimant orally. In accordance with the orders of Judge Eccles made at a preliminary hearing on 20 May 2019, the claimant prepared a written witness statement to stand as her evidence in chief. The respondent then provided a list of questions it wanted to put to the claimant in cross examination, and the claimant provided written answers to those questions. The claimant's written answers stand as her cross examination. The claimant did not attend the hearing, her representative relied on the written statement and cross examination as the only evidence of the claimant personally.

32. In addition, the tribunal heard from the claimant's partner, Mr Hugh Scullion. Mr Scullion, in accordance with a formal power of attorney, attended on behalf of the claimant and provided instructions to the claimant's representative.

33. The respondent presented two witnesses as follows:

    a. Ms Claire McCallum – Head of HR for the respondent; and

b. Ms Carole Dearie - who chaired the relevant disciplinary hearing.

34. In addition to witness evidence the Tribunal were presented with an agreed joint bundle containing all the documentary evidence the Tribunal were referred to.

35. There was some discussion at the outset of the hearing regarding whether the Tribunal would need to view CCTV footage. The representatives were agreed that they had anticipated and prepared on the basis that they would not be permitted to show this in evidence. Based on this expectation, the claimant's representative had added a number of screen shots from the CCTV footage as additional documents in the agreed bundle.

36. It was confirmed to the parties that, should it become apparent that what the CCTV showed was materially in dispute, the Tribunal was prepared to view it. This was subject to a stipulation that the parties would have to provide a device capable of playing the footage. As matters transpired, although there was some dispute about the details of what was shown on the CCTV recording, the reelvant substantive content was not in dispute. As a consequence, the Tribunal did not need to view the CCTV footage.

37. In addition to the evidence, both representatives produced detailed written submissions. Additional oral submissions were limited, and mostly consisted of clarifications of the written submissions, provided in response to specific requests for clarification from the Tribunal.

38. Based on the evidence presented the findings of fact set out below were made. A significant part of the relevant facts were not in dispute. Where there was a dispute over a determinative material fact, the reasons for the Tribunal's view of that disputed fact are explained below.

39. The claimant was employed by the Respondent from mid-2000 until her resignation by letter dated 8 November 2017. The claimant, immediately prior to the relevant events, was employed as an Assistant Unit Manager at the respondent's Iona House Unit. The Iona House Unit was a secure unit for young persons. The claimant's contract of employment, which was before the

Tribunal, states that the "Board of Managers" of St Mary's Kenmure are her employer.

40. The claimant accepted in her written answers to cross examination questions that issues had arisen during her employment with the respondent prior to the events relevant to this claim as follows:

    a. she had been given a written warning in December 2013 in relation to a young service users primary care needs; and

    b. she had made a medical administrative error in March 2017, but she did not recall being given a verbal warning for that error;

41. The respondent had a six-page policy headed "*Discipline at Work Policy*", which was before the Tribunal. The claimant produced a single page document, which appeared to be part of a larger document, headed "*Disciplinary and Dismissal Procedure*". The claimant's evidence was that she was not aware of the policy produced by the respondent, and believed the single page document she produced set out the relevant disciplinary policy applicable to her employment with the respondent.

42. The material difference between the documents was that the policy produced by the respondent included scope for demotion to be used as a disciplinary sanction, whereas the document produced by the claimant included no such provision. The view of the Tribunal was that the document produced by the claimant appeared to be a summary of the disciplinary procedure in place at the respondent organisation. The policy document produced by the respondent is more detailed, clearly headed as the appropriate procedure and was confirmed by the respondent witnesses to be the full applicable policy. This specifically, within a section headed "*Dismissal or action short of dismissal*", confirms that disciplinary action can result in an employee being "*demoted*", as well as loss of seniority.

43. The secure unit housed persons between the ages of 12 and 18, who frequently exhibit challenging and at times violent behaviour. Part of the

claimant's duties were to undertake daily risk assessments and ensure a safe environment for the young persons and staff.

44. The claimant was accepted to have been a disabled person at all relevant times to the issues raised in this claim. The disability in question was described as anxiety and depression. The respondent did not accept that they were aware the claimant had this disability, or had information from which they should have been aware at all relevant times.

45. The issue which lies at the root of the claimant's claims arose on Wednesday 19 July 2017. This claimant was on duty that day on a late shift. During that shift a panel in the wall between a secure bedroom and corridor became dislodged and fell from that wall.

