EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4103370/2019

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Held in Glasgow on 19, 20 and 21 August 2019

Employment Judge L Wiseman

10 **Mr Patrick O'Connor** **Claimant**
Represented by:
Mr A Cox -
Solicitor

15 **Mears Care (Scotland) Ltd** **Respondent**
Represented by:
Ms A Bennie -
Counsel

20 **JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

The tribunal decided to dismiss the claim.

REASONS

1. The claimant presented a claim to the Employment Tribunal on the 4 April 2019 alleging he had been unfairly (constructively) dismissed.

25 2. The respondent entered a response denying the claimant had been entitled to resign and claim constructive dismissal.

3. I heard evidence from the claimant; and from Ms Nicola Robertson, Customer Care Co-ordinator and the claimant's line manager; Ms Ann Low, Regional Support Manager, who heard the claimant's grievance and Ms Elizabeth 30 Macdonald, Head of Service, who heard the claimant's grievance appeal.

4. I was also referred to a file of jointly produced documents. I, on the basis of the evidence before me, made the following material findings of fact.

Findings of fact E.T.

Z4 (WR)

5. The claimant commenced employment with Independent Living Services on the 16 July 2000. He was employed as a Support Worker.

6. The claimant's employment transferred to the respondent when they acquired Independent Living Services. The claimant continued to be employed as a

5 Support Worker.

7. The nature of the respondent's work is to provide care at home to the elderly and/or vulnerable, either privately or through Local Authority care packages.

8. The claimant was employed on a zero hours contract (page 41). The (Independent Living Services) contract described the hours of work as follows:

10 *"Your normal working hours in a week are variable. The Company will endeavour to match individual employees with hours requested eg evening work, weekends, full time or part time, but due to the nature of the Business, hours or particular times cannot be guaranteed. You will be paid only for actual hours worked. …"*

15 9. The claimant signed a Working Week Agreement (page 45) whereby he agreed to work more than an average of 48 hours in any week.

10. In or about 2013, the claimant agreed with his then line manager that he would resign from his second employment and focus on his role with Independent Living Services, in return for more "formal" hours. A "statement of ongoing 20 hours" was agreed and signed by both parties and operated until 2017.

11. The claimant was mainly assigned to one service user (RG) and worked a large number of hours with him including sleepovers (approximately 128 hours per fortnight).

12. A change to the way in which sleepover hours were paid led the respondent

25 (Ms Robertson and Ms McEwan) to carry out a review of the hours worked by members of staff. The respondent wished to focus on staff working an average of 60 hours per week.

13. The claimant met with his line manager, Ms Nicola Robertson, on the 16 March 2018 for an appraisal meeting. Ms Robertson informed the claimant at that meeting of the need to make a change to his rota. The reason for this was because the service user RG needed 24 hour care and the claimant was the main carer on the package. The claimant had recently been on annual leave and it had created a problem for the respondent trying to back-fill so many hours. In addition to this, it was felt RG was becoming dependent on the claimant and did not want anyone else to care for him. It was also in the claimant’s interests to become involved in a different care package because if anything happened to RG, the claimant would be left with very few hours because he did not know any of the other service users.

14. Ms Robertson proposed the claimant lose one Thursday night RG sleepover and one other RG shift, and that this be replaced with hours with a new service user. Ms Robertson produced a proposed rota (page 47) showing a reduction from 5 sleepovers to 4 and totalling 120 hours per fortnight.

15. The claimant told Ms Robertson that he was concerned about losing money each month. Ms Robertson agreed to raise this issue with her manager Ms Kay McEwan.

16. Ms Robertson emailed Ms McEwan on Sunday 18 March (page 46). In the email Ms Robertson confirmed her discussion with the claimant, noted he was working on average 128 hours per fortnight and that he relied on the money each month for his children. Ms Robertson noted the claimant had left the meeting, but returned to say he had worked out that he would be down £478 over 4 weeks, that he had been doing the job for years and did not understand why it had to change. The claimant was worried about the situation.

17. Ms Robertson and Ms McEwan met with the claimant on the 20 March. A note of the meeting was produced at page 52. The discussion focussed on the removal of the Thursday night sleepover, and the claimant confirming he was “quite upset”. The claimant referred to the agreement he had made with his previous line manager. Ms McEwan told the claimant the previous line manager was no longer employed and she

could not comment on what may 30 have been agreed, but parties now had to look forward.

18. The claimant agreed, following discussions at that meeting, to a revised rota which reduced the number of sleepovers from 5 to 4, but introduced shifts with a new service user, AD. This proposal gave the claimant hours with three service users, and gave him very close to the same number of hours.

