



EMPLOYMENT TRIBUNALS (SCOTLAND)

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Case No: 4100884/2020 (V)

**Hearing Held in Edinburgh via Cloud Based Video Platform (CVP) on the 2nd,
3rd and 4th November 2020**

10

Employment Judge Porter

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Mr I McDermid

**Claimant
In Person**

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Common Services Agency

**Respondent
Represented by
Ms Stobart, Advocate
assisted by Ms Ewart,
solicitor**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

It is the judgment of the Employment Tribunal to dismiss the claimant's claims of unfair constructive dismissal and breach of contract.

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Introduction

1. The claimant was employed by the respondents as a Band 5 Information Analyst/Statistician between the 30th November 2015 and the 17th of September 2019. In these proceedings he claims unfair constructive dismissal and breach of contract.

2. The claimant's claims are resisted, and there was a Preliminary Hearing ("PH") on the 26th June 2020. At that PH the case was set down for a Hearing on Liability of 3 days' duration to be heard via CVP/Kinly.
3. The Hearing took place on the 2nd, 3rd and 4th November 2020. The claimant represented himself, and the respondents were represented by Ms Stobart, Advocate assisted by Ms Ewart, solicitor. The Hearing took place by CVP/Kinly and evidence was heard from the claimant himself. For the respondents, evidence was heard from Martin O'Neill, a Principal Information Analyst, David Murphy a Senior Information Analyst and the claimant's line manager, Stuart Baird, Service Manager and Aileen Stewart, Associate Director of Human Resources. The parties referred to a Joint Bundle of Documents numbered **1-883**.

The Issues

4. The parties liaised on issues in this case. Unfortunately, such liaison did not result in an agreed List of Issues and the parties produced separate Lists of Issues which were similar, but not identical in content. The Tribunal elected to follow the claimant's List of Issues in these proceedings, which are reproduced below.

Claimant's List of Issues

Did the following acts and omissions take place? –

- I. failure to undertake a job evaluation under s 6.33 Agenda for Change Terms and Conditions, in November 2015;
- II. failure on the part of management to address concerns which the Claimant had raised in relation to nature of his role, pay and conduct of management from February 2019 onwards;
- III. removal of access to Renal Registry data in April 2019;

- IV. preventing the Claimant from carrying out survival modelling work that Consultants on steering group had requested in February 2019;
- V. imposition of time consuming, routine work on Musculoskeletal Audit which reduced the time the Claimant had for higher value work on Stroke Audit
5 from February 2019 onwards;
- VI. Claimant was asked to carry out a complex piece of Musculoskeletal Audit work (Band 6) with what he understood was a veiled threat of disciplinary action if he refused to do it in July 2019;
- VII. unwarranted threats of disciplinary action in February and July 2019;
- 10 VIII. Final straw – meeting on 31/7/19 at which it was clear to the claimant that the position of management was entrenched and that a grievance would be fruitless.

Is the alleged “final straw” more than innocuous?

15 Did the claimant affirm the contract since the final straw?

If not, was the final straw in itself a repudiatory breach of contract?

If not, was the final straw part of a course of conduct comprising several acts and omissions which, viewed cumulatively, amount to a repudiatory breach of contract (including a breach of trust and confidence)?

20 Even if the meeting on 31/7/19 was not a final straw (because it was innocuous), was there nevertheless an earlier repudiatory breach of contract which the claimant did not affirm?

Did the Claimant resign in response to a repudiatory breach?

25 In the event that the Tribunal finds the Claimant to have been constructively dismissed, was such dismissal fair or unfair in terms of section 98 of the Employment Rights Act 1996. In this regard: (a) what was the potentially fair reason for dismissal, and (b) was it reasonable for the respondent to treat that reason as sufficient for dismissal?

Breach of contract

Was the respondent required to carry out a job evaluation, further to section 6.33 of the Agenda for Change Handbook, in November 2015?