46. The panel in question was one that provided for viewing into the secure bedroom from the outside. In addition, the panel contained controls that permitted the water, electricity and lights within the secure bedroom to be switched on and off. Accordingly, the panel is fitted into an opening in the wall between the secure bedroom and the corridor outside.

47. In total, the part of the unit where the incident occurred, had two groups of three secure bedrooms on separate corridors. The corridor outside the bedroom to which the panel which fell was connected is covered by CCTV. Screenshots from the CCTV at and around the relevant time were provided to the Tribunal.

48. During the claimant's shift on 19 July 2017 the panel in question was noted to be loose. There was some dispute about how long the panel had been loose, and why they panel was loose. Whilst the claimant's representative sought to rely on an assertion that the panel had been loose for some time having been fitted by unqualified persons, and the claimant had previously reported it as being loose, none of these factors were found to be material. No evidence was presented to suggest that the panel had, prior to 19 July 2017, actually become dislodged from the wall and fallen, as distinct from potentially being loose and thus at risk of being dislodged.

49. When the panel became dislodged and fell there was a power surge, and the description given to the Tribunal was that electrical sparking occurred. The undisputed evidence was that this sparking was visible on the CCTV, although this was not visible on the screenshots provided to the Tribunal. In addition, the respondent's evidence was that the power, lighting being on a separate circuit, shorted out for the rooms on the corridor in question. The occupant of the room with the fallen panel was then left in their room for between five and nine minutes after the panel fell. During this time the young person was alone and unsupervised. Whilst there was some dispute over the length of time (five or nine minutes), the respondent's evidence that it was nine minutes was stated to be taken from the CCTV, and accordingly is accepted as more likely to be accurate. In any event, nothing material is determined by the difference between five and nine minutes in this context.

50. The claimant had been present at the time the panel fell. There was some dispute as to how the panel came to fall, and the claimant was ultimately subjected to disciplinary proceedings in relation to charges that included causing the panel to become dislodged. The account provided to the Tribunal, which was given in evidence by the chair of the claimant's disciplinary hearing, was taken from the CCTV footage. The claimant had been seen inspecting and touching the loose panel, with apparently debris falling from the wall around the panel during this inspection. The occupant of the secure bedroom the panel was connected to then came out of their room, approached the panel, and in the claimant presence sought to push the panel back into place. The claimant did not appear to take any steps to stop this being done. Then, apparently not shown on the CCTV footage, the young person returned to their room and further pushed the panel, this time from the room side. This is the pushing which appears to have caused the panel to fall from the wall on the corridor side.

51. The claimant accepted at all times that she was the most senior person present in the unit at the time of the panel falling from the wall. She further accepted that she was in the vicinity of the panel when it fell.

52. There was no dispute that after it fell, the immediate vicinity of the panel was an unsafe place for the young persons to remain in. There were exposed wires and had been electrical shorting and sparking.

53. The claimant proceeded to move young persons from the affected part of the unit to a safer environment. She did not, however, until several minutes later check on or move the young person who had been left alone in the room with which the fallen panel actually connected.

54. Following the events of 19 July 2019, the respondent undertook a fact-finding exercise, which included interviewing the claimant. This resulted in the claimant being placed on precautionary suspension on 25 July 2019. This was confirmed to the claimant in a letter of the same date. This letter was in the document bundle before the Tribunal.

55. The claimant was invited to a disciplinary hearing on Wednesday 9 August 2019. The letter inviting the claimant to the disciplinary hearing was dated 31 July 2019, and was before the Tribunal. This letter confirmed that the disciplinary issues to be considered at the hearing were potentially issues of gross misconduct. The letter states that it enclosed copies of statements that the respondent had obtained from various witnesses, and CCTV footage. The letter concluded by listing potential outcomes of the hearing, referencing a final written warning, demotion or dismissal.

56. Copies of the documents alleged to have been included with that letter, other than the CCTV, were considered by the Tribunal.