5 19. The claimant was introduced to the service user AD and undertook some shadowing shifts. The claimant worked some shifts with AD and was scheduled to do his first sleepover there on 11 May. The claimant contacted Ms Robertson on 10 May to inform her he was going off sick because of a condition with his leg. The claimant produced a Fit Note (page 61) confirming

10 he had visited the GP on the 11 May and had been signed off as unfit for work for four weeks because of peripheral arterial disease which required investigation.

20. The claimant did not in fact return to work. He submitted Fit Notes all of which confirmed he was unfit for work because of work-related stress.

15 21. The claimant submitted a grievance by letter of the 6 April 2018 (page 54). The grievance referred to being told by Ms Robertson that he was to lose the Thursday night sleepover. The claimant confirmed he could not accept this because of the loss of earnings.

22. The claimant was invited to attend a grievance meeting chaired by Ms Ann 20 Low, Regional Support Manager. The meeting took place on the 10 May 2018, and a note of the meeting was produced at page 56. The claimant told Ms Low that he had lost a sleepover and hours on the RG package, and suffered a loss of earnings because of it. The claimant could not understand why “his” hours had been given to new staff. The claimant agreed he had been given

25 other hours with a new service user AD, but he had received information suggesting AD was violent, and he refused to do sleepovers with him.

23. The claimant confirmed that the outcome he sought was to be reinstated to the RG package. He also told Ms Low that he thought Ms Robertson’s treatment of him

had been unprofessional and unfair because of the issue 30 with the hours and the paperwork he had given her.

24. Ms Low issued a grievance outcome letter dated 19 June (page 71). Ms Low confirmed she had reviewed the claimant's working pattern for the past three years and spoken with the team responsible for scheduling it. She understood changes were made to the schedule because the claimant spent the majority 5 of his time with one service user and this presented concerns because of cover for holidays and sickness absence and the service user becoming reliant on the claimant. Ms Low understood from Ms Robertson and the note of the meeting on the 20 March, that the claimant had agreed to one of the proposed rotas changing his working hours. She concluded that having had 10 regard to the health and safety implications of the claimant continuing to work the hours he had been working, and the risk to the service user of limiting the number of support workers he interacted with, this aspect of the grievance was not upheld.

25. Ms Low also rejected the claimant's grievance that he had been unfairly 15 treated and noted the changes had been fully discussed with the claimant and that he had been offered a choice of alternative rotas.

26. The claimant, by letter of the 26 June (page 75) appealed against the grievance outcome. The basis of the appeal was that employees should be treated consistently and he knew of other employees working more hours than 20 he had worked. The claimant reiterated that the change was having an adverse effect on his income and considered the reduction to hours was not fair.

27. A grievance appeal meeting took place on the 16 July and was chaired by Ms Liz Macdonald, Head of Services. A note of the meeting was produced at 25 page 87. The claimant was accompanied at the meeting by Mr Steven Briggs, a former trade union representative. The claimant told Ms Macdonald that his hours had reduced because he no longer had the Thursday sleepover, and his wages were down £300: the claimant wanted his 4 weekly pay to be reinstated.

28. Ms Macdonald informed the claimant that she had reviewed the hours worked since January 2018 and the hours had varied each week between a minimum of 56.25 and a maximum of 86.62: a reduction in hours was not apparent. Ms Macdonald also informed the claimant that more than 70 hours per week was too much and could not continue. The claimant rejected this on the basis he had always worked a large number of hours and had been happy to do so.

29. The claimant's representative asked Ms Macdonald whether she would be able to offer the claimant 60 hours per week, and whether the claimant would be happy with that. The claimant responded *"yes, as well as my sleepovers".* Ms Macdonald explained there had been a change in the way sleepovers were paid and they were now paid as an hourly rate as opposed to a flat sum. Ms Macdonald confirmed she was willing to speak to the supported living team to enquire whether they would be prepared to offer a guaranteed 60 hours per week, but this would need to have the sleepovers incorporated into them.

30. The claimant also raised his belief there was no care plan in AD's home and that the service user had been violent towards his mother. The claimant should have been informed of this particularly as he had previously been beaten up (not whilst in the employment of the respondent). The claimant said he had been having nightmares about going in to see AD. He felt totally destroyed and had no trust left in "them" upstairs. He said that after all the years he had put into the service, he did not know if he even wanted to come back. He described Ms Robertson as being totally unprofessional.

31. Ms Macdonald reiterated that she was happy to speak to the supported living team about a guaranteed 60 hours per week incorporating sleepovers and training. There would only be additional hours if holidays or absence needed to be covered. Ms Macdonald did not ever get a straight answer from the claimant regarding whether this would be acceptable: the claimant maintained he would be £300 down. The claimant did ask whether the 60 hours would be with RG. He also asked about a severance package.