5 If so, is the respondent in breach of contract as a result of not carrying out such a job evaluation?

Findings In Fact

5. The Tribunal made the undernoted essential Findings in Fact from the evidence heard by them.
- 10 6. The claimant was employed as a Band 5 Analyst/Statistician on the 30th November 2015. His Contract of Employment is to be found at **45-50**.
7. The claimant remained a Band 5 Analyst/Statistician until the termination of his employment on the 17th September 2019. The evidence before the Tribunal was consistent in describing the claimant as a very competent, capable and talented
15 employee who produced work to a consistently high standard.
8. The Tribunal accepted the uncontested evidence of Martin O'Neill and Stuart Baird that the respondents encourage development and progression for their employees and, further, that the majority of the respondents' Band 5 Analysts apply for promotion over time and progress to a Band 6 role. The Tribunal also
20 accepted the uncontested evidence of Martin O'Neill and Stuart Baird that the claimant had many opportunities to apply for a Band 6 post with the respondents and on one occasion had the chance to act up as a Band 6 but chose not to avail himself of these opportunities.
9. In January 2016 a Band 6 employee, Jacqueline Campbell went on maternity
25 leave. She remained on maternity leave until the 4th of October 2016. The Tribunal accepted the evidence of Martin O'Neill that all of Jacqueline Campbell's duties were assigned to him, aside from the data analyst work at Scottish Renal Registry which was assigned to the claimant. The Tribunal accepted the evidence of Martin O'Neill that this meant that Martin O'Neill undertook all
30 aspects of Jacqueline Campbell's Band 6 work, and that the claimant was aware

of that. The Tribunal accepted that the duties assigned to the claimant were consistent with his Band 5 job description, which did include covering more complex work **(52-57)**.

5 10. The Agenda for Change Handbook formed part of the claimant's contract of employment with the respondents. Para 6.32 of this document provides: "6.32 *Individuals may be moved into a higher pay band where it is necessary to fill a post on a temporary basis when a vacancy is unfilled, but being advertised, or the post is being held open for someone who is due to return, eg from long-term sickness absence, maternity leave, or from extended training.*" Para 6.33 of this document provides: "Pay should be set either at the minimum of the new pay band, or, if this would result in no pay increase (by reference to basic pay plus any recruitment and retention premium, if applicable) the first pay point in the band which would deliver an increase in pay...In circumstances where the individual is not required to carry out the full responsibilities of the post, pay will be determined by job evaluation." **(79-80)**

15 11. The Tribunal accepted the evidence of Martin O'Neill that the claimant was not placed into a higher pay band whilst undertaking work that had been dealt with by Jacqueline Campbell as he did not undertake all of her duties and those duties undertaken by him were consistent with his Band 5 role. Likewise, the Tribunal accepted the respondents' position that in these circumstances there was no requirement to give the claimant a pay increase or undertake a Job Evaluation whilst Jacqueline Campbell was on maternity leave.

20 12. The Tribunal considered it worthy of note that at no point in the period January to October 2016 did the claimant request higher pay or a job evaluation as a result of fulfilling duties formerly undertaken by Jacqueline Campbell.

25 13. In January 2019 there were discussions between Martin O'Neill and Stuart Baird about analyst resources, work allocation and how they were going to cover their colleague, Rik Smith's work in the period between his retirement and the appointment of another Band 6. On 7th February 2019 Martin O'Neill emailed the claimant, David Murphy and Rik Smith and stated: "*The team will be getting a new Band 6 analyst who will take on the lead role for MSk. Recruitment is underway so all going well we should have someone in post within the next few*"

months. That doesn't give much time for a handover. Therefore we have decided its best for the team if Rik hands over to Iain to cover the day to day running until full time cover is in place. I will also be taking a more active role in MSk to help Iain and get as much of Rik's knowledge before he leaves." **(316)**