57. The claimant's evidence was that the decision to take disciplinary action against her should have been made by the Board of Directors. She believed it was made by Carole Dearie. The letter inviting the claimant to a disciplinary hearing was sent by Ms Claire McCallum – Head of HR for the respondent. Under the discipline at work policy referred to earlier, it is stated that it is for the head of HR to decide if disciplinary action is necessary because there is a case to answer based on the fact-finding investigation. The summary one-page disciplinary procedure produced be the claimant merely refers to the "Board of Directors" being able to commence disciplinary action. There is

nothing within that document that precludes that Board, which appears to be the same as the Board who are named as the claimant's employer, delegating that authority.

58. The disciplinary allegations made against the claimant were stated in the invitation to a disciplinary hearing as follows:

> *"Allegedly failing to execute your role as a Manager by failing to keep your staff members safe during the serious incident on the evening of 19 July 2017.*
>
> *Allegedly putting a Young Person at considerable risk and not following safe care procedures in relation to the incident of the viewing panel of Bedroom 4 in the Iona Unit became dislodged with the wall and causing the panel to be displaced.*
>
> *Allegedly not creating a safe environment for Young People in relation to the incident of the viewing panel of Bedroom 4 in the Iona Unit became dislodged with the wall and causing the panel to be displaced."*

59. The letter specifically stated potential outcomes of the process included dismissal and demotion.

60. A further copy of the letter inviting the claimant to the disciplinary hearing was sent on 3 August 2017, with the only relevant material change being the addition of "*no action*", "*verbal warning*" and "*written warning*" as potential sanctions. In addition, the second letter clarified that the CCTV footage of the incident would be available to view at the disciplinary hearing.

61. Both letters inviting the claimant to the disciplinary hearing asked the claimant to confirm if she was going to be accompanied at the hearing, and if so by whom.

62. The claimant's disciplinary hearing took place on 9 August 2017 as scheduled. The respondent recorded that hearing and produced a verbatim transcript of everything that was said at the hearing. That transcript was before the Tribunal who had the benefit of reading it in full.

63. The transcript records the initial discussions with the claimant during which the claimant declined an offer to view the CCTV footage and confirmed that she was happy to proceed without being accompanied. Further, the claimant explicitly declined the respondent's offer for her to be accompanied by a work colleague.

64. During the disciplinary hearing the claimant was taken through the events on 19 July 2019 regarding the panel. The claimant sought to highlight her assertion that the panel had been loose for some time, and was awaiting repair. The transcript records that the claimant was told "*You are not here because of a panel*", to which the claimant replied, "*Right ok*". A few moments later the claimant is told by Carol Dearie "*its not about the actual panel being loose*" to which the claimant respondent "*right that's fine then*" and she was then told "*its about what happened when the panel became dangerously unsafe, that is the issue.*"

65. This exchange, recorded in the disciplinary hearing, is consistent with the evidence of the respondent's witnesses. This evidence was that the concern which led to the imposition of a disciplinary sanction was the claimant's lack of appropriate immediate safeguarding action once the panel had become an immediate hazard.

66. At the conclusion of the disciplinary hearing the Carol Dearie is recorded as stating to the claimant:

> *"I can't dismiss the seriousness of this Lorraine, there were young people and staff in an environment that was incredibly unsafe, a young person could have been electrocuted and you could have been electrocuted and the staff, the whole environment was not made safe, the minute the panel was dislodged by yourself to the extent that it was is the minute that there should have been an environment that was made safe from that. Also I have taken into consideration that a significant amount of time has passed with the young person is his room after the panel had fallen out with no check being made about whether he was actually ok or not."*

67. The claimant was informed that, taking into account mitigation, the decision was made not to dismiss her but to demote her from a management position. This was put, at the disciplinary hearing, in the following terms:

> *"I am opting not to go for dismissal in recognition for the 17 years however I will be demoting you with immediate effect."*

68. It was confirmed to the claimant that the demotion would mean her salary would reduce, which the claimant confirmed she understood.

69. The claimant's evidence was that she had not fully understood or comprehended what being said to her, and she would have benefitted from having a representative present.

70. The outcome of the disciplinary hearing was confirmed to the claimant in a letter dated 10 August 2019. This letter was sent by Claire McCallum, and included a copy of the minutes of the disciplinary hearing. The claimant was invited to contact Claire McCallum if she should "*wish to alter the minutes of the hearing*". The letter further confirmed to the claimant the details needed for her to submit an appeal against her dismissal. No request to alter the hearing minutes was made.