32. Ms Macdonald sent a grievance appeal outcome letter dated 20 July (page 94). Ms Macdonald confirmed that having looked at the hours the claimant had been working since the start of 2018, she could see no reduction in the

amount of hours he had been given. Ms Macdonald stated the hours the claimant had previously been working had been excessive and not good for his health or to the benefit of the client. Ms Macdonald referred to her understanding that if the respondent could offer him 60 hours per week which 5 would be inclusive of sleepovers, and not specifically working with one client, then the claimant would be happy with this. She confirmed that having spoken to the manager of the service, she was happy for this to happen, and HR would contact him to amend his contract on his return from sick leave.

33. Ms Macdonald confirmed she had spoken with the manager of the service 10 and explained the reason the claimant had not been informed of the service user's violent behaviour was because it was directed purely at family members and never at staff. Ms Macdonald confirmed there was an up to date care plan in the office and in the service user's home.

34. The claimant has also raised an issue regarding training in respect of head 15 injuries. Ms Macdonald investigated this by reviewing the records and confirming the claimant had received training to enable him to deal with clients, although not specifically regarding head injuries.

35. Ms Macdonald confirmed the grievance had not, for these reasons, been upheld.

20 36. The claimant was invited to attend an informal meeting on the 2 July regarding his absence. A note of that meeting was produced at page 76. The claimant told Ms Robertson that he felt totally destroyed by the grievance process and losing the hours. He also referred to not sleeping much at night and waking up in cold sweats following his introduction to AD.

25 37. The claimant signed a medical records consent form to allow the respondent to contact his GP for a medical report. The respondent wrote to the claimant's GP on the 5 July (page 83) and received a response on the 26 July (page 96). The GP confirmed the claimant was not currently fit for work and that he was *"quite stressed and anxious"* regarding the shift pattern.

38. Ms Robertson met with the claimant again on the 27 August for a first formal absence review meeting. A note of the meeting was produced at page 100. The claimant, when asked how he was feeling told Ms Robertson that he had been beaten up in the

past and when the violent behaviour of AD was not disclosed to him, he had been annoyed and upset. The claimant had been prescribed antidepressants by his GP and had appointments with the mental health team. The claimant was asked how he felt about returning to work and responded that he could not see it because he did not have any faith in the company.

39. Ms Sharon Traynor, HR Advisor, wrote to the claimant on the 24 September (page 106) because the claimant had told Ms Robertson that there were issues he had raised in the grievance appeal meeting which had not been addressed. Ms Traynor had agreed to look at the notes taken at the appeal hearing and the outcome letter to see if there were any points which had not been addressed. Ms Traynor confirmed she had done this but could not see any issues raised in the notes which were not addressed in the outcome, with the exception of the claimant's query about a severance package. Ms Traynor confirmed the company would only look at a severance package should there be a potential redundancy situation, but that was not the case here because there was ample work available.

40. Ms Robertson met with the claimant on the 21 October for a second formal absence review meeting. A note of the meeting was produced at page 116. The claimant was asked what the respondent could do to help him return to work, and he suggested occupational health.

41. The respondent does not have an occupational health provider, but they arranged for the claimant to be seen on the 26 October and a report (prepared on the 1 November) was produced at page 122. The report noted *"the underpinning issues in relation to his anxiety and stress relate to the workplace and the recent matters of discontent. It is Patrick's perception that the outcome of these matters have not been concluded fairly or to his satisfaction…."* The report also noted the nurse had found the claimant continued to have a high level of discontent with his employer and that this was the main reason for his continued absence. The claimant did have symptoms, but these were entrenched in the workplace issues. The nurse envisaged the GP would continue to sign the claimant off as being unfit for work; however if the GP knew there was a supportive return to work plan in

place, and that continued absence may lead to a worsening of the condition, then a supportive and phased return to work may be possible.

42. The claimant had elected to receive the occupational health report two days prior to his employer. He did not receive the report and chased this up with the respondent on 5 (page 137) and 9 November (page 138). The claimant then wrote to the respondent on the 11 November (page 139) asking them to send him a copy of the report.

43. The claimant, having heard nothing from the respondent, resigned by letter of the 22 November (page 141).

44. The respondent's absence management procedure had not been exhausted at the point the claimant resigned. The procedure provided for a third meeting to take place and, as at the date of resignation, this had not yet been arranged or taken place.

45. The claimant has not been fit to work since the termination of his employment. He is in receipt of Universal Credit.

Credibility and notes on the evidence

46. I found the respondent's witnesses to be, on the whole, credible and reliable, although Ms Low did not have a good recollection of matters. Ms Robertson denied the claimant's assertions that she had put him under pressure to accept a change to his hours, and denied she had refused the claimant's request to discuss matters with someone else.