5 14. In response, by email dated the 8th February 2019 the claimant stated: "... *It is not acceptable to me that I be expected to cover for Rik for an indefinite period unless I get the promotion I would require to do this on a permanent basis. The first occasion when I was asked if I was interested in taking on Rik's responsibilities was last week in a discussion with Martin. I made it clear that in*
10 *order for me to do this I would require a permanent band 7 role; however, I would just add Rik's MSk work to my current role and this is clearly far cheaper than hiring an additional person. I would continue with my work on the Stroke Audit although the priority would be MSk. In last week's meeting, I also made it clear to Martin that if I was not offered what I'd require to do the additional MSk work*
15 *then I'd be happy to continue with what I'm currently working on and on my current pay band. I should also add that I'd be happy to cover Jacqueline's SRR work while she is on maternity leave as I did this previously."* **(317)** By email of 13th February 2019 Martin O'Neill responded and stated: "*I have perhaps been unclear, you are not being asked to undertake Rik's role as this would indeed*
20 *involve a promotion or acting up (until the permanent role was filled). You are being asked to take over the basic day to day running of the MSk audit with support from myself which is within the scope of your generic Information Analyst job description. You are not being asked to do any additional analysis or develop any new analysis which would potentially fall within the SIA Band 6 role. I am*
25 *however very confused as to why you believe that you would 'require' a band 7 role to undertake band 5 activities within MSK and SSCA, I thought I previously explained why this was not possible."* **(318)** To this end, the Tribunal accepted the evidence of Stuart Baird and Martin O'Neill that as the respondents are a public body it was not within their gift to promote employees as recruitment is
30 done via an open process.

15. There was a meeting on 18th February 2019 between Martin O'Neill, David Murphy and the claimant to discuss the outstanding issues around Rik Smith's retirement and cover of the MSk work. Following that meeting, Martin O'Neill

emailed the claimant to confirm the allocation of the MSk work then discussed **(319)**. The claimant emailed back to say that the work allocation they had discussed was only acceptable to him if it was for a defined and short period of time **(320)**. There ensued further email correspondence **(322, 325)**. By email of the 20th February 2019 Martin O'Neill responded to each of the claimant's points and stated in conclusion: *"If you still have an issue with this then I will have no option but to seek advice from HR regarding the employee conduct policy."***(326)**

16. The Tribunal accepted the evidence of Martin O'Neill that the claimant's behaviour could become a conduct issue if the claimant was going to continue to refuse to do the work that was required of him and concluded that this was reasonable and did not constitute a breach of the implied term of trust and confidence in the claimant's contract of employment. In reaching this conclusion the Tribunal had regard to the fact that the claimant was employed as a Band 5 analyst and as such had to undertake work allocated to him that was commensurate with his job description.

17. In terms of an email dated the 20th February 2019 (in response to an email from Stuart Baird) the claimant accepted that he would do the MSk work required of him **(335)**. In that email the claimant stated: *"I still feel that I shouldn't have to be taking on any of Rik's work, even for a temporary period, given the ample time to find a replacement."*

18. The Tribunal found, on the basis of unchallenged evidence, that the MSk work that the claimant was requested to do lay within his Job Description as a Band 5 Information Analyst/ Statistician.

19. There continued to be difficulties with the claimant undertaking the MSk work. Rik Smith emailed the claimant and Martin O'Neill on the 15th March 2019 and Martin O'Neill alone on the 18th March 2019 outlining the issues that he had with ensuring that the routine MSk audit tasks were covered, given that the claimant had by then made it clear that he would not want to become more heavily involved in MSk audit reporting **(339-340)**

20. Rik Smith was replaced by an internal appointment, namely Caroline Smith. The claimant emailed Martin O'Neill on the 18th March 2020 and stated that he thought it might be for the best if, after the initial handover phase to Caroline

Smith he had no regular involvement with the audit **(343)**. Martin O'Neill responded by stating that he would like the claimant to continue to cover the MSk work **(344)**. At this time there were communications between Martin O'Neill, Stuart Baird and David Murphy around the claimant's refusal to follow instructions and the claimant's conduct in general **(345-347)**.

