EMPLOYMENT TRIBUNALS

Claimant: Ms J. Richards

Respondent: Clwyd Alyn Housing Ltd.

HELD BY: CVP **ON:** 18-21th January 2021

BEFORE: Employment Judge T. Vincent Ryan

REPRESENTATION:

Claimant: Mr. A. Windross, Counsel
Respondent: Ms L. Quigley, Counsel

RESERVED JUDGMENT

The judgment of the Tribunal is:

1. The claimant resigned from her employment with the respondent on 14th February 2020. She was not dismissed. Her claim of constructive Unfair Dismissal fails and is dismissed.

2. The respondent did not make unauthorised deductions from the claimant's wages (or breach her contract of employment with regard to payment for time to be taken in lieu of overtime payment (TOIL), accrued at the date of the claimant's resignation). The claimant's claim that unauthorised deductions were made from her wages relating to TOIL (and any claim of breach of contract in this regard, or otherwise) is not well-founded, fails and is dismissed.

REASONS

1. **The Issues**: the issues to be decided in this case were clarified at a preliminary hearing conducted by employment Judge Jenkins on 15 September 2020 and they appear in the hearing bundle commencing at page 33, (all further page references will be to the hearing bundle unless otherwise stated). In a situation

where the claimant makes a claim for constructive unfair dismissal and that there was an unauthorised deduction from her wages it was agreed between the parties that the following issues arose:

1.1. **Constructive Unfair Dismissal**

1.1.1. did the respondent act in fundamental breach of the claimant's contract in respect of the implied term relating to mutual trust and confidence?

1.1.2. The alleged breaches were as follows:

1.1.2.1. The respondent's failure to afford the claimant a 12-week phased return to work;

1.1.2.2. the respondent providing the claimant with work in excess of her usual duties prior to her operation and not giving her any support to ease her back into work;

1.1.2.3. the respondent's exclusion of the claimant from meetings with the environmental officer;

1.1.2.4. the claimant being undermined and belittled by her manager, Dawn Burrows;

1.1.2.5. the respondent informing the claimant on 26 March 2019 that it "didn't want [her] back";

1.1.2.6. the respondent interviewing Paul Seymour and Dawn Burrows before listening to her grievance;

1.1.2.7. the respondent failing to take into account statements from colleagues when reaching a decision on her grievance;

1.1.2.8. the respondent suspending the claimant three days after her having raised a grievance;

1.1.2.9. the respondent suspending the claimant for safeguarding referrals that other managers had not been suspended for;

1.1.2.10. the respondent informing the claimant on 12 August 2019 that "more information had come to light" and that she was required to attend a further meeting on 9 September 2019;

1.1.2.11. during the second investigation meeting the respondent informing the claimant of a further 12 allegations which had been brought against her in addition to the original three safeguarding complaints;

1.1.2.12. the respondent failing to take into consideration the information and evidence to support the claimant's position that the allegations were unfounded;

1.1.2.13. respondent demoting the claimant and downgrading her to senior care practitioner to different care home with a significant pay decrease;

1.1.2.14. Suzanne Mazzone's aggressive behaviour towards the claimant at the grievance meeting on 17 December 2019;

1.1.2.15. the respondent's failure properly to consider the claimant's points in support of her case which demonstrated that she had not been negligent in her role subsequently leading to her demotion. This alleged breach is said to have been the "last straw" in a series of breaches.

1.1.3. Did the respondent without reasonable and proper cause conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence with the claimant?

1.1.4. Did the claimant resign because of the breach?

1.1.5. Did the claimant delay in resigning?

1.1.6. In the event that there was a constructive dismissal, was it otherwise fair within the meaning of section 98 (4) Employment Rights Act 1996 (ERA)? The respondent contends that any such dismissal was fair ground of the claimant's conduct (although the respondent's counsel, Ms Quigley, properly conceded in submissions that if there was a dismissal for breach of the implied term it could only be a fair dismissal in exceptional circumstances and would therefore usually be considered unfair).

1.2. **Unauthorised deductions from wages:** was the claimant owed wages in respect of time off in lieu? If so, did the respondent's non-payment amount to an unauthorised deduction from wages?

The Facts:

2. **Case summary**: it is agreed between the parties that the summary of the case set out by Judge Jenkins in the said preliminary hearing of September 2020 is accurate namely:

"The claimant was employed by the respondent from 4 May 2010 until she resigned on 14 February 2020, which she contends was in circumstances amounting to constructive unfair dismissal. That is on the basis of an

accumulation of events, from an alleged failure by the respondent to afford a phased return to work following a planned operation in February 2019, through to the asserted "final straw" of the claimant being disciplined and demoted, which was confirmed on appeal in February 2020. She also contends that she suffered an unauthorised deduction from wages through the respondent not paying her in respect of outstanding TOIL on termination of her employment. The respondent resists the claims."

The parties have helpfully agreed a chronology of events from 4 May 2010 when the claimant commenced employment as care manager to her resignation effective on 14 February 2020 (page 994). As this is an agreed chronology it is accepted as factually correct. I need not therefore recite each date and event.

3. **The respondent**:

3.1. In its grounds of resistance to the claim the respondent describes itself as a registered housing charity with services ranging from affordable general family housing to single person accommodation, supported living accommodation and specialist care support, and low-cost home ownership, intermediate and market rented accommodation. That description is not controversial.

3.2. Insofar as it provides specialist care support, at very least, it is regulated. Its operation is subject to the provisions of the Registration and Inspection of Social Care (Wales) Act 2016 (effective 1 April 2019), the Regulated Services (Service Providers and Responsible Individuals) (Wales) Regulations 2017 (effective 2 April 2019), and related Guidance. I will refer in this judgement to those provisions and that guidance collectively as the "regulatory framework".

3.3. Plas Bod Llwyd Care Home (PBL) is owned and managed by the respondent. It is regulated. The claimant was employed at this home at the material time.

3.4. Prior to the regulatory framework the onus of compliance in respect of registration of care facilities rested with the registered manager of a home. The regulatory framework provides for the designation of a responsible individual ("RI"). The RI must be a board member of the organisation in question. The RI will have responsibility for the sites operated by an organisation and not just a single home.

3.5. The RI's responsibilities include to supervise management, including seeing to the appointment of "a suitable and fit manager" in respect of each site or home, and accountability for service quality and compliance with the regulatory framework. The role carries personal responsibility.

3.6. The regulatory framework is overseen by Care Inspectorate Wales (CIW). CIW registers, inspects, and acts to improve the quality of the provision of social care. It regulates, inspects and then prepares inspection reports as well as dealing with enforcement for any non-compliance with regulations.

3.7. The respondent is a large employer. It has a HR Department. It's management of the regulatory framework and personnel is documented. There are safeguarding policies and procedures (page 1213 and page 1222 respectively). The respondent is a Community Benefit Society, managed by its members; It is a limited company with a board of members.

3.8. The respondent appointed Dawn Burrows to be the RI and she commenced on 14 December 2018 albeit she was not formally appointed to the board of members until 21st of May 2019, as by that date CIW had insisted following consultation and negotiation that RIs must be on management boards.

3.9. I found the respondent's witnesses to be conscientious and truthful; they gave consistent, objective analysis of professional standards required in the provision of care services, and constructive criticism of services delivered where those services reached or did not reach those standards. I did not find any evidence of improper collusion or of any conspiracy between any of them detrimental to the claimant or prejudicial to proper management of both the claimant and its care home in question; I rely on my factual findings below in support of these conclusions. I heard evidence from the following witnesses for the respondent:

3.9.1. Paul Seymour – Executive Director of Resident Services from July 2015 to May 2020. Mr Seymour was the line manager for the RI (who was the claimant's line manager). He is the respondent's Safeguarding Champion taking the lead in respect of safeguarding incidents across the organisation and is responsible to report to the board, track cases, and ensure lessons are learned. Mr Seymour suspended the claimant from work pending investigation into safeguarding matters and he was the subject of grievances raised by the claimant.