47. Ms Macdonald impressed as a straightforward and honest witness. She clearly explained the basis of the grievance appeal, the issues discussed, the steps she took to investigate the issues raised by the claimant and the steps she took to try to resolve matters. Ms Macdonald also reviewed the hours worked by the claimant in the period January to March, and this meant she could respond to the claimant's concerns clearly and accurately. This was in contrast to Ms Robertson who was really not sure what the rotas at pages 47 and 48 represented.

48. I found the claimant to be an honest witness, but his insistence on talking about the points which concerned him rather than answering the questions put to him

meant there was a lack of clarity regarding his evidence. This was compounded by the fact the claimant appeared to accept what he was told by the respondent, only to subsequently challenge it. For example, the claimant appeared to have agreed a change to his rota with Ms Robertson and Ms 10 McEwan, but this subsequently became the main issue of his grievance.

Claimant's submissions

49. Mr Cox invited the tribunal to have regard to the claimant's evidence regarding the terms of his contract. A zero hours contract had been produced at page 41, but the issue was whether this had truly been a zero hours contract in 15 circumstances where the claimant had regularly worked the same hours. The claimant told the tribunal he had worked substantially and solely for the respondent for a number of years. There was a dispute regarding the number of hours he worked, but Ms Macdonald had, at page 88, noted the hours worked in the 16 weeks before the claimant went off sick. Mr Cox submitted, 20 based on the claimant's evidence and page 88, that the claimant had a contract which guaranteed hours and sleepovers for the service user RG. The respondent had acquiesced in that arrangement for a considerable time, and there were contractual terms regarding the number of hours.

50. Ms Macdonald, in the grievance appeal outcome letter, had offered the 25 claimant a guaranteed 60 hours per week. Mr Cox submitted the claimant had a contractual entitlement to fixed hours, and this was breached when Ms Robertson and Ms McEwan offered him something less. The claimant had been stressed and anxious regarding what had happened, but he had, it was submitted, given a genuine and accurate reflection of his case.

30 51. Mr Cox submitted Ms Low and Ms Macdonald had spoken openly and honestly. However, Ms Robertson's evidence had to be considered carefully because there had been confusion regarding the rotas at pages 47 and 48; she said page 48 had been agreed by the claimant but that was in dispute; she rejected the suggestion that she had put the claimant under pressure to accept the change to his hours and had simply said it "never happened"; she 5 said she knew of "no risk whatsoever" regarding the service user AD, whereas Ms Macdonald said there had been clear reference to it in the care plan and Ms

Robertson had been too willing to hold the party line rather than listen to anything else.

52. Mr Cox submitted that if the tribunal did not accept the attempt to push the 10 claimant into a position on the 20 March which would cause him financial hardship was a breach of contract, the alternative position was that there had been a breach of the implied duty of trust and confidence. The evidence and paperwork demonstrated the claimant had, from the 6 April, lost confidence in the respondent, and subsequent events had to be seen in that light. The 15 claimant's main focus had been on returning to work despite feeling to the contrary because of the way in which matters had been dealt with. No-one spoke to the claimant about the occupational health report, or sent him a copy of it. He asked the respondent about it twice and requested a copy: the lack of a response was the final straw.

20 53. Mr Cox invited the tribunal to find for the claimant and to make an award of compensation to reflect the effects this had had on the claimant's mental health and the fact he remained unfit for work.

Respondent's submissions

54. The respondent's primary position was that the claimant resigned from his 25 employment and was not dismissed; if the tribunal concluded the claimant was dismissed, the reason for the dismissal was that the claimant's capability or some other substantial reason and that the dismissal was fair and, if the tribunal concluded the dismissal was unfair, any sum awarded should be reduced to reflect contributory conduct and Polkey.

30 55. Ms Bennie referred to sections 94 and 95 of the Employment Rights Act and to the cases of **Western Excavating Ltd v Sharp 1978 ICR** and **Mahmud v Bank of Credit and Commerce International SA 1997 ICR 606**. Ms Bennie invited the tribunal to note the alleged breach of contract was said to have taken place on the 20 March, but the claimant did not resign until the 22 November.

5 56. Ms Bennie submitted the clear evidence of the claimant and the respondent's witnesses was that the claimant was employed on a zero hours contract. The claimant

had spoken of an arrangement with his previous line manager, but he had not suggested how many hours had been guaranteed. His evidence was not enough to demonstrate a contract for guaranteed hours: at best he 10 had a contract for more hours than zero. The respondent did accept the claimant worked a high number of hours, but that did not alter the fact he had a zero hours contract.