71. The claimant appealed by letter dated 17 August 2017, sent by email on the same day. The claimant's appeal letter stated that she wanted to "*refute the reasons for the disciplinary sanctions put on myself stating that I did not create a safe environment and for the disciplinary sanctions placed on me*". Claire McCallum responded by letter dated 21 August 2017, asking the claimant to submit her formal grounds for appeal within seven days. This was stated by Claire McCallum to be because she "*had examined [the claimant's] letter to try and determine the grounds upon which [she] may wish to appeal*" and that the claimant had "*not stated specifically what formal ground [she] wished to appeal on"*.

72. Under cover of an email dated 28 August 2017, the claimant sent a more detailed letter of appeal. This letter was dated 17 August 2017, the same date

as her first letter of appeal. This letter identified the following issues as grounds of appeal:

i) the decision to suspend her was unfair and may be a breach of contract;

ii) that the claimant was not guilty of gross misconduct;

iii) that it was a one-off incident, and assurances it would not happen again had not been taken into account; and

iv) the investigation was flawed, although the nature of the flaws were not identified. The claimant stated they would be set out at the appeal.

73. The claimant did not state a ground of appeal was on the basis that demotion was a sanction that could not be imposed because it resulted in a reduction in salary, or that this was believed to be a breach of contract.

74. The claimant was absent from work under a GP certification for work related stress from 10 August 2017. The claimant had been suspended up to her disciplinary hearing. This work related stress absence resulted in the claimant being referred to Occupational Health, which was notified to her in a letter of 15 August 2017 from Claire McCallum. The claimant asserted in her statement that she did not believe there was a need for a reference to occupational health at that time, as she had only been absent for a short period of time.

75. An appeal investigation meeting arranged to take place on 5 September 2017, with a Mr John Quinn as the appeal investigation officer. The letter confirming this to the claimant was sent on 1 September 2017. This confirmed the claimant was entitled to be accompanied by a "*certified trade union representative or a work colleague*" to the appeal investigation meeting. The claimant did not attend this meeting, and did not give prior notice to the respondent that she would not attend. The claimant did not present any evidence that the respondent had taken any prejudicial action in response to this non-attendance, other than to rearrange the meeting. This was in the light

of the subsequent explanation given by the claimant for her non-attendance at the meeting.

76. On 21 September 2017, Claire McCallum wrote to the claimant and asked her to contact Mr Quinn or Claire McCallum to make arrangements for an appeal investigation meeting with Mr Quinn within the next "*7 to 10 working days*". The letter contained the direct phone numbers of both Mr Quinn and Claire McCallum. In addition, the letter confirmed that the respondent was awaiting an Occupational Health report arising from an occupational health consultation the claimant attended on 28 August 2017. The reason stated for the non-receipt of the report was that Integral Occupational Health were still awaiting the claimant's consent for the release of the report.

77. The investigation appeal hearing was rescheduled and took place, as agreed with the claimant, on 12 October 2017. Minutes of the appeal investigation meeting were before the Tribunal. Following that meeting, the claimant was invited to an appeal hearing on 1 November 2017, to consider the following grounds of appeal:

> *"1. The decision to suspend me was unfair and could be considered a breach of contract*
>
> *2. There are flaws in the investigation which have impacted on both the investigation and the outcome."*

78. The invitation to the appeal hearing confirmed to the claimant that she was entitled to be accompanied by a certified trade union representative or work colleague. The claimant attended the appeal hearing, the outcome of which was inconclusive. This was because the decision panel wished to investigate matters further before reaching a decision.

79. By letter dated 8 November 2017, the claimant resigned from her employment. The claimant set out the reasons for her resignation as follows:

> "*because of the intolerable conduct of my employer in imposing an unjustifiable and harsh disciplinary sanction against me, together with the fact that the appeal process has taken so long to conclude*."

The claimant went on to state that she believed the time taken to deal with the appeal was a deliberate attempt to "*prevent [her] from enforcing [her] rights by making a claim to the employment tribunal*."