3.9.2. Dave Lewis – who has been a director since at least 2014 and, since 2018, Executive Director of Asset Management. Mr Lewis heard the claimant's appeal against the rejection of her first grievance (heard by Vanessa Rhodes).

3.9.3. Linda Hughes – Assisted Supported Living Manager and member of the senior leadership team. Ms Hughes investigated issues of concern relating to the claimant and safeguarding.

3.9.4. Suzanne Mazzone – Executive Director of Housing Services (but at the material time Head of Income and Service Improvement). Ms Mazzone was the disciplining officer in respect of the allegations against the claimant that were investigated by Ms Hughes. It was agreed with the claimant and her trade union representative that Ms Mazzone would simultaneously hear the claimant's second grievance dated 15 October 2019 (page 765). Ms Mazzone rejected the claimant's second grievance and, whilst finding that the claimant was responsible for gross

misconduct in her management of PBL, she demoted the claimant to senior care practitioner rather than dismiss her. She also dealt with the matter of the claimant's claim to be entitled to 65 hours and 34 minutes accrued time which she could take off in lieu of payment for working additional hours (TOIL).

3.9.5. Craig Sparrow – executive director of development. Mr Sparrow dealt with the claimant's appeal against disciplinary sanction issued by Ms Mazzone. He rejected the appeal. He considered an alternative role for the claimant at a more senior level to the one into which he had been demoted but this was offered post-resignation and was not then accepted by the claimant.

3.10. **Absentees – Kevin Hughes and Dawn Burrows**: Unfortunately, I did not hear evidence from Kevin Hughes who was the claimant's line manager prior to the appointment of Dawn Burrows, nor from Dawn Burrows. Mr Hughes had been the Senior Community Care Manager prior to his departure from the respondent's employment and the appointment of Ms Burrows as RI in accordance with the regulatory framework. My findings in respect of Mr Hughes and Ms Burrows, specifically their management role and style, is gleaned from the evidence of the claimant and the respondent's witnesses. It appears to me that Mr Hughes, who was a very experienced professional in the care sector, adopted a management style that was, in comparison with Ms Burrows, relatively relaxed and could be described as being a light touch; there was no evidence before me to suggest that this was inadequate or unsatisfactory or in any sense likely to give rise to any regulatory noncompliance, but it was a style of management with which the claimant was comfortable. With the introduction of the regulatory framework the role of RI was created as an enhanced form of the role previously held by Mr Hughes; they were not the same role. Commensurate with the personal liability imposed on an RI and the aims of the respondent with regards to compliance and improved standards of care, Ms Burrows style was far more hands-on and direct than had been Mr Hughes'. The emphasis under the regulatory framework was for increased internal vigilance and inspection at a local level with a constant drive towards improvement based on internal inspection, observation, and reporting. Whilst there would still be inspections by CIW who would report on any compliance or non-compliance in terms of the regulatory framework, nevertheless there was emphasis on each home subjecting itself to similar rigours. My understanding of this is that the RI would effectively act as an internal care inspector, monitoring and auditing the homes under her responsibility, consulting management, liaising with staff, and proactively commenting and criticising on practice with a view to improving standards of care. This enhanced role did not therefore lend itself to a relaxed or light touch style, or at least certainly not in the early stages while the regulatory framework bedded-in and everybody became accustomed to it. The regulatory framework became effective in April 2019. The claimant resigned in February 2020. I find that as far as the management of the home in which the claimant worked was concerned the regulatory framework had not bedded-in by the date of the

claimant's resignation. I find that there was tension and friction between staff and management, staff and the RI, during the bedding-in or transition period between the old regime and the regulatory framework; there was a sense of insecurity and suspicion on the part of at least some of the staff at some of the care homes as they adapted to the management of the RI and the regulatory framework. It follows from all the above that I find Ms Burrows' style to be the polar opposite of Mr Hughes', but none of the evidence before me suggests that she misunderstood her role or failed to work conscientiously and diligently to be an effective RI; I take due cognizance of the likelihood that she ruffled a few people's feathers; the claimant was certainly unnerved and distressed. I accept as conscientious findings of the grievance officers that Ms Burrows did not engage in bullying or harassing conduct. On the balance of probabilities I find, taking the above findings into consideration along with the claimant's perception as described below, that Ms Burrows could come across as being challenging and direct.

4. **The claimant**:

4.1. I found the claimant's to be an earnest and conscientious witness who gave a truthful account of her perception of events. She was clearly committed to her work. The claimant was also highly sensitive to criticism with a tendency to take constructive comment as a personal criticism or slight. She appeared to me to be defensive of her position, and not only when under perceived (by her) threat during the grievance and disciplinary proceedings but also by virtue of a change of management style forced by the regulatory framework. I find that the claimant lost a sense of objectivity and a degree of selfawareness which caused her to misunderstand some of what was said and done in and about the events described below. All that said, I fully accept the claimant sincerity and I can appreciate the sense of disappointment and distress at the way events unfolded for her. I rely on my factual findings below in support of these conclusions.

4.2. The claimant was employed by the respondent from 4 May 2010 until her resignation on 14 February 2020; she was care home manager at PBL. Prior to the regulatory framework she was the appropriately registered manager meeting required qualifications and standards.

4.3. Prior to the appointment of the RI under the regulatory framework the claimant was responsible to Mr Hughes, the Senior Community Care Manager, for the day-to-day management of PBL. For nine years leading up to the events that are the subject of these proceedings the claimant had a clean disciplinary record, had not been subject to criticism by the Inspectorate (CIW and its predecessor) and she had achieved an award for her management.

4.4. The claimant was very committed to her work, the colleagues that she managed, and the residents at PBL. She describes herself as being "passionate" about her work and, despite their criticisms of aspects of management, the respondent's witnesses did not criticise the claimant's

apparent “passion” and willingness to work long hours, or at least to be in attendance for long hours about her work. The respondent’s witnesses are critical about the claimant’s standards in some respects, but they do not doubt her willingness to work hard. The claimant came across to me as someone who would throw herself into her work with a wish to work as independently as she could, managing the home with the minimum interference from outside with the preference of being allowed to get on with things herself. She was a willing worker prepared to take on the burden of work and to get on with it. She had her own way of working which had never been called to account by CIW and its predecessor over a nine-year period. She had a clear view of herself as a successful, efficient, and regulationcompliant manager.

4.5. I heard evidence from the claimant’s trade union representative Mr Mark Jones on her behalf. I found Mr Jones to be a conscientious and truthful witness accurately describing his perception of events. When he felt that an investigator, disciplinary or grievance officer ought to be criticised he did so but by the same token he was quite straightforward in commenting favourably on things said or done by them. When he expressed his surprise at certain events, I did not consider that he was exaggerating or being disingenuous. His evidence was appropriate for an advocate for a party giving an account of matters as he saw them on behalf of his union member.