21. Whilst covering Jacqueline Campbell's maternity leave the claimant attended Scottish Renal Registry meetings and volunteered at one such meeting that he would carry out survival modelling for the Scottish Renal Registry. By email dated the 28th February 2019 Neil Muir, the Clinical Co-ordinator asked the claimant how he was getting on with this work. Martin O'Neill was copied into this email. The claimant responded by stating that progress had been sporadic as he could only fit this work in around his other work. In response, Martin O'Neill emailed the claimant, copying Neil Muir and then stated: *"As you haven't started work on this lain, and with current resource issues within the team, this is not a piece of work we can currently do – ie not core work."* **(336)**

22. The Tribunal found this to be an entirely reasonable decision from Martin O'Neill in his capacity as a Band 7 supervisor as the claimant had volunteered to carry out the survival modelling work, and over two years later was advising that progress had been sporadic as he had had to fit this work around his other duties as a Band 5 Analyst. Following this exchange, Martin O'Neill removed the claimant's access to the Scottish Renal Registry, for data protection reasons as the claimant no longer had active work there. In cross examination the claimant accepted that data protection was a good reason for removal of access to the Scottish Renal Registry.

23. On the 17th April 2019 the claimant sent an email to Stuart Baird, David Murphy and Martin O'Neill. In that email **(353)** the claimant stated: *"Reviewing my role" ... It has been acknowledged that I am over-qualified for my role. When I started, I covered Jacqueline's maternity leave which involved complex statistical analysis for the annual report and additional work on survival modelling. This was for a year, after which I carried out the clinical outcomes work for the stroke audit, including home time. This type of high value work reflects my experience and qualifications and allows me to contribute significantly to the healthcare audits."*

The claimant concluded by stating: *“With this in mind, is there a process whereby my role can be reviewed to ensure that I am on an appropriate pay grade?”*

24. Stuart Baird responded by email dated 18th April 2019 **(354)** and concluded that email by stating: *“the job I require to be done is a Band 5 and the work being allocated to you and managed via your work plan is commensurate with that. If you feel you are ‘over qualified’ for the job you are undertaking then you of course have the opportunity to apply for Senior Information Analyst roles which are on a rolling advert and the only way in which you have the ability to seek promotion.”*
25. In June 2019 Caroline Smith spoke to Martin O’Neill and raised concerns regarding the claimant’s work and in particular the fact that the claimant had told her he was just helping out in MSk and that going forward he would be working on tasks that better suited his skills. This conversation was recorded in an email from Martin O’Neill to Stuart Baird on 25th June 2019 **(366)**.
26. On 16th July 2019 the claimant was asked by Caroline Martin to carry out some MSk work. The claimant’s response was that he was busy with stroke data work, and he was unlikely to be in a position to look at the work in the near future **(380)**. After checking with David Murphy, the claimant was allowed to carry on with the stroke data work rather than commencing the task assigned to him by Caroline Martin **(373)**.
27. On the 18th July 2019 the claimant wrote to Stuart Baird, copying in Martin O’Neill and David Murphy. In that letter the claimant repeated his previous concerns regarding the nature of his role and fair pay for his role and raised for the first time allegations of bullying **(376-377)**. In response, Stuart Baird emailed the claimant on the 25th July 2019 and then stated: *“I cannot be clearer than stating that you were never employed to cover a Senior Information Analyst maternity cover. You were employed as an Information Analyst and your contract of employment and job description reflect this.”* **(389)**
28. A meeting had been arranged for 31st July 2020 and it was determined that all the claimant’s allegations would be discussed at that meeting. On 25th July 2020 Stuart Baird wrote to the claimant and stated: *“The intention of the meeting is to discuss your ongoing issues with your work plan and for me to hear any outstanding issues that you may have with it. I understand that Martin has*

already provided yourself with a copy of your generic job description which we can refer to during the course of our discussions. I am of the view that this meeting is informal and that at this point no formal grievance process has been instituted, however you may wish to be accompanied by a work colleague or Trade Union Representative and I would ask that you provide me of prior notice of who would be coming with you, should this be the case.” (384) The claimant responded by stating: *“After researching the relevant policies, I believe my contract was breached when I covered Jacqueline’s maternity leave at the start of my job; therefore you are in the position of trying to enforce a contract that has been breached.” (390)*