80. The claimant's resignation was accepted by letter dated 10 November 2017. By letter dated 16 November 2017 the final outcome of the claimant's appeal was confirmed, her appeal being dismissed. The findings in relation to the grounds of appeal were as follows:

81. The claimant complained her suspension was unfair and could be a breach of contract. Reference was made by the appeals officer to the fact that the claimant stated in the appeal hearing that it was "*ok to suspend then lead an investigation but this wasn't lead properly*". This is not consistent with an investigation being unfair. The appeals officer found that the claimant had been suspended to allow an investigation to occur. Further, the claimant's suspension had always been stated to be precautionary, and was found to have been in accordance with the disciplinary policy. For these reasons this ground of appeal was rejected.

82. The claimant had identified a concern that the investigating officer did not like her. The claimant had indicated in her appeal hearing that she had been considering taking out a grievance against the investigating officer. No such grievance had ever been raised, nor had any complaint that the investigating officer was not an appropriate person for the role made. For these reasons, the claimant's complaint that the investigating officer did not like her were not upheld as a ground of appeal.

83. The claimant's assertions of flaws in the investigation were not upheld. No detailed explanation of this conclusion was set out in the post termination decision letter sent to the claimant. The appeal outcome was simply a finding that the process followed had been "*appropriate*". The claimant is not, however, recorded as having raised specific flaws with the investigation other than the identity of the person appointed to do the investigation and a vague assertion that matters had "*not been investigated in its entirety*". The claimant did set out the various points where she felt the facts as found by the

disciplinary officer were wrong. These were, however, mainly focussed on events before the panel fell from the wall, appearing to seek to determine who was to blame for the panel being loose. In relation to the claimant's actions after the panel became dislodged, this was captured on CCTV that had been viewed as part of the investigation.

84. Minutes of the appeal hearing were before the Tribunal. The minutes record, in relation to the claimant being accompanied at the hearing:

> *"L. Thomson was then asked to confirm that she had not brought representation with her today. She confirmed that her friend who was planning to support her works with a legal organisation and that it was not deemed appropriate for him to come along."*

85. The claimant disputed, in her written answers to cross examination, receipt of the minutes of the appeal hearing on 1 November 2017. In relation to representation the claimant confirmed that the person she had intended would accompany her was the consultant who represented her in this Employment Tribunal hearing. She further stated that "*a representative or a friend to support me would have been very beneficial, especially to help me understand the charges and what my rights were.*"

86. In relation to her disability, the claimant conceded in her written answers in lieu of cross examination that she had at no time informed the respondent she was disabled, or requested any form of adjustment to allow for her health issues. The claimant's position was that the respondent should have been aware of this, taking into account the comments of the Occupational Health Doctor. On the basis of the evidence before the Tribunal it was not possible to determine the date upon which the Occupational Health report was released to the respondent, save that it must have been sometime after 21 September 2017 at the earliest. This was on the basis that the respondent had recorded in a letter sent to the claimant that the claimant had not yet given consent for the release of the report as at that date. The evidence of Claire McCallum was that the report had never, as far as she knew or could recall, been received.

Submissions and Conclusions

Was the claimant dismissed?

87. The parties were in agreement that the claimant had resigned, the disputed issue being whether that resignation met the requirements to be a dismissal. For this the claimant must first establish there has been a fundamental breach of contract by the respondent. The claimant submitted that there had been a breach of the implied duty of trust and confidence. This is a contractual duty implied into all employment contracts. A breach of this term is by definition fundamental.

88. The parties were further in agreement that the proper test to apply when determining if there has been a breach of the implied trust and confidence term was set out in **Malik**. Within this test the respondent accepted that disciplinary action is something which likely to fundamentally break or undermine trust and confidence. The disputed question is whether the respondent's actions had a reasonable and proper cause.

89. The claimant does not dispute that an incident of concern occurred on 19 July 2017. The claimant does not dispute that she was the most senior person actually present when that incident occurred. The claimant submits that the respondent "*did not have reasonable and proper cause to invoke the disciplinary procedure at the time it did because the evidence was not sufficient*." This submission is not one that the Tribunal accepted. The invocation of a disciplinary procedure is something that requires a low evidential threshold to be met. The fact that the incident had occurred and the fact there were concerns over matters including how the claimant, as the senior person present, had acted in the immediate wake of that incident is itself sufficient to justify a disciplinary investigation. The respondent's disciplinary policy suggests suspension during a disciplinary investigation is appropriate. This is a valid position, especially when the investigation relates to conduct that may amount to gross misconduct.