4.6. The Claimant commenced a period of sick leave for a planned operation on 26 November 2018 returning to work on the 11th February 2019 during which time Ms Burrows had been appointed as RI. Negotiations and discussions were still going ahead between CIW and the respondent as to whether the RI ought to be a member of the board but in any event, she effectively came into post as an RI in December 2018 (and was later admitted to the board). During the period of the claimant’s absence following Ms Burrows’ appointment, the claimant was in touch with colleagues at PBL who told her that Ms Burrows was upsetting the staff and making a lot of changes; the claimant was informed that Ms Burrows was causing the staff to feel “very stressed about it” (the introduction of the regulatory framework). As the claimant believed that this had carried on for a few weeks she decided to return to work earlier than had been planned. She felt well enough to return to work. She decided to return to work early specifically to address what she considered to be the concerns of staff about Ms Burrows. The claimant believed that working at PBL had become more pressured in that there was allegedly additional work for the staff preparing medication folders and care plans, which she was led to believe amounted to big changes. The staff complained to her that they were being thrown in at the deep end and not been given enough time. The claimant was concerned at the implications of all of this for her and for her management of PBL. She returned to work with an adverse view of Ms Burrows and a defensive attitude on behalf of herself and her colleagues at PBL (even though the claimant denies having a negative view). The claimant considered that Ms Burrows was acting like an inspector, visiting PBL as if she were doing inspections which the claimant thought was wrong and inappropriate, being inconsistent with the approach adopted by Mr Hughes previously. These views

and attitudes did not improve between the time of the claimant's return to work following ill-health absence and her resignation.

Facts specific to the list of issues set out above (where the allegation or issue is shown in italics, but the findings are not italicised):

5 The respondent's failure to afford the claimed 12-week phased return to work:

5.1 It was agreed that the claimant would have a three-week phased return to work (not 12 weeks) following her absence that ended in February 2019. In her absence Tracey Roberts was appointed acting manager. Prior to her absence the claimant was aware of Ms Roberts' appointment and she was aware for some time the date of her scheduled operation and how long she is likely to be absent. She had
the time and opportunity for a proper handover of all management functions to Ms Roberts.

5.2 On her return it was agreed that the claimant would work three days a week and that Tracey Roberts would act up for the rest of the week. That arrangement lasted part only of the first week whereupon Ms Roberts returned to the "floor" working in the home.

5.3 The claimant did not complain initially but got on with the work in hand. She was aware that she had a lot to do to bring up to date care plans and matters relating specifically to medication. There were a lot of bureaucratic changes. These changes were significant and important in the management of the care of residents, including in compliance with the regulatory framework. The claimant took it upon herself during that first week and afterwards to work from home to catch up; she felt pressure to keep up with the requirements of the regulatory framework as it was being managed by Ms Burrows. Some at least of this pressure was self-imposed; as I have said, the claimant was passionate and conscientious; she also wanted to assert or maintain her authority in response to Ms Burrows' line management of her (at least that was the impression she gave me from her oral evidence).

5.4 Ms Burrows offered support and gave the claimant opportunities to request assistance from her if the claimant wanted to speak to her about any concerns and her workload. This is evidenced in email correspondence contained within the hearing bundle (including where Ms Burrows held back a report that required further action be taken, apparently so as not to overload the claimant). On the claimant's first day back at work she and Ms Burrows had a one and a half hour meeting to discuss all relevant matters relating to the return to work, resident care and management of PBL. The claimant decided or at least agreed that Tracey Roberts would only be paid her honorarium for acting-up until 18 February. As the manager of the home, she could have retained the services of Tracey Roberts but instead allowed her to continue with an

investigation in which she had been involved prior to the claimant's return. The claimant believed that Ms Burrows instructed Tracey Roberts to return to her other duties and assumed that there was no point in asking anything different but accepted that she had the authority to manage Tracey Roberts as she saw fit. The claimant was not set a timeframe to catch up with work that needed to be done in accordance with the regulatory framework; there was a lot of work to be done in respect of care plans and medication, but the respondent left the claimant to self-regulate her workload; being conscientious the claimant assumed that she must work additional hours to get up to date in the shortest possible time. The claimant's approach was part of what she characterises as part of being a workaholic.

5.5 The claimant's sense of duty coupled with her defensiveness surrounding Ms Burrows led her to shoulder the burden of catching up and trying to get ahead in the shortest time, and she became distressed.

5.6 During the grievance and disciplinary processes (that dovetailed as will be seen) no one, including the claimant, was completely clear as to why the phased return did not continue in operation and why Ms Robert returned to the "floor" and under whose instruction; in those circumstances I cannot make a finding as to these matters. There was confusion about this point.

5.7 The upshot, or at least in part, was that the claimant developed shingles and was absent again from work for the 25 February 2019 until 8 March 2019.

5.8 The claimant's trade union presented a grievance to the respondent on 29th of May 2019 (page 103) on behalf of the claimant. It included reference to the issue over the failure of the phased return to work for the initially agreed three-week period, and more generally the complaint that there was a lack of support from management upon the claimant's return to work. The complaint was raised in respect of both Dawn Burrows and Paul Seymour. The claimant also grieved that she had been humiliated, intimidated and belittled by Dawn Burrows contrary to the dignity at work policy.

5.9 The grievance was dealt with by Vanessa Rhodes, an external HR consultant engaged by the respondent for this purpose. The papers in relation to the grievance investigation and hearing are at pages 107 – 392. Ms Rhodes interviewed Paul Seymour, the claimant, Dawn Burrows, and Christina Hale and Lisa Johnson (care home managers on another site), and colleagues of the claimants who wish to remain anonymous, Lisa Martland (HR adviser), Lauren Richards who was involved in a medication audit around the time of the claimant's return to work, and Tracey Roberts. Ms Rhodes prepared a formal report which

includes reference to Ms Rhodes considering email correspondence, a fit note received from the claimant, and the claimant's private notes which were submitted in support of the grievance. Ms Rhodes' outcome of 25 June 2019 followed a hearing on the same date at which the claimant was accompanied by a representative and when they were both allowed make representations and submissions. The grievances in relation to the lack of support including of a proper phased return to work, and the alleged bullying and harassment by Dawn Burrows were not upheld.

5.10 The claimant appealed against the outcome by letter dated 5 July 2019 (page 397). Mr Lewis heard the appeal and there was a hearing at which the claimant and her representative were allowed make submissions which were duly considered. Mr Lewis' appeal outcome is dated 17 September 2017 (507 of the hearing bundle).

5.11 Mr Lewis upheld the claimant's grievance concerning a lack of support including phased return to work as had been agreed. He concluded that there was a genuine intention to support the phased return to work and the claimant's well-being by both Dawn Burrows and Paul Seymour, but he was critical of the lack of evidence of a structured phased return to work plan. He was critical of deficiencies in the way in which the claimant's return had been managed. He upheld the claimant's complaint and expressly did not uphold Vanessa Rhodes's decision in respect of this aspect of the grievance, albeit he did so on different grounds to the claimant's appeal.

5.12 Mr Lewis upheld Vanessa Rhodes' decision with regard to the grievance relating to the allegations that Dawn Burrows humiliated, intimidated or belittled the claimant contrary to the dignity at work policy. Claimant's grievance was not upheld in that respect.

6 *The respondent providing the claimant with work in excess of her usual duties prior to her operation and not giving her any support to ease her back into work*:

6.1 There was some confusion between counsel as to what was meant by this allegation; as I understand it the claimant is saying that in comparison with her workload prior to her operation and sickness absence she was given excessive work to do after her return to work in February 2019.