57. Ms Bennie submitted, in relation to a breach of the implied term of trust and confidence, that the evidence did not support any material breach of the 15 implied term of trust and confidence in the period 16 March to 22 November. The claimant argued that being dissatisfied with occupational health and not receiving the report were the last straw, but it was submitted this could not amount to a last straw because these had not been the actions of the employer. In **Omilaju v Waltham Forest London Borough Council 2005** 20 **ICR 481** the Court of Appeal held that the final act had to contribute something to the breach of contract even if relatively insignificant. The final act was not the act of the employer and accordingly it could not contribute something to the breach of contract.

58. Ms Bennie submitted that if the tribunal was not with her on this point, and 25 examined the earlier conduct of the respondent, then there was not conduct amounting to a breach of the contract of employment. Further, even if there was a breach, it was not repudiatory in nature.

59. Ms Bennie referred to the evidence and submitted the claimant accepted it had been explained to him that he was working too many hours; that the 30 respondent wanted staff to work an average of 60 hours per week; that the respondent had a concern about continuity for the service user and for staff.

The claimant understood that because of the high number of hours he worked with RG, the package would struggle to cover those hours in the event of holidays or sickness. There was no dispute regarding the fact the respondent had had to contact the claimant during his holidays to call him in to cover shifts 5 because they could not backfill the shifts. Ms Bennie submitted the respondent's concern was legitimate and raised for discussion with the claimant. The respondent had a duty of care to staff and a duty to act in the best interests of its business and the service users.

60. The respondent decided to remove the Thursday shift from the claimant (6pm 10 – 11pm, and then a sleepover). The respondent acknowledged the impact this had on the claimant's earnings and so they identified another service user package and offered the claimant hours on that package. Ms Bennie invited the tribunal to accept the evidence of Ms Robertson as credible and reliable, and to accept the rota at page 47 was the one she proposed to the claimant 15 and, after discussion and reflection, the rota on page 48 was the one agreed to by the claimant.

61. The claimant did not start work on the new rota because he had to undertake some shadowing shifts. The claimant was due to do his first sleepover at AD's on the 11 May, but was unable to do so because of his leg condition. Ms 20 Bennie submitted that in the period 20 March to 10 May, the claimant worked more hours than previously.

62. Ms Bennie invited the tribunal to note that at no time did the claimant say the respondent insisted on him working with AD. The clear evidence of the respondent's witnesses was that if the claimant did not want to work with AD, 25 other work would be found. Further, Ms Macdonald offered the claimant a guaranteed 60 hours per week including sleepovers and training. It was submitted the respondent had bent over backwards to engage with and accommodate the claimant. The difficulty however was that the claimant had a particularly closed mind and there was nothing the respondent could do to 30 resolve matters for the claimant. It still remained unclear why the claimant felt the need to resign, particularly when the absence management process had not been completed.

63. Ms Bennie submitted that having regard to the evidence as a whole, the conduct of the respondent was not conduct amounting to a breach of the contract of employment. Further, if the tribunal found there was a breach of contract, it was not a material or repudiatory breach.

5 64. Ms Bennie further submitted that even if there was a repudiatory breach, the claimant did not resign in response to the breach. The documents demonstrate the claimant spoke of not knowing if he wanted to come back to work; of not having faith in the company and of a lack of trust yet he did not resign until the 22 November. The change to hours was discussed with the 10 claimant in March. The claimant had, by May, acquired knowledge of AD but worked hours with him and was due to do a sleepover on the 11 May. The grievance procedure concluded in July and Ms Traynor wrote to him in

September. The occupational health meeting took place in October, and the claimant resigned a month later. Ms Bennie reminded the tribunal the claimant 15 had had the benefit of legal advice. All of these factors demonstrated the claimant delayed in resigning and affirmed the contract.

65. Ms Bennie submitted that if the tribunal found the claimant was dismissed, then the reason for the dismissal was capability or some other substantial reason. The respondent had dealt with the grievance in accordance with their 20 grievance procedure and managed the claimant's sickness absence in accordance with their procedure. The dismissal was fair.

66. Ms Bennie invited the tribunal, should it consider compensation, to reduce the sum awarded because the claimant had contributed to his dismissal and because of the application of the Polkey principles.

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Discussion and Decision

67. I had regard to the terms of section 95 Employment Rights Act, which provides *that "an employee is dismissed by his employer if (c) the employee terminates* 30 *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."* In the case of **Western Excavating Ltd v Sharp 1978 IRLR 27** it was made clear that it is not enough for the employee to leave merely because the employer had acted unreasonably; the employer's 5 conduct must amount to a fundamental breach of the contract of employment.