29. The meeting on the 31st July 2019 took place with the claimant, Stuart Baird and Martin O’Neill present. There was a discussion regarding the claimant’s duties and how these were in line with his Band 5 job description. In the course of the meeting Stuart Baird advised the claimant that his behaviour could be a conduct issue as he was refusing to undertake work and was challenging his line managers. The Tribunal considered this to be a reasonable statement of fact made by a manager of the claimant in all the circumstances of the case.

30. The Tribunal accepted the evidence that Stuart Baird said that it was difficult for people who raise grievances. However, the Tribunal also accepted the evidence of Stuart Baird that he made this comment with a view to resolving the claimant’s issues informally and out of concern for the claimant who presented as nervous and at times aggressive. In these circumstances the Tribunal considered this comment to be reasonable and not a breach of the implied term of trust and confidence in the claimant’s contract of employment.

31. Stuart Baird emailed the claimant following the meeting on the 31st July 2019. That email re-iterated the respondents’ position that the claimant was only ever asked to cover Band 5 duties. In the email Stuart Baird stated: *“Unfortunately we did not have time to further explore your allegations of bullying and harassment and I am very keen that we are able to do so as soon as possible. I understand that you are about to go on leave so would therefore ask if you can let me know when you are free on your return in order that we can go through the allegations specifically.” (392)*

32. Following the meeting on 31st July 2019 the claimant was absent on sick leave.

On 19th August 2019 the claimant submitted his resignation, with an effective date of termination of the 17th September 2019. His letter of resignation of 19th August 2019 stated: *“I am resigning due to the failure to address my concerns, detailed in meetings and email correspondence in recent months, about the nature of my role, fair pay and bullying by management. I also believe that my contract was breached on my first day of employment as the Secondment PIN policy was not followed when I was covering the maternity leave of a colleague on a higher pay grade. Given the stressful nature of the situation and the distraction that it is likely to cause to my work and that of the healthcare audits team, I have decided to resign and seek alternative employment rather than raise a formal grievance about my concerns.”* **(409)**

33. The Tribunal accepted the evidence of Stuart Baird that he was disappointed that the claimant had chosen to resign as he considered the claimant to be an excellent worker and he felt that the claimant’s issues could have been sorted out. By letter dated 21st August 2019 Stuart Baird wrote to the claimant and stated: *“I can confirm that I have received, with regret, your email letter of resignation. As you know, I would have liked to have pursued the matter further with you in order to avoid unnecessary stress and for the organisation to have had the opportunity to hear and address your concerns fully.”* **(417)**

34. The Tribunal also accepted the evidence of Martin O’Neill that he was frustrated and disappointed that the claimant had resigned as he considered the claimant to be a talented analyst.

35. There was evidence heard regarding the respondents’ failure to comply with a SARS request. The claimant also put it to the respondents’ witnesses that they were ‘bad mouthing’ him. The Tribunal did not consider it necessary to determine such matters to reach judgment in this case; however, having heard such evidence as was available, the Tribunal was of the view that any failure on the part of the respondents to comply with the SARS request was accidental, and that there is no evidence to substantiate any allegations of ‘bad mouthing’.

OBSERVATIONS ON THE EVIDENCE

36. The Tribunal considered the claimant to be a credible witness inasmuch as he was clearly telling what he believed to be the truth. Notwithstanding this, the evidence as presented did not substantiate his allegations that his work with the respondents was anything other than commensurate with his Band 5 status. To this end the Tribunal considered that both David Murphy and Martin O'Neill were, at all material times, aware of the claimant's work commitments. They were both clear that whilst elements of the claimant's work were complex the claimant was not undertaking Band 6 work.

37. It may be that the claimant was indeed over qualified for his role as a Band 5 analyst; however, he did not avail himself of opportunities for promotion.