6.2 There was a considerable amount of work to do at the home to satisfy the regulatory framework. That was an ongoing requirement. The requirement was enhanced by virtue of the regulatory framework to which the respondent was working. Whilst the work pre- and post-illhealth absence was of a similar nature there was increasing emphasis on improving record keeping, evidential paper trails, and general quality of auditable

service. Some at least of the new work was being dictated by Ms Burrows' understanding of her responsibilities and what was required from each home. In relation to PBL responsibility for carrying out the work on site lay with the claimant. She largely dictated her own rate of work and set herself a tough task and demanding timescales, overseen and encouraged by Ms Burrows who was also demanding. The respondent had cautioned the claimant against returning to work too soon. Mr Seymour expressly told her to ease herself back into work in an email, the claimant went at the work with what was described as "gusto". At the same time the claimant agreed to end Tracey Roberts' honorarium so that she could continue her other duties rather than supporting the claimant, and she reduced reliance on agency staff (staff that had been authorised by Ms Burrows) because of her budgetary concerns. The respondent had not set an overall timeframe for the claimant to catch up. Whilst Dawn Burrows indicated the work that had to be done, it was the claimant who characteristically sought to shoulder the burden and to do so in the shortest time possible. As she was not well inclined towards Ms Burrows, had come back from her sickness absence early to address what she considered were issues with her, and was generally discontented with the new regime I find that there was an element of resentment. The claimant would do whatever she considered necessary for the good of the home and its residents and staff but very much according to her own interpretation of what was in their best interests; it was not that she worked reluctantly but that she found it more burdensome than she would have previously, especially under the management of Mr Hughes. I find from the claimant's evidence, the surrounding evidence and documentation that the circumstances tainted the claimant's view of Ms Burrows and the respondent; she saw everything through her tainted, subjective, prism.

7 *The respondent's exclusion of the claimant from meetings with the Environmental Officer*:

7.1 Upon the claimant's return to work she was informed that several residents had been admitted to hospital within a short period of time with what appear to be respiratory difficulties that may have been caused by laundry equipment. It transpired that the ill-health problems were viral but before that was established or suspected an investigation was carried out into the Otex equipment. This was a very serious situation that was taken extremely seriously by all concerned.

7.2 Mr Seymour and Ms Burrows attended on site. The local authority's environmental health officer attended to meet management. The claimant allowed Ms Burrows and Mr Seymour

to use her office. Between them they allocated tasks that had to be completed, including confirming allocation to the claimant of responsibility for day-to-day running of the home and the completion of a required online form in relation to the health and safety risk. Meanwhile Ms Burrows and Mr Seymour met with the Environmental Health Officer. Ms Burrows and Mr Seymour discussed the incident with the claimant, and they agreed a general plan of action.

7.3 Ms Burrows assisted the claimant when she requested it in respect of the completion of the online form (the claimant thought she had lost it and Ms Burrows retrieved it).

7.4 The claimant was not excluded from management either in general or specifically relating to the incident. She was not expelled from her office. She played her part in overall management of the situation, and PBL more generally at this time, and in relation to the incident as agreed with her senior colleagues, albeit she would have preferred a more major role in managing the incident itself. It was appropriate for Ms Burrows and Mr Seymour to be wholly engaged in crisis management of the incident bearing in mind their statutory responsibilities, and responsibilities to the respondent.

8 *The claimant being undermined and belittled by her manager, Dawn Burrows; AND the respondent informing the claimant on 26 March 2019 that it "didn't want (her) back"*:

8.1 On the basis of the evidence that I heard and read, but in the absence of any evidence from Ms Burrows, I find that she went about her duties in accordance with the regulatory framework which the claimant resented as she considered that Ms Burrows was acting like an inspector on inspection. Her preference would have been for Ms Burrows to conduct herself as Mr Hughes had previously, under the old regime. The claimant considered that the new regime meant that she was being questioned and her authority challenged, and she was being side-lined. There was clearly a shakeup in management practices and procedures. There was friction and tension in the transition between the old and new regimes leading to sense of insecurity and defensiveness as previously described. I am unable to conclude that there was any occasion when Ms Burrows undermined and belittled the claimant. This was the subject of the claimant's formal grievance, which was investigated by Ms Rhodes, that led to the outcome as described above with an appeal and Mr Lewis's appeal outcome as described above. The management shake-up and increased pressure to self-inspect and improve was driven by the regulatory framework; the respondent was bound to work to

that. It amounted, however, to unwelcome change to the claimant and some colleagues.

8.2 With regards the alleged remark by Mr Seymour I prefer his account which is more in keeping with my general findings. I found him to be a truthful witness whereas the claimant, whilst truthful, is unreliable in that she was by that time she was less capable of objective assessment of a lot that was said to her; I base this on the claimant's evidence in cross examination and that of the respondent's witnesses as well as the documents that are available. The claimant wished to speak to Mr Seymour about her fraught relationship with Ms Burrows and they met on the 25 April 2018. The meeting took place in Mr Seymour's office. She told Mr Seymour that Ms Burrows would have to change her ways. In line with comments previously made by Mr Seymour when he cautioned the claimant about returning to work too soon after her operation when she returned to work in February and about easing herself into work, he again expressed his surprise that she had come back so soon and said that he was concerned she had underestimated the impact of it upon her. He may well have said the words, or words to the effect, that he had not wanted the claimant to return to work when she did, but only in the context of his empathy and that he was not seeking or encouraging an earlier return to work. He did not say that she was unwanted. The claimant was wanted back at work and expected in good time when she was well enough. All he had said and meant was consistent with what he had said to her prior to the return, that she ought not rush back because her operation had been significant. The claimant misunderstood what was said to her and had no reason to so misunderstand it save for her lack of objectivity at this point. In the context and circumstances of Mr Seymour's comment her interpretation was the least likely. The claimant would not listen to what Mr Seymour wished to say or any explanation from him. She wanted to insist that Ms Burrows changed her ways, and she was not open to a dialogue with Mr Seymour. In frustration she ended the meeting abruptly and left his room. Such was the claimant's apparent distress that Mr Seymour almost immediately after the meeting asked that a HR officer to contact her to see if she was all right, and, some days later he too queried the claimant's well-being directly.

9 *The respondent interviewing Paul Seymour and Dawn Burrows before listening to her grievance*: Ms Rhodes interviewed Mr Seymour about the claimant's grievance before she met with the claimant. She interviewed Ms Burrows after she met with the claimant. The respondent's grievance procedure allows for witnesses to be interviewed in any order and no particular order. This matter was raised by the claimant on her grievance appeal. Ms Rhodes explained that her reasoning was one of logistical convenience in that she was able to see Mr Seymour when she

did in advance of the claimant, and it was not by any deliberate design. Mr Lewis looked into the matter and gave it due consideration as part of the appeal, concluding this was an innocent explanation of the sequence of interviews that did not have a prejudicial effect on the outcome of the grievance investigation. I reiterate that Mr Lewis in part overturned the grievance outcome and upheld the appeal, but not for any reason related to the sequencing of witness interviews. I did not hear evidence from Ms Rhodes. I cannot make any finding of fact that the sequencing of witness interviews in any way prejudiced the investigation and outcome as there is no evidence to support the suspicions voiced by the claimant and her trade union representative Mr Jones. I find that what Ms Rhodes did was permissible within the terms of the applicable procedure. The matter was dealt with properly by the respondent through the subsequent appeal process.

10 *The respondent failing to take into account statements from colleagues when reaching a decision on her grievance*:

10.1 Ms Rhodes prepared an investigation report commencing at page 138. She lists 10 people (and references two anonymous witnesses) who were interviewed including for and on behalf of the claimant before reaching her conclusions. She explained her conclusions in the report including by reference to those statements.

10.2 The claimant suspects that some statements were not taken into account. She gave the impression in evidence that she meant insufficient weight was placed on them by Ms Rhodes as she feels they vindicated her and that was the outcome Ms Rhodes ought to have reached.