68. An employee, in order to be able to claim constructive dismissal, must meet the following four conditions:

- there must be a breach of contract by the employer;
- that breach must be sufficiently serious to justify the employee 10 resigning, or else it must be the last in a series of incidents which justify his leaving;
- the employee must leave in response to the breach and not for some other unconnected reason and

- he must not delay too long in terminating the contract in response to the employer's breach, otherwise he may be deemed to have waived the breach and agreed to vary the contract.

69. The first issue I must determine is whether there has been a breach of contract by the employer. The claimant's primary position was that there had been a breach of his contract on the 20 March when, at the meeting with Ms Robertson and Ms McEwan, he was told he would lose some hours and one sleepover for RG. In the alternative the claimant argued there had been a breach of the implied duty of trust and confidence.

70. There was no dispute regarding the fact the claimant had initially been employed, by Independent Living Services, on a zero hours contract (page 41). No changes or amendments were made to that contract following the transfer of the claimant's employment to the respondent. The claimant, at the grievance meeting, confirmed he was on a zero hours contract. He was also asked at the grievance appeal meeting if he had contracted hours in his contract, and responded "its zero hours".

71. The claimant did explain to Ms Macdonald, at the grievance appeal meeting, that he had been working two jobs and had been asked by his then line manager to resign from the other job on the promise of certain hours because he was needed by the respondent. The claimant told Ms Macdonald that Ms Robertson had drafted up hours and that he was to be offered between 55 and 52 in principle. The claimant is noted as saying that he thought this superseded the original contract. Ms Macdonald did not agree and confirmed it was still a zero hours contract.

72. Mr Cox invited the tribunal to consider whether the zero hours contract truly reflected the arrangement between the parties. I did not doubt what the claimant told Ms Macdonald or this tribunal insofar as I accepted he had been encouraged to give up his other employment to work solely for the respondent in return for being given hours. The difficulty however was this was essentially the extent of the evidence: (i) there was nothing to suggest how many hours the claimant may have been given although there was

reference at the grievance appeal hearing to being given between 52 and 55 hours; (ii) there
15 was reference in the notes to the claimant saying Ms Robertson had been at the meeting with the previous line manager, but Ms Robertson, in cross examination, said she only knew what the claimant had told her about this and had not been at the meeting; (iii) the hours worked by the claimant between 2013 and 2018 were not produced and the claimant spoke only of
20 doing a lot of hours; (iv) the Principal Statement of Ongoing Hours which the claimant said had been signed by both parties appeared no longer to be in existence (the claimant told the tribunal his line manager, Lorraine Scullion, had shredded it in 2016 because things were changing); (v) the summary of hours for January to March, produced by Ms Macdonald at the grievance 25 appeal hearing, demonstrated the claimant worked a significant but varying number of hours each week and (vi) the claimant accepted that if something happened to RG he would be left with no/little work because he did not know other service users and had no hours with other service users. This appeared to be an acknowledgement there were no guaranteed hours.

30 73. I could not, on the basis of the evidence before me, conclude the zero hours contract had been replaced by another contract for fixed hours, because I could not determine what those fixed hours were or might have been. I

accordingly concluded the zero hours contract remained in place although there was an understanding between the parties that the claimant was keen to work lots of hours and had acquired a pattern of work with RG which meant he would be offered, and would accept, large numbers of hours with that
5 service user.

74. I decided, having reached the above conclusion, that the respondent's decision to remove some hours and the Thursday sleepover from the claimant did not amount to a breach of contract in circumstances where the claimant was employed on a zero hours contract.

10 75. I next considered whether there was a breach of the implied duty of trust and confidence. The House of Lords in the case **of Malik v Bank of Credit and Commerce International 1997 ICR 606** held that an employer shall not, without reasonable and proper cause conduct itself in a manner calculated or likely to destroy or seriously damage

the relationship of confidence and trust 15 between employer and employee. Mr Cox submitted the claimant had lost confidence in the employer from the 6 April onwards. He did not specify exactly what it was the respondent was alleged to have done (or not done) to cause this loss of confidence, and so I proceeded on the basis the loss of confidence arose from the change to his hours and the way in which the 20 respondent subsequently dealt with the matter.

76. There was no dispute in this case that the respondent wished to reduce the number of hours the claimant was working. I accepted Ms Macdonald's evidence that a review of working hours had been carried out for all members of staff, following the change to the way in which sleepovers were paid. I 25 accepted the claimant was not the only member of staff to be affected by a reduction to hours.