90. In any event, the test in **Malik** requires conduct that is more than merely unreasonable to amount to a breach of trust and confidence. This is a

threshold which disciplinary suspension and/or action is found not to have met in these circumstances.

91. The claimant further submits that the way that the disciplinary process was conducted contributed to a breach of trust and confidence. The claimant's submissions point to alleged deficiencies in the disciplinary investigation. A small number of examples were given, none of which amount to a compelling argument, mostly because they relate to claimed deficiencies in the investigation into how the panel had come to be loose, and who knew it was loose, rather than events surrounding the time it fell and the actions of the claimant in the minutes following it falling.

92. It was submitted that the respondent had not properly investigated as part of the disciplinary process whether individuals had been put at risk by the panel falling and the claimant's actions. The evidence showed that CCTV had been viewed, which had shown a panel falling from a wall and emitting electrical sparks causing a partial power failure. It is difficult to see what sensible investigation into whether that would be a safe environment should have been undertaken. The CCTV showed that a young person had been left unsupervised in the vicinity of that fallen panel for up to nine minutes.

93. Finally, the claimant argued that the fact that first invitation to a disciplinary hearing had not identified as possible outcomes 'no action', 'verbal warning' or 'written warning' was "*decidedly odd*", suggesting the outcome was prejudged. The evidence was that a later version of the letter, sent to the claimant three days later, included these potential outcomes. It is not found by the Tribunal to be "*odd*" or suggestive of predetermination of the outcome. The respondent correcting an omission in a letter sent at an early stage of a disciplinary process, and doing so expeditiously and without any prompt from the claimant, falls significantly short of the threshold of amounting part of a breach of trust and confidence.

94. In addition, it is noted that the claimant did not appeal on the basis that the outcome of the process had been prejudged. It was described by the claimant

using words such as "*harsh*" and "*unfair*" on numerous occasions, but never prejudged, predetermined or anything similar.

95. The claimant in her evidence, albeit not in submissions made on her behalf, complained that the appeal process had taken too long as part of a breach of trust and confidence. This was cited as a reason for her resignation in her resignation letter, which went on to suggest that the delays in the appeal process were deliberate and intended to somehow prevent a claim being made to an Employment Tribunal. The evidence showed that a significant part of the reason for the delay was because the claimant had not attended the first scheduled appeal investigation meeting. Further, the claimant was referred to Occupational Health, the outcomes of which, at least initially, were not sent to the respondent as a consequence of the claimant failing to provide the necessary consent. Including the delays caused by these issues, the appeal proceeded to a hearing on 1 November 2017, the appeal grounds beyond having been provided in detail to the respondent on 28 August 2017. This represents a period of just over two months to get to the appeal hearing, during which an investigation meeting scheduled for 5 September 2017 had to be rescheduled due to the claimant's non-attendance, the rescheduled date of 12 October 2017 being agreed with the claimant. This does not suggest any unreasonable delay by the respondent, and falls significantly short of the threshold to be found to have contributed to a breach of trust and confidence.

96. It is also noted that the claimant has previously complained as part of her discrimination claim that an adjustment should have been made by allowing her more time to prepare for hearings and meetings in the process, including postponing scheduled hearings. It is difficult to see how this could be consistent with a submission that the delays in this process were a breach of trust and confidence.

97. For these reasons, the Tribunal do not find that there was a breach of trust and confidence by the respondent, all their actions being found to have a reasonable and proper cause. Accordingly, the claimant cannot establish that she was dismissed and her claim of unfair dismissal cannot succeed. For the

same reasons, any claims insofar as they were pursued, that the claimant was dismissed as an act of discrimination cannot succeed.

Knowledge of disability

98. The respondent accepted that the claimant was a disabled person.

99. The evidence was that the claimant had struggled with mental health issues in or around 2014 following an alleged sexual assault at work. The evidence was further that the claimant had not had any absences from work connected to her mental health this since around that time, at least until after the disciplinary process during which she resigned commenced.

100. There was no evidence which led the Tribunal to conclude that the claimant had communicated to the respondent information from which they could reasonably have concluded, at least until sometime after 28 August 2017, that the claimant had ongoing mental health problems that met the definition of a disability under the Equality Act 2010. Nor was there evidence that the respondent had knowledge from which a reasonable suspicion could have been reached that the claimant's mental health problems in or around 2014 had ever met the long-term criteria in the Equality Act 2010 to a have amounted to a disability.