10.3 On the face of it there is no evidence to support the claimant's suspicion other than that she did not succeed with her grievance. I have not heard from all those interviewed by Ms Rhodes and cannot gainsay her conclusion in that appears to have been based on having followed due process. In any event the claimant had the right to appeal, which she did, and Ms Rhodes' outcome was partially over-ruled.

11 *The respondent suspending the claimant three days after her having raised a grievance*:

11.1 The claimant raised her first grievance on 29 May 2019 (pp103 – 105) and the outcome was dated 25th of June 2019 (page 391-392).

11.2 There were three safeguarding incidents at PBL around this time, namely on 13th May 2019, 6 June 2019, and 26 June 2019. The claimant was suspended on 28 June 2019 (page 395) because of the three safeguarding incidents. The claimant was therefore

suspended one month after she lodged her grievance against Ms Burrows and Mr Seymour.

11.3 Mr Seymour recommended to Elaine Gilbert, Executive Director of HR, Communications and Marketing that the claimant be suspended; he did this as a senior manager and the safeguarding champion because there were three safeguarding incidents at the home in quick succession, within a short period of time. This fact gave rise to concerns of there being systematic failures at the home in relation to the recognition and reporting of safeguarding matters to the Local Authority.

11.4 Ms Gilbert wrote to the claimant on 28 June 2019 (p395) confirming that "we" were asking her to refrain from duty on full pay and benefits with immediate effect and until further notice pending a formal investigation into the circumstances surrounding the three safeguarding issues. Ms Gilbert was confirming the corporate decision of the respondent based on the recommendation of Mr Seymour. She was reminded that suspension was not a disciplinary sanction; Ms Gilbert explained how matters would proceed. She was provided with appropriate documentation where policies and procedures and details of the employee assistance programme with a named HR business partner.

11.5 Mr Seymour was primarily concerned at this stage about potential management failings highlighted by the safeguarding incidents; he was aware that Ms Burrows had further management concerns regarding the administration of medication, the preparation of care plans and risk management plans in the home; some of the issues referred to above, such as the claimant cancelling agency staff that have been authorised by Ms Burrows, gave the senior management cause for concern about the safe running of the home. The timing of the suspension was not as alleged by the claimant; the timing of the suspension was not related either to the claimant's lodging of her grievance or confirmation of its outcome.

12 *The respondent suspending the claimant for safeguarding referrals that other managers had not been suspended for*:

12.1 There were three safeguarding incidents at PBL on the above dates and they gave rise to concern about an apparent failure to either recognise, or report/document appropriately, safeguarding matters where one resident was left unattended on a commode and another on a bed pan, a resident who required a commode was issued with incontinence pads causing distress exacerbated

when her call bell was not answered, a resident falling whilst being hoisted.

12.2 There was no evidence before me that three such or similar incidents had occurred in any of the respondent's other homes within a short period of time. There was no evidence before me that any one such incident occurred in any of the respondent's other homes.

12.3 It was however common ground that there was a safeguarding incident in a nearby home managed by the respondent where two residents had engaged in potentially inappropriate conduct with each other and the matter was not properly reported to the Local Authority. There had been some confusion over recent training received by the staff as to whether that conduct was a safeguarding incident that ought to be reported; the confusion arose over the reporting threshold recently recommended by the local authority in such circumstances. The manager of the care home in question was not suspended for investigation and was not disciplined; the local authority re-explained the threshold for reporting, and it was considered that a lesson had been learned.

13 *The respondent informing the claimant on 12 August 2019 that "more information had come to light" and that she was required to attend a further meeting on 9 September 2019 and during the second investigation meeting the respondent informing the claimant of a further 12 allegations which have been brought against her in addition to the original three safeguarding complaints*:

13.1 Linda Hughes was appointed to investigate the safeguarding issues and any issues surrounding them. Between 24 July 2019 and 9 August 2019 Linda Hughes conducted interviews with Ms Burrows, DG, BM, PH and then on 9 August met with the claimant and her union representative. She collated notes of those interviews and documents relating to the matters raised and discussed. 9 August 2019 was a Friday.

13.2 Ms Hughes worked on the investigation over the weekend of 10 - 11 August 2019. On reviewing the information that she had to hand she formed the view that she required further information from the claimant in respect of a number of matters that had come to light during the investigation and which she had not covered with her on 9 August.

13.3 The further questions arose on Ms Hughes reviewing all the interview notes and documents, and not as a result of additional information given to her after she had spoken to the claimant on 9 August. There is no evidence to support the claimant's suspicion that, Ms Hughes being satisfied on 9 August 2019 that it was unlikely the matter would proceed any further and to disciplinary

action, was then presented with additional information by Ms Burrows or anyone else. There is no evidence beyond the claimant's stated suspicion (and that implied by Mr Jones) that further information was fed to Ms Hughes to go after the claimant again with an enhanced case; that did not happen. Ms Hughes came across as a truthful and reliable witness who approached the investigation conscientiously and without prejudice or bias; I accept her statement and her evidence in cross-examination. In the light of her concern that she had not covered everything at the first interview, Ms Hughes invited the claimant and her union representative to a second interview when she put to the claimant the outstanding matters that required addressing. Ms Hughes wanted to give the claimant the opportunity to have her say in respect of all matters that could amount to disciplinary charges.

14 *The respondent failing to take into consideration the information and evidence to support the claimant's position that the allegations were unfounded*:

14.1 I reiterate my findings above in relation to Ms Hughes' investigation; as evidenced above she took time to consider all available evidence and to ensure that it was properly taken into account in her investigation including by interviewing the claimant a second time.

14.2 By letter dated 18 November 2019 (page 766 - 770) the claimant was invited to a disciplinary hearing. The hearing was rescheduled by agreement. In any event the invitation letter confirmed that the purpose of the hearing was to address the claimant's grievance and to respond to a series of safeguarding allegations that were set out in detail in the letter and which went beyond the immediate facts of the three safeguarding issues. The allegations were matters however that were part of the investigation by Ms Hughes. The claimant was reminded that she could be accompanied by a colleague or union representative. She was advised that she could ask questions, present evidence, and call witnesses, and that witnesses would be available for her to question. She was told she could send a written response to the allegations in advance of the hearing and she was asked to provide details of the witnesses that she wished to call to the hearing. The documentary evidence pack had already been sent to her and she had already acknowledged receipt. She was advised that the allegations "may amount to a case of gross misconduct and if proven may constitute grounds for your dismissal from employment". The letter confirmed the statement that Social Care Wales had been informed and would be updated, (albeit they were not updated immediately following the outcome of the disciplinary process).

14.3 The joint grievance and disciplinary hearing took place on 17 December 2019 chaired by Suzanne Mazzone; the minutes commence at page 835. The grievance hearing was in respect of a grievance dated 15th October 2019. The claimant agreed to the matters being dealt with on the same occasion. The claimant was accompanied by Mark Jones, GMB Union representative. The hearing was attended by the witnesses Tracey Roberts Elaine Gilbert Paul Seymour Dawn Burrows and Christina Hale. The minutes confirm, and I accept, the evidence of Ms Mazzone, that she acknowledged the information contained in the pack provided by the claimant (page 836). The claimant and her union representative were asked questions and given an opportunity to answer questions asked and to make submissions. At paragraph 12 of the minutes, it is noted that the chair proposed to go through matters one by one and stated that she had reviewed all the evidence. That process was then undertaken; there are further references to consideration of statements provided by the claimant. I note that in his witness statement Mark Jones confirmed that he thought, subject to interjections that were made, the disciplinary hearing "went reasonably well" and he cites with approval matters that were raised by the claimant with Christina Hale and Tracey Roberts; Mr Jones refers to submissions that he and the claimant made as well as referencing documents they wished to have considered. Reading the witness statements of the disciplining officer, Mr Jones and the minutes of that meeting it appears to have been a thorough hearing.