77. The evidence of Ms Robertson and Ms Macdonald regarding the need to make changes was credible and reliable. I accepted there was a legitimate need to reduce hours (a) for the health and safety of the employee; (b)

30 because RG had become too reliant on the claimant and did not like other support workers going in; (c) because the claimant's recent period of annual leave had highlighted the difficulty in getting all of his hours covered when he was on holiday or off sick; (d) if anything happened to RG the claimant would be left with no/very few hours because he did not know other services users and (e) the respondent wanted to move to a position where all staff did an 5 average of 60 hours per week.

78. There was no dispute these reasons were discussed with the claimant. The claimant was reluctant to change his hours because he had worked with RG for a lengthy period of time and because he did not want to lose any money. I found Ms Robertson was receptive to the claimant's position and although 10 the claimant was to lose some hours and a sleepover, she assured him he would be given hours with another service user to compensate for this. The proposed rota confirmed the hours the claimant would be given with another service user AD.

79. Ms Robertson met with the claimant for his appraisal on the 16 March; she 15 met with him again on the 19 March to discuss the proposed rota and she and Ms McEwan met with the claimant on the 20 March to discuss the claimant's response to the proposed rota and his suggestions for hours he was prepared to do. Ms

Robertson's evidence that the proposed ongoing rota at page 48 was agreed with the claimant was not entirely satisfactory because Ms 20 Robertson did not appear to be confident of that position. Furthermore, the notes of the meeting suggested that points raised by the claimant (for example a Saturday off) were still to be investigated and considered.

80. I concluded that whilst page 48 had not been agreed, the claimant did (initially) agree to losing some hours and a sleepover from the RG package, and to 25 replace (most of) those hours with a new service user. The claimant argued that he had been pressured by Ms Robertson to accept the change to his hours. I could not accept that argument because I preferred the evidence of Ms Robertson. I further considered that if the claimant had felt pressured by Ms Robertson he would have raised it at the meeting with Ms McEwan, but 30 no mention was made of this. I also took into account the fact the claimant was introduced to the new service user, undertook some shadowing shifts and was due to have the first sleepover on the AD package on the 11 May.

81. The claimant, in his letter of grievance (page 54), made it clear that he was willing to go along with the change *"only as long as my wages are not less"* than they previously were. There was no clarity regarding the claimant's earnings and the cost to the claimant of the changes proposed by the 5 respondent and the extent to which this would have been offset by the hours offered with the new service user. The claimant produced a variety of figures ranging from losing £400 per month to a much lesser figure, and I did not know whether this factored in how much he would earn from the hours with the new service user. I was satisfied, notwithstanding this lack of clarity, that 10 by the time the claimant raised the grievance (6 April 2018) he was convinced he would lose money as a consequence of the changes to the rota.

82. The issue of the claimant's hours was discussed fully at the grievance meeting with Ms Low. The claimant told Ms Low he did not know how many hours he worked: he simply worked the hours for which he was rota'd. The claimant 15 was unhappy that other support workers had been introduced to the RG package and had been given some of "his" hours. The claimant accepted his hours had gone back up with AD, but he was not willing to do sleepovers at

AD's because of the information he had acquired regarding AD. The claimant's solution was to be put back onto the RG package with the hours and lost sleepover being reinstated.

83. Ms Low looked into the points raised by the claimant and concluded, having spoken with Ms Robertson and considered the notes of the meetings, that the claimant had agreed to a change to his working hours. Ms Low acknowledged the claimant did not wish to have sleepovers at AD's house but noted other work could be offered. I was satisfied Ms Low could not reinstate the claimant to the hours he had previously worked on the RG package because to do so would have been contrary to all of the reasons noted for requiring the change.

84. Ms Macdonald provided a summary of the hours worked by the claimant in the period January to May 2018 and confirmed it demonstrated the claimant's hours had not reduced because it averaged out. She also confirmed the claimant had been working an excessive number of hours and that this could not continue. Ms Macdonald undertook to confirm whether a guaranteed 60 hours per week could be offered to the claimant.

85. Ms Macdonald also agreed to investigate the position regarding AD, the care plan and any risk to members of staff.

86. Ms Macdonald, in the letter of outcome of grievance appeal, confirmed to the claimant a guaranteed 60 hours per week contract could be offered, and that there was a care plan in AD's house and no risk to members of staff.

87. I was satisfied, having reviewed this evidence, that the respondent followed their grievance policy and that Ms Low and Ms Macdonald investigated and considered the issues raised with them by the claimant. Ms Macdonald in particular put forward a proposal to resolve the grievance which would have guaranteed the claimant 60 hours per week.