101. The evidence does show that from the respondent's receipt of an occupational health report sometime after 28 August 2017 they would have been aware of facts from which they could reasonably have suspected at the least that the claimant may be a disabled person. Accordingly, the respondent is not found to have had the knowledge required for the claimant's claims of discrimination to potentially succeed until 28 August 2017 at the earliest, and potentially later than that.

Reasonable Adjustments Discrimination

102. The claimant argues in her submissions that the respondent discriminated against her by failing to make reasonable adjustments. The adjustments that the claimant identifies in her pleadings that were not made are as follows:

(i) The respondent should have adjourned the initial disciplinary hearing because the claimant was not represented and was "*clearly under stress and confused*";

(ii) The claimant could have been given longer to prepare for hearings and meetings; and

(iii) The respondent had not permitted to have her choice of representative at the disciplinary appeal hearing.

103. In addition to these adjustments, at the case management stage of the claimant's claim she identified the following adjustments as not having been made:

i) Not providing supervision or mentoring;

ii) Not taking into account a medical condition when continuing with a formal procedure;

iii) Having formal meetings in the workplace; and

iv) Restricting workplace representation.

104. The only reasonable adjustment referred to in the written submissions presented on behalf of the claimant at the hearing, which was further explained in oral submissions, was the refusal to allow the claimant's legal representative to accompany her to the appeal hearing. None of the other previously suggested adjustments were pursued by the claimant in submissions. This is consistent with the claimant's representative's confirmation to the Tribunal at the outset of the hearing for the basis for the claimant's claims and the issues in dispute between the parties.

105. Given the finding above regarding when the respondent was aware of facts from which they could have suspected the claimant may be disabled, there cannot have been a duty to make reasonable adjustments prior to 28 August 2017, at the very earliest. How long after that date knowledge, and therefore a potential duty to make adjustments could have arisen, is unclear. At the earliest it would have been long enough after that date for the claimant to

have given disclosure authority to the Occupational Health doctors, and for them to then disclose the report to the respondent. In any event, there cannot have been discrimination by failure to make reasonable adjustments until after the disciplinary hearing and initial outcome.

106. Although not pursued actively in the hearing, despite them relating in part to matters prior to 28 August 2017, and despite the indication from the claimant's representative that the only adjustment in issue related to representation at the appeal hearing, the Tribunal considered the adjustments previously suggested by the claimant. The conclusions reached by the Tribunal in relation to these were as follows:

i) In relation to the lack of supervision and mentoring, the suggestion that this adjustment should have been made is not found to be logical. The respondent did not become aware supervision and mentoring may be needed until after the events that led to the disciplinary action. As part of the disciplinary sanction steps of this nature were planned and communicated to the claimant in the initial outcome letter. The fact they were never acted on is a result of the claimant being absent from work from then until the date of her resignation. Accordingly, it is difficult to see how there would be any duty to make this adjustment which could have been breached, and even if there were, the adjustment was in fact made.

ii) The suggested adjustments regarding not taking into account medical conditions when applying the disciplinary process to the claimant were not reflected in concerns that were raised by the claimant during the disciplinary process. The claimant was first certified as unfit for work after disciplinary hearing (disregarding any absences unrelated to the claimant's disability or those from in or around 2015). In response the respondent sought to refer the claimant to Occupational Health, which is a step the claimant criticises as premature and suspicious. The claimant did not properly authorise the outcome of that referral to be released to the respondent until chased. It is difficult to see what further reasonable

adjustment the respondent should have made to the process to take account of the claimant's medical condition until it had some medical advice. It is further unclear what substantial disadvantage the claimant asserts should have been addressed by any such adjustments, other than connected to representation which is considered below.

iii) The claimant at no time, either during the disciplinary process or in her evidence for this Tribunal hearing, suggested she was too stressed to attend the workplace. Accordingly, it is difficult to see how such an adjustment could be reasonable.

iv) In relation to the duration of the process, the claimant complained during the process and in her resignation letter that the process was taking too long. It is difficult to see how this sits with an assertion now that there should have been an adjustment to give her more time and delay matters.

v) In relation to the lack of representation, the Tribunal had the advantage of a verbatim transcript of the disciplinary hearing and could identify no point in that transcript where the claimant's responses or engagement with the hearing were consistent with her being at a substantial disadvantage. The claimant is recorded as engaging appropriately with the allegations made and available evidence. Further, the claimant is recorded to have specifically agreed she was content to proceed without a representative present. In the circumstances, it is not found that the respondent was under a duty to make the adjustment of adjourning the disciplinary hearing.