14.4 Ms Mazzone worked on the file of papers over the Christmas holiday period. She dealt with the grievance and disciplinary matters separately as agreed.

14.5 The grievance and disciplinary hearing outcomes and letters are dated 13 January 2020 (pp891 – 896). Ms Mazzone confirmed that since the hearings she had the opportunity to reflect on all the information provided such that she was in a position to provide her decisions; she then lists the people who provided evidence that was taken into account or otherwise participated in the hearings prior to the decisions. I find that Ms Mazzone's account is accurate as is her statement, and that she did take into consideration the information and evidence provided by the claimant to support her position that the allegations were unfounded. Having taken all of the information into account, both the claimant's and management case, Ms Mazzone reached the decisions set out in her outcome letters. The process was apparently thorough, and the decision was conscientious.

14.6 She wanted to retain the claimant within the business but did not consider it appropriate that she remain as a home manager at this

time; she considered that an alternative post away from PBL would benefit the claimant. Demotion was preferred to summary dismissal or dismissal on notice. Demotion is a sanction allowed for in the respondent's disciplinary procedure, even though as in this case, it could result in a substantial reduction in pay.

14.7 The grievance was not upheld. The claimant had grieved that she had been victimised by Mr Seymour and Ms Burrows for raising her first grievance by suspending her and taking disciplinary action. Again, Ms Mazzone gave credible and reliable evidence to support her conclusion and I accept its veracity.

14.8 I found Ms Mazzone to be a straightforward, honest and reliable witness generally and I accept her witness statement, the factual account of what occurred, her deliberations, thought processes and rationale for her disciplinary decision. The disciplinary hearing was conducted appropriately and in accordance with both the respondent's own policies and procedures and compliant with the principles of the ACAS code in relation to disciplinary matters and grievance matters.

14.9 The claimant appealed against the disciplinary outcome and the appeal hearing was conducted by Mr Sparrow. The claimant was again represented by Mark Jones. Mr Sparrow confirmed at the outset that he had received and considered all of the information available in respect of these matters including information provided by the respondent on the Monday before the hearing. The claimant provided a considerable amount of documentation by way of evidence and submissions at every stage of each grievance and throughout the disciplinary procedure; it was appropriately considered by each officer of the respondent when considering either grievance, disciplinary, or appeal matters. Mr Sparrow described the file of papers as being "huge" and I accept his evidence that that is how he perceived it but also that he read it and considered its contents carefully.

14.10 This hearing took place on 5 February 2020 (the notes commence at page 921) and Mr Sparrow's appeal outcome of 12 February 2020 is at page 931. At the hearing the claimant, assisted by Mr Jones, took Mr Sparrow through her evidence and the evidence of the respondent's management witnesses emphasising where she found fault or alleged that there was inconsistency or error. Mr Jones and the claimant were so satisfied with the way that the hearing had gone that they were confident the appeal would succeed.

14.11 The appeal was properly conducted in the sense that it complied with the provisions of the applicable procedures and ACAS guidelines.

14.12 Following the hearing Mr Sparrow sought clarification about a number of points raised; the clarification was by way of affirmation of notes that had already been produced to the claimant and to him. He considered the matter for several days immediately following the hearing before writing his decision.

14.13 I found Mr Sparrow to be a straightforward, honest and reliable witness and I accept his witness statement, the factual account of what occurred, his deliberations, thought processes and rationale for his decision to uphold the disciplinary decision to demote the claimant. He prioritised safeguarding issues. He referred to an alternative role as a Senior Care practitioner and confirmed his recommendation that other roles should be explored as opportunities for her. Subsequently such an offer was made but that was shortly after the claimant had resigned.

15 *The respondent demoting the claimant and downgrading her to senior care practitioner in a different care home with a significant pay decrease*: I have already found as a fact that the disciplinary hearing was appropriately conducted and was fair; furthermore, that the disciplining officer acted appropriately and conscientiously in reaching her decision, as did the appeals officer. The decision to demote the claimant fell within the range of available sanctions, in the circumstances as outlined, in the respondent's disciplinary procedure. The decision did not breach a provision in the claimant's contract.

16 *Suzanne Mazzone's aggressive behaviour towards the claimant at the grievance meeting on 17 December 2019*:

16.1 during the course of the disciplinary hearing the disciplining officer twice intervened and interrupted the claimant. She did so in the capacity of chairperson; I accept her evidence that she was not aggressive in doing so but she sought to make due progress. The claimant wished to be heard out and did not feel that she was ever given the opportunity to say everything she wanted to say since she returned to work in February 2019 (I say this by reference to examples such as the claimant abruptly leaving a meeting with Mr Seymour, and her allegations of being excluded when in fact there was delegation of duties following the OTEX incident). The claimant was sensitive and reacted adversely to robust chairing of the meeting, taking it as a slight. The claimant had a lot to say and a lot of written work that she wanted to present, and she did so; she did not appreciate being asked to move when she had covered a point to the satisfaction of the disciplining officer.

16.2 The claimant and Mr Jones perceived Ms Mazzone's chairing as aggressive; Ms Mazzone had not intended to appear so. I did not find any evidence of bias or prejudgment or undue pressure to maintain progress during the hearing. On balance I find that Ms Mazzone was not being aggressive. She was being an assertive chairperson wishing to make due progress and to have the opportunity to consider the considerable amount of evidence and submissions that she had to consider before reaching a conclusion.

16.3 When discussing TOIL entitlement, the claimant pointed out the considerable number of hours that she had recorded that she had worked. Ms Mazzone appeared to rebut that suggestion by commenting that just because somebody is present in a building it does not mean they are working, meaning that there may be no constructive output despite attendance. I find that this was not aggressive, but it was challenging and potentially dismissive. Understandably, though a statement of the obvious, it upset the claimant. It was an unhelpful comment and perhaps ungracious in the way that it was said in that context, but it was an off the cuff remark which I find was not intended to destroy or seriously damage the relationship; it was a self-evident statement used in context.

17 *The respondent's failure to properly consider the claimant points in support of her case which demonstrated that she had not been negligent in her role subsequently leading to her demotion. This alleged breach is said to have been the "last straw" in a series of breaches*: I have already made findings of fact above in relation to the due consideration of the claimant's points in support of her case by the investigating officer, disciplining officer, grievance and grievance appeal officer and disciplinary appeal officer. I have found not as alleged.

18 *Did the respondent without reasonable and proper cause conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence with the claimant?*

18.1 The respondent managed the claimant by reference to the regulatory framework and her role and responsibilities as care home manager;

18.2 the respondent acted in respect of the claimant's grievance in accordance with its grievance procedure and compliant with the applicable ACAS code.

18.3 The respondent managed the claimant's disciplinary investigation, hearing and appeal in accordance with its disciplinary procedure and compliant the applicable ACAS code.

19 *Did the claimant resign because of the breach?* The claimant resigned because she was no longer prepared to accept the respondent's management, and she was wholly dissatisfied with the outcome of her grievance and the disciplinary procedure which she felt was unjustified. Her working environment and line management approach had changed owing to the regulatory framework, and the claimant was either unable or unwilling to adapt to it, such that she felt insecure and unappreciated in a role that she enjoyed. Being demoted was the last straw and triggered her resignation when her appeal against that sanction was rejected by Mr Sparrow; she resigned in response. She did not feel vindicated by the grievance procedure and she felt demeaned by the disciplinary procedure.