38. Neither did the evidence substantiate the allegation that there were unwarranted threats of disciplinary action made to the claimant. To this end, the Tribunal accepted the evidence of Martin O'Neill that reference to the conduct policy was made in the course of correspondence relating to the claimant's refusal to carry out Band 5 work allocated to him. The Tribunal did not consider that such a reference could constitute an unwarranted threat of disciplinary action, particularly against a background where Martin O'Neill wanted to retain the claimant as an employee within the organisation. Insofar as the meeting on the 31st July 2019 is concerned, the Tribunal accepted the evidence of Stuart Baird that in raising the issue of the claimant's behaviour as a conduct issue he had in mind the claimant's refusal to undertake Band 5 work and the fact he constantly challenged his managers. Again, given that Stuart Baird considered the claimant to be an excellent worker whom he did not want to lose the Tribunal were unable to conclude that such comments constituted unwarranted threats of disciplinary action.

39. The Tribunal found the respondents' witnesses and in particular Martin O'Neill and Stuart Baird to be entirely reliable and credible. Key to this finding was the constant theme throughout the evidence that the claimant was a valued employee being a talented analyst whom they wished to retain within the organisation and to whom opportunity was afforded for promotion.

THE LAW

40. In these proceedings the claimant brings claims of both breach of contract and unfair constructive dismissal. Insofar as unfair constructive dismissal is concerned, s95(1)(c) of the Employment Rights Act 1996 provides: “(1) *For the purposes of this Part an employee is dismissed by his employer if ... the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer’s conduct.*”
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- 10 41. **Western Excavating (ECC) Ltd v Sharp 1978 ICR 221 CA** remains the leading case in this area of law. There, the Court of Appeal ruled that for an employer’s conduct to give rise to a constructive dismissal it must involve a repudiatory breach of contract. As Lord Denning MR put it: “*If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer’s conduct. He is constructively dismissed.*”
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- 20 42. In order to claim constructive dismissal, therefore, an employee must establish that there was a fundamental breach of contract on the part of the employer; the employer’s breach caused the employee to resign; and that the employee did not delay too long before resigning, thus affirming the contract and losing the right to claim constructive dismissal.
- 25 43. A course of conduct can cumulatively amount to a fundamental breach of contract entitling an employee to resign and claim constructive dismissal following a ‘last straw’ incident, even though the last straw by itself does not amount to a breach of contract **Lewis v Motorworld Garages Ltd 1986 ICR 157, CA**. However, the ‘last straw’ must contribute, however, slightly, to the breach of the implied term of trust and confidence. An entirely innocuous act on the part of the employer cannot be a final straw, even if the employee genuinely but mistakenly interprets the act as hurtful and destructive or his or her trust and
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confidence in the employer. The test of whether the employee's trust and confidence has been undermined is an objective one. **Omilaju v Waltham Forest London Borough Council 2005 ICR 481, CA.**

44. When an employer breaches the implied term of trust and confidence, the breach
5 is 'inevitably' fundamental (**Morrow v Safeway Stores plc 2002 IRLR 9, EAT**).

SUBMISSIONS

45. The parties both intimated summaries of their submissions, which are replicated
below.

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For the claimant

Claimant's summary of submissions

15 **Summary**

- At the start of my employment with the Respondent in 2015 on a band 5 pay grade, I covered part of a higher pay grade (band 6) colleague's post during her maternity leave.
- The Respondent breached my contract of employment at the outset by not
20 carrying out a Job Evaluation required under Section 6.33 of the Agenda for Change Handbook.
- After the maternity cover ended in 2016, I continued to perform work that was suitable and appropriate for a higher pay grade.
- In 2019, when I raised concerns with management about the nature of my
25 role and my pay grade over a six-month period, managers did not address my concerns, undermined my work, threatened me with disciplinary action and made unreasonable demands.
- In April 2019, I suggested resolving my concerns about my role with a review of my pay grade; however, management ignored this opportunity.