107. The Tribunal explored with the claimant's representative the submission that the respondent was under a duty to allow the claimant to be accompanied by him, a legal adviser, at the appeal hearing. This was the only adjustment claim actively pursued by the claimant at the hearing. In oral submissions he

clarified that the substantial disadvantages relied on in relation to that adjustment are:

i) The claimant was not able to understand the factual allegations against her; and

ii) The claimant lacked moral support that would have been supplied by a representative who was a family friend.

108. The claimant's representative was specifically asked to clarify how the absence of a legally qualified person to accompany her at the appeal hearing could have caused either of these disadvantages. He was unable to explain or assist in relation to this, expressly stating that was a matter for the discretion of the Tribunal.

109. The documentary evidence in relation to the reason why the claimant's legal representative was not permitted to accompany her to the disciplinary hearing was limited to a single reference in the notes of that hearing. This made it clear that the respondent's objections were rooted in concerns that *legal* representation was not appropriate. There is no suggestion the claimant could not be accompanied by her trade union representative, as she had been at the appeal investigation meeting. In addition, there is no evidence to suggest that the respondent would have prevented a family friend, who was not a legal representative, accompanying her if she had made that request.

110. The finding of the Tribunal is that the rule applied to the claimant at the disciplinary appeal hearing was that she could not bring a *legal* representative with her. This rule did not put the claimant at the disadvantages she has identified and sought to rely on, or any disadvantage that the Tribunal could see from the available evidence. Accordingly, it is not found that the respondent was under a duty to adjust the disciplinary policy for the claimant in this way.

Discrimination Arising from Disability

111. The claimant did not pursue this claim in submissions.

112. Whilst it is clear that disciplinary action is unfavourable treatment, for the reasons set out above, it is not found that anything done or not done in the disciplinary process was a consequence of the claimant's disability.

113. It is noted that at the outset of the process the respondent was not found to have been aware of the claimant's disability. Discrimination arising from disability requires the respondent to have knowledge of the claimant's disability (actual or constructive).

114. At the appeal stage, when the respondent may have become aware of the claimant's disability, it is not found that the claimant was unfavourably treated in any way that arose from or was connected to her disability. The respondent followed their disciplinary process in a way that has been found not to have put the claimant at any disadvantage as a result of her disability such that it would have been reasonable to vary that process.

Unlawful Deductions from Wages

115. It is accepted that the claimant was demoted as an outcome of the disciplinary process. At no point was evidence presented to suggest that the claimant had not been paid in accordance with the contractual salary due for that demoted position.

116. The respondent's disciplinary process specifically identifies demotion as a potential outcome of the process. The policy is incorporated by reference in the claimant's contract of employment. The policy does not at any point suggest it is not contractual.

117. In both invitations to her disciplinary hearing it was clearly stated that demotion was a potential outcome. The claimant did not object to the possibility of demotion either at or before the disciplinary hearing.

118. The evidence of the respondent, which was accepted as clear, logical and consistent, was that demotion was a concession to the claimant as an alternative to dismissal for gross misconduct. This concession was made after taking into account her past service.

119. Demotion resulted in a reduction in salary, which took effect from the date of the disciplinary hearing. The claimant did not await the outcome of her appeal prior to resigning from her employment.

120. The finding of the Tribunal is that the demotion, and consequent salary reduction for the claimant, were clearly authorised by the relevant polices, as identified in the claimant's contract of employment. Those policies at no point suggest they are not to be treated as part of the claimant's contract of employment. It is further found that the claimant at the disciplinary hearing raised no objection to the demotion, a sanction imposed to avoid her summary dismissal following a finding of gross misconduct. The claimant understood that her wages were dependant on her seniority. At all times the claimant was paid the correct amount for her seniority grade.

121. Accordingly, it is found that no unlawful deduction of wages occurred.

Employment Judge : N Buzzard
Date of Judgment : 29 January 2020
Date sent to parties : 12 February 2020