20 *Did the claimant delay in resigning?*

20.1 Mr Sparrow's appeal outcome letter was sent to the claimant on 12 February 2020 confirming the sanction of demotion (page 931 932). The claimant resigned with immediate effect by letter dated 14 February 2020 (page 994).

20.2 In response to the resignation, and on the same day, the respondent wrote to the claimant asking her to reconsider her decision and specially to think about the possibility of a different role (to the demoted post) as recommended by Mr Sparrow. The claimant did not rescind her resignation, and she subsequently declined an alternative post that was offered.

21 *Was the claimant owed wages in respect of time off in lieu? If so, did the respondent's non-payment amount to an unauthorised deduction from wages?*

21.1 On 1 March 2010 the claimant was sent a letter by the respondent entitled "offer of appointment" and this followed her successful job interview on 18 February 2010. The offer confirmed her appointment to the post of Care Home Manager at PBL subject to preemployment checks and the like. References were also requested. The letter then set out the principal terms and conditions of the claimant's employment (subject to those matters) and made reference to the staff handbook which was available on the intranet.

21.2 The statement sets out the statutory requirements of written particulars of employment. Under the heading "hours of work" the terms and conditions confirmed a normal working week of 37 hours; it also confirmed that the claimant may be required to work in excess of her normal working hours should this become necessary for the proper performance of her duties. She would be required to record her hours of attendance on a timesheet. Whilst her post did not qualify for payment in respect of overtime working for hours in excess of 37 hours per week, however, "Time Off in Lieu will be granted upon agreement with your line manager". As

indicated by that capitalisation and in accordance with common usage this latter provision was referred to habitually as TOIL.

21.3 The contract did not provide for payment in lieu of TOIL, which would in any event be equivalent to an overtime payment which was expressly disallowed in the written statement of employment particulars. There was no oral contractual agreement amending or varying these written terms and conditions. The said document expressly stated that any variation of the terms set out would be confirmed in writing.

21.4 The claimant signified her agreement to the terms and conditions of her appointment as set out in the above-mentioned letter by signing and dating the letter 3 October 2010.

21.5 The claimant frequently worked over and above her 37 contracted hours per week. Her practice was to complete timesheets indicating her hours of work inclusive of time that was actually taken as TOIL. This was confusing to the respondent as it would appear to be a form of double accounting, taking time off but logging it as worked hours. I find that this was not the claimant's intention, but it led to a discrepancy and misunderstanding as to the total number of hours that the claimant actually worked, and the number of hours taken as TOIL. There was little cross-examination of witnesses on these points however I find on the basis of the evidence before me, and in particular the statement of Ms Mazzone, that the claimant had over calculated her TOIL. As of 14 February 2020, the claimant had accrued four hours 58 minutes time that she was entitled to take off in lieu, as this was the amount agreed with her line manager. It could only be granted upon such agreement.

21.6 On the claimant's resignation she was paid a sum equivalent to her wages for the amount of accrued TOIL that was agreed by her line manager.

The Law: The applicable law has been identified and reflected in the agreed list of issues; both parties made uncontroversial submissions which were duly noted, including on appropriate case law. In the absence of a substantial challenge by either party of the other parties' outline submissions (received from the respondent) or skeleton argument (received from the claimant, drafted by Mr G Waite, Counsel), or respective oral submissions I need not further analyse the evolution of the law and distillation of the principles beyond briefly stating the basic principles. The parties' submissions in full were considered, reread and applied as I feel appropriate.

21. <u>Constructive Unfair Dismissal</u>:

21.1 S.94 Employment Rights Act 1996 (ERA) establishes an employee's right not to be unfairly dismissed. S.95 ERA sets out the circumstances in which an employee is dismissed which includes where an employee terminates the contract of employment (with or without notice) in circumstances in which he or she is entitled to terminate it without notice by reason of the employer's conduct (a constructive dismissal).

21.2 It is well established that for there to be a constructive dismissal the employer must breach the contract in a fundamental particular, the employee must resign because of that breach (or where that breach is influential in effecting the resignation), and the employee must not delay too long after the breach, where "too long" is not just a matter of strict chronology but where the circumstances of the delay are such that the employee can be said to have waived any right to rely on the respondent's behaviour as the basis of their resignation and a claimed dismissal.

21.3 The breach relied upon by an employee may be of a fundamental express term or the implied term of trust and confidence and any such breach must be repudiatory; a breach of the implied term will be repudiatory, meaning that the behaviour complained of seriously damaged or destroyed the essential relationship of trust and confidence. Objective consideration of the employer's intention in behaving as it did cannot be avoided but motive is not the determinative consideration. Whether there has been a repudiatory breach of contract by the employer is a question of fact for the tribunal. The test is contractual and not one importing principles of reasonableness; a breach cannot be cured, and it is a matter for the employee whether to accept the breach as one leading to termination of the contract or to waive it and to work on freely (that is not under genuine protest or in a position that merely and genuinely reserves the employee's position pro temps).

21.4 As to whether a claimant has resigned as a result of a breach of contract, where there is more than one reason why an employee leaves a job the correct approach is to examine whether any of them is a response to the breach, rather than attempting to determine which one of the potential reasons is the effective cause of the resignation.

21.5 Even if an employee establishes that there has been a dismissal the fairness or otherwise of that dismissal still falls to be determined, subject to the principles of s.98 ERA. That said it will only be in exceptional circumstances that a constructive dismissal based on a repudiatory breach of the implied term will ever be considered fair.

21.6 "In the normal case where an employee claims to have been constructively dismissed it is sufficient for a tribunal to ask itself the following questions" **Kaur v Leeds Teaching Hosp [2018] EWCA Civ 978** (Per LJ Underhill):

(1) What was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, his or her resignation?
(2) Has he or she affirmed the contract since that act?
(3) If not, was that act (or omission) by itself a repudiatory breach of contract?
(4) If not, was it nevertheless a part (applying the approach explained in *Omilaju* [that "the function of the Employment Tribunal when faced with a series of actions by the employer is to look at ***all*** the matters and assess whether cumulatively there has been a fundamental breach of contract by the employer"]) of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a (repudiatory) breach of the *Malik* [trust and confidence] term? If it was, there is no need for any separate consideration of a possible previous affirmation, [because: "If the tribunal considers the employer's conduct as a whole to have been repudiatory and the final act to have been part of that conduct (applying the *Omilaju* test), it should not normally matter whether it had crossed the *Malik* threshold at some earlier stage: even if it had, and the employee affirmed the contract by not resigning at that point, the effect of the final act is to revive his or her right to do so").
(5) Did the employee resign in response (or partly in response) to that breach?

22. Unauthorised Deduction from Wages/Breach of contract:

22.1 The wording of a written contract or confirmation of terms of a contract ought to be given its natural meaning. Provided parties have entered into a contract for valuable consideration and without coercion its terms should bind them. A tribunal ought not imply terms unless they are required to give effect to the contractual relationship.

22.2 s13 Employment Rights Act 1996 gives a worker the right not to suffer unauthorised deductions from wages. An employer shall not make a deduction from wages of a worker unless the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the workers contract, or the worker has previously signified in writing his agreement or consent to the making of the deduction.

22.3 There is no statutory right to take time off in lieu of overtime or for payment in respect of accrued TOIL upon termination of employment.

22.4 Wages are defined in s 27 ERA as meaning any sums payable to a worker in connection with employment including a list of payments without reference to TOIL. TOIL is by definition not the payment of money but the taking of time away from work; in the claimant's case this was at management's discretion in that it had to be agreed.

22.5 The parties agreed that there is no implied contractual term that a worker is entitled to payment of accrued TOIL on termination; there would have to be an express contractual provision for a contractual claim to succeed.