- Managers refused to acknowledge the complexity of my work and insisted that I was only ever doing band 5 work during the maternity cover.
- The last straw event was the meeting with managers on 31st July 2019 where it was clear that the position of management regarding the complexity of my work, and particularly the pay grade of the maternity cover, was entrenched and that raising a grievance about my concerns would be fruitless.
- If management had not breached the contract at the outset and performed a proper Job Evaluation, then it is likely there would not have been the dispute about my pay grade, later on, that resulted in my resignation.
- Managers did not inform me that they had breached my contract at the outset; if they had admitted this in 2019, before I resigned, it is likely that they would have had to resolve the dispute with the review I had suggested in April 2019.
- The conduct of management undermined my trust and confidence in the Respondent and I was entitled to resign and consider myself dismissed.
- I was constructively dismissed by the Respondent.

For the respondents

Respondents' summary of submissions

In relation to the claim for breach of section 6.33 Agenda for Change contract, the Respondent submitted that there was no breach of contract when the Respondent asked the Claimant in 2015 to undertake the Band 5 tasks that formed part of Ms Campbell's duties before she went on maternity leave. In particular the Respondent submitted that section 6.33 of Agenda for Change only applies when an employee is asked to move temporarily into a higher pay grade post. The Respondent submitted that the section did not apply to the Claimant as he was not asked to cover Ms Campbell's Band 6 post. The Respondent chose not to move someone into her post and instead took the decision to divide the tasks she undertook between existing members of staff. Mr Baird when dividing the tasks ensured that the tasks were within the individuals job descriptions. It was submitted that there was no breach of contract in the circumstances. It was submitted, in the alternative, that the Claimant did not complain about said breach until after he resigned. The Claimant, by carrying out the work on the SRR Report without

complaint and by offering to take on the SRR Report again in 2019 with no increase in pay, accepted the alleged breach and, therefore, acquiesced in the breach.

5 The Respondent, in relation to the claim for constructive dismissal, submitted that the Claimant was not dismissed but instead chose to resign because he did not want to undertake the work on the MSk audit that he had been allocated within the terms of his job description. The Respondent submitted that they acted reasonably at all times and that at no time did Mr Murphy, Mr O'Neill or Mr Baird act in a way, without reasonable and proper cause, that was calculated or likely to destroy trust and confidence between the parties. The Respondent submitted, on the contrary, that 10 the managers in question acted reasonably in trying to resolve the Claimant's concerns informally and that they were entitled to ask him to work on Band 5 work that was within his job description. It was submitted that the Respondent was not in fundamental breach of the implied term of trust and confidence nor any express term of the Claimant's contract namely section 6.33 as submitted above. The Respondent 15 acted at all times reasonably. It was further submitted that the meeting on 31 July 2019 to discuss the Claimant's concerns could not be characterised as a 'final straw'. The Respondent submitted that the alleged breach that the Claimant relied on namely the breach of 6.33 could not be relied upon as the Claimant on his own 20 evidence did not know of the alleged breach until after he resigned. In the alternative, it could not be relied upon as he had delayed too long (namely since 2015).

DISCUSSION AND DECISION

25 46. In their determination of this case the Tribunal was guided by the issues as defined.

Unfair Constructive Dismissal

47. The Tribunal considered firstly the claimant's claim of unfair constructive dismissal. To this end, the Tribunal noted that the claimant's List of Issues compromised eight acts or omissions founded upon by the claimant in asserting 30 that there was a fundamental breach of contract on the part of the respondents.

48. The Tribunal considered firstly the claimant's claim that the respondents' failure to undertake a job evaluation under s6.33 of the Agenda for Change Terms and Conditions in November 2015 was a fundamental breach of contract. To this end, the Tribunal had regard to their Findings in Fact, namely that during Jacqueline Campbell's maternity leave the Claimant was asked to cover only Band 5 duties formerly carried out by her. Jacqueline Campbell's Band 6 duties were carried out by Martin O'Neill. In these circumstances the Tribunal concluded that there was no obligation on the part of the respondents to undertake a job evaluation under s6.33 of the Agenda for Change Terms and Conditions. Accordingly, there was no breach of contract on the part of the respondents in respect of their failure to carry out a job evaluation under s6.33 of the Agenda for Change Terms and Conditions.