88. I formed the opinion that the claimant became more intransigent as the process continued: the only solution he wanted was to be reinstated to the RG package to work as he had previously done. The claimant did not ever indicate whether a

guaranteed 60 hours per week was acceptable and if not why not. There was no suggestion the claimant calculated (or asked the respondent to calculate) how much he would earn under this arrangement and whether it would be to his detriment financially. There was no explanation why the claimant, having exhausted the grievance procedure, did not accept the contract for 60 hours per week.

89. I did not doubt the claimant became anxious and stressed by what happened, particularly as he was not earning any money during the period of his sickness absence. I was however entirely satisfied the respondent did not, in dealing with the grievance process, act in a manner calculated or likely to destroy trust and confidence. I considered the opposite was true insofar as (a) it was made clear to the claimant that if there were issues with AD and the claimant did not want to work with him then other work could be offered. The evidence suggested the claimant was a good support worker and there was plenty of work which he could have been offered; (b) the respondent wanted to retain the claimant in employment and (c) the respondent was prepared to offer the claimant a move from a zero hours contract to a contract guaranteeing 60 hours per week, with an acknowledgement the claimant could work additional hours to cover holidays and sickness absence.

90. I next considered the way in which the respondent dealt with the claimant's absence. I noted there was no suggestion the respondent had breached the terms of their absence management policy. The claimant suggested he had not wanted to meet with Ms Robertson and had made this clear. I preferred Ms Robertson's evidence regarding this matter and concluded that whilst the claimant may have thought this, he did not ever articulate it to Ms Robertson or HR.

91. The respondent met with the claimant to review his absence and obtain information regarding the reason for the absence, the prognosis, his medication, how he felt regarding a return to work and whether the respondent could take any steps to assist him back to work. The respondent obtained a report from the claimant's GP and also acted on the claimant's suggestion of obtaining an occupational health report. I was

satisfied the respondent took reasonable steps to inform themselves of the claimant's situation and kept him up to date with the progress of the absence procedure.

92. The respondent arranged for the claimant to attend a double length 20 occupational health appointment, and arranged for the claimant to be transported to the appointment and back home. The claimant, in his evidence to this tribunal, expressed dissatisfaction with the occupational health process because the nurse whom he met had taken up the majority of time speaking about herself and had then cut the claimant's time short because someone 25 else was waiting to be seen.

93. I, in considering this point, had regard to the report prepared by the occupational health nurse which ran to some six pages and contained a significant amount of information which had been provided by the claimant. I considered this alone undermined the claimant's view of the appointment.

30 94. The report was dated 1 November 2018. The claimant had asked for a copy of the report to be provided to him 2 days prior to it being sent to the respondent. There was no evidence to suggest when the respondent received the report. I accepted the claimant's evidence that he did not receive a copy of the report and that he phoned the respondent twice to chase this up, and wrote once, but did not receive a response. There was no evidence to explain 5 why no-one had responded to the claimant.

95. The claimant relied on this whole chronology of events to demonstrate there had been a breach of the implied duty of trust and confidence. He argued the fact of not being sent the occupational health report was the last straw. I was referred to the case of **Omilaju v Walthan Forest London Borough Council** 10 **2005 IRLR 35** where 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 followed that although the final act may not be blameworthy or unreasonable it had to 15 contribute something to the breach even if relatively insignificant. As a result, if the final act did not contribute or add anything to the earlier series of acts it was not necessary to examine the earlier history.

96. I have set out above my conclusion that the respondent, in dealing with the change to the claimant's working hours, the grievance and the absence 20 management procedure, did not breach the implied duty of trust and confidence. The respondent did not, in dealing with these matters, conduct itself in a manner calculated or likely to destroy or damage the trust and confidence with the claimant. In fact, I was satisfied the respondent acted in a manner to try to address and resolve the issues raised by the claimant and, 25 further, that the claimant could have resolved matters to his satisfaction if he had been prepared to accept what was offered by Ms Macdonald.

97. I, as set out above, did not know when the respondent received the occupational health report. There however appeared to be no dispute regarding the fact (a) the claimant did not receive the report two days prior to 30 the respondent and (b) the respondent did not reply to the claimant's enquiries regarding the occupational health report. I was not satisfied these facts amounted to a fundamental breach of contract in their own right. Further,

having concluded above that there was no breach of the implied duty of trust and confidence, the issue of whether this was a last straw does not require to be addressed.

98. I decided, for all of the reasons set out above, that there was no breach of 5 contract in respect of the claimant's hours of work and no breach of the implied duty of trust and confidence. There was no breach of contract entitling the claimant to resign and claim constructive dismissal. The claimant resigned: the claimant was not dismissed. I decided to dismiss the claim.

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Employment Judge: L Wiseman
Date of Judgment: 28 August 2019
15 **Date sent to parties: 03 September 2019**