Application of law to facts:

23. Constructive Unfair Dismissal:

23.1 The most recent act of the respondent that the claimant says caused or triggered her resignation was the outcome that she failed her appeal against a finding of gross misconduct with the sanction of demotion;

23.2 The claimant did not affirm her contract after that outcome.

23.3 The outcome followed the implementation by the respondent of its disciplinary policy and procedure in which the claimant was accorded her statutory rights and which complied with the requirements of an applicable ACAS code. The sanction of demotion was provided for within the respondent's policy. I have not made any finding of improper implementation of the disciplinary policy, any bad faith on the part of the respondent, or anything other than conscientious application of reasonably high principles of care home management. The respondent acted properly.

23.4 This is not a claim of "ordinary" unfair dismissal where s98 ERA applies to the initial questions to be decided. In this case the claimant has to prove a fundamental breach of contract in the implementation and outcome of the disciplinary procedure, or in relation to one or more of the other allegations made by her. As regards the outcome of the disciplinary proceedings, they were conducted in accordance with the contractual principles and did not breach the implied term of trust and confidence. I have found that the respondent's actions were conscientious and evidence-based, following due process and according to the claimant her full contractual and statutory rights.

23.5 I fully appreciate the claimant's dismay at the outcome, but the respondent was entitled to prioritise safeguarding and had reasonable cause to believe that there were deficiencies in the claimant's exercise of her duties and fulfilment of her responsibilities in this regard. It was entitled, on the evidence available, to conclude that the claimant's conduct amounted to gross misconduct and to sanction her as it did. That is not to say I would have done so; I must not substitute my judgment by considering how I may have dealt with the situation. I am not in the care or healthcare professions and I was impressed at the high standards of professionalism shown by the respondent's officers with regard to required standards of care for residents. I have to consider, not what I would have done, but whether the respondent breached the claimant's contract. It did not.

23.6 There were three safeguarding issues in short order; investigation tended to show that practices and procedures in effect were deficient and that the procedures, training, instruction and supervision of some of the staff jeopardised the prioritisation of safeguarding. Ultimate responsibility lay with the claimant as the manager. Mr Windross made repeated submissions that the issues of concern to the respondent were learning points, that they were matters that could be addressed by training. The claimant was an experienced manager. She had a planned absence from work and the respondent had reason to criticise her for the extent of her handover to the acting manager which highlighted gaps in training and in training plans. There must come a point when an employer can be so concerned at the number of outstanding learning points for an experienced senior member of staff that they have reason to believe there has been misconduct.

23.7 The disciplinary outcome, including that on appeal (with the recommendation that continued efforts be made to seek suitable alternative employment to that into which the claimant was demoted), was conduct calculated and intended to maintain the relationship between the parties and not conduct calculated to destroy it. In this case it was conduct that did destroy the relationship, but I could not say that for an employer to follow appropriately an applicable procedure is likely to destroy such a relationship. The claimant is so suspicious of everything the respondent said and did that she was almost bound to consider that she was being scapegoated and unfairly blamed, but that is a subjective view. It cannot be right that everyone who is sanctioned as allowed, following proper implementation of a disciplinary procedure can then say that the employer has breached the contract because an adverse outcome was always likely to seriously damage or destroy the relationship with the employee. There are times, such as here, when an employee may have to humbly accept fault and accept the employer's adjudication having faith in its good faith. The claimant's absence of faith alone does not render the respondent's actions breaches of contract. It was an unwarranted absence of trust in the respondent, perhaps born out of insecurity in her role upon the appointment of Ms Burrows, or out of resentment at her, or disquiet at the managerial changes and work generated by the regulatory framework, or more than one of those factors; the claimant was losing her pre-eminent position at PBL in that Ms Burrows had and was having a bigger say in day-to-day activities than had Mr Hughes. That does not amount to a breach of contract by the respondent. It may explain the claimant's unwillingness to accept the respondent's management. I find that those factors were all in play.

23.8 The claimant had a very good employment record, but the regulatory framework required a different focus and deficiencies were found. The respondent took mitigating factors into account and chose not to

dismiss the claimant despite a finding of gross misconduct; that in itself is unusual. Not only that, but the respondent made it clear that it was hoping for a continued employment relationship with the claimant learning whilst in the demoted role or accepting another suitable role for the time being.

23.9 The appeal outcome was not a fundamental breach of contract. Was it part of a series of acts amounting to such a cumulative breach of contract, or were any of the other alleged breaches actual breaches of the implied term? On the basis of the findings of fact and applying the law as outlined above I find that there was no series of acts or individual act where the respondent, without reasonable cause, conducted itself in a way calculated or likely to destroy the relationship.

23.10 Viewed through the claimant's subjective prism the respondent could do no right and she could justify everything that she did or omitted to do. The evidence does not support such subjective feelings. I understand the claimant not liking what she found on her return to work from her illness absence, not least because she came back prepared to dislike it on the basis of what her colleagues had told her. She came back with a view to sorting matters out and opposed to what she understood Ms Burrows to be about. That set a tone. The tone did not improve for the claimant. It drowned out adequate objective analysis or self-appraisal.

23.11 Against that background the claimant's appreciation of all else was distorted, and the circumstantial progression from unblemished record to disciplinary sanction was viewed only with suspicion and never with proper self-awareness or professional analysis; that is not surprising when one is so close to events and so affected by them. The claimant seemed to despair and could almost see no good in anyone or anything. From a compassionate perspective I can sympathise with her emotional reaction to what was seen as a fast moving down-ward spiral. For those reasons I have found this an unfortunate, even sad and difficult, case where an outsider would have hoped for anything from the claimant to save her career with the respondent. That said, I do not criticise her for resigning, as that is a matter of her choosing and I have no role in judging her actions in that way; resignation was her prerogative.

21.7 I have to judge the conduct, by act and/or omission of the respondent however, and I have found no substantive grounds to criticise its officers and managers, let alone to find that they have fundamentally breached the claimant's contract; the respondent did not. It had just cause for its actions; it acted properly and conscientiously, in accordance with its known and accepted policies and procedures; its outcomes were justifiable. There was no evidence to support untoward collusion or any vendetta against

the claimant; I have found that a series of managers and others, doing their best, arrived at decisions and acted as they did in the proper exercise of their duties and in good faith, in compliance with express and implied terms of the contract and its policies and procedures.

21.8 The answer to the question: Did the respondent without reasonable and proper cause conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence with the claimant? Is no, not in respect of the appeal and disciplinary outcomes nor in respect of the claimant's other allegations.

23.12 The fact of the claimant's dissatisfaction with her line managers, that she did not get the grievance outcomes that she wanted, and that she received a disciplinary sanction that she did not want is unfortunate; none of that necessarily amounts to a breach of contract let alone a fundamental one. In this case I find there was no repudiatory beach of contract. The claimant resigned. She was not constructively dismissed.

24. TOIL:

24.1 The claimant had accrued TOIL by the date she resigned. She had no contractual right to payment of wages in respect of it at that time. The respondent paid her for the TOIL that it agreed, and its agreement was an essential element of the discretionary TOIL arrangements.

24.2 The respondent did not breach the claimant's contract or breach her right not to suffer unauthorised deductions from wages; TOIL is not a wage. Any guarantee of payment would amount to overtime pay and that was expressly excluded from the claimant's terms and conditions of employment.

Employment Judge T.V. Ryan

Date: 9th February 2021

JUDGMENT SENT TO THE PARTIES ON 12 February 2021

FOR THE TRIBUNAL OFFICE Mr N Roche