49. Further and in any event, even if the respondents' failure to undertake a job evaluation under s6.33 of the Agenda for Change Terms and Conditions in November 2015 constituted a fundamental breach of contract on the part of the respondents, it is the judgment of the Tribunal that the claimant delayed too long in resigning in response to this breach and thus affirmed the contract of employment.

50. The Tribunal then proceeded to consider whether the respondents failed to address the concerns which the claimant had raised in relation the nature of his role, pay and conduct of management from February 2019 onwards. In determining this issue, the Tribunal had regard to their Findings in Fact. In this respect, the Tribunal found that the claimant's concerns, raised in correspondence, had on each occasion been responded to by the respondents. To this end, in the period from February 2019 the claimant repeatedly raised issues that he was overqualified for his role as a Band 5 analyst; that he was undertaking work that was above his pay grade; and that deploying him on MSk work was not a good use of his talents. The Tribunal found that claimant was indeed a very talented, well qualified and able analyst; however, the fact remained that he was employed as a Band 5 analyst and, as the respondents repeatedly advised him, all the tasks allocated to him by his managers were within the generic job description of Band 5 analysts to be found at **58-64**. The claimant had ample opportunity to apply to become a Band 6 analyst in the

course of his employment but chose not to do so. For these reasons, the Tribunal concluded that the respondents were not in breach of their contract of employment with the claimant by their failure to address the concerns which the claimant raised in relation to the nature of his role, pay and the conduct of management from February 2019 onwards.

51. The Tribunal then considered the claimant's assertions that the removal of his access to the Renal Registry data in April 2019 and preventing the claimant from carrying out survival modelling work that consultants on a steering group had requested in February 2019 constituted a material breach of contract on the part of the respondents. The Tribunal again had regard to their Findings in Fact in determining this issue. In particular, the Tribunal had regard to the fact that the claimant volunteered to carry out survival modelling work for the Scottish Renal Registry in the course of Jacqueline Campbell's maternity leave between December 2015 and October 2016. In February 2019 (over 2 years later) the claimant advised Neil Muir that progress on this work had been sporadic as he could only fit it around other work and, as a result, Martin O'Neill advised that with current resources within the team this was not a piece of work the claimant could undertake as it was not core work **(336)**. As a consequence of this, the claimant's access to the Scottish Renal Registry was revoked due to data protection issues. The Tribunal, in their Findings in Fact, found that the decision of Martin O'Neill in these circumstances was entirely reasonable; and, further, that the claimant himself accepted in cross examination that data protection was a good reason for the revocation of access to the Scottish Renal Registry.

52. The Tribunal then considered the claimant's assertions that the imposition of time consuming, routine work on MSk reduced the time which the claimant had for higher value work on stroke audit from February 2019 onwards. In this respect, the Tribunal observed that the claimant's resistance to undertaking MSk work is a recurrent theme in these proceedings. To this end, there is no doubt that the claimant was a very talented analyst; however, as the respondents consistently reminded him, he was employed as a Band 5 analyst and as such the allocation of MSk work to him lay comfortably within his job description. Accordingly the Tribunal was unable to find that the respondents breached the claimant's contract of employment in this respect.

53. The Tribunal then considered the claimant's assertion that in July 2019 the claimant was asked to carry out a complex piece of MSk Audit work with what he understood was a veiled threat of disciplinary action if he refused to do it. The Tribunal had regard to their Findings on the emails to be found at **373** and **380** and observed that Martin O'Neill concluded that the claimant should carry on with his Stroke IR work rather than carry out the MSk Audit work requested of him by Caroline Martin. In these circumstances the Tribunal were unable to conclude that the respondents were in breach of their contract of employment with the claimant in this respect.
54. Finally the Tribunal had regard to the claimant's claim that the respondents breached the implied term of trust and confidence in his contract by unwarranted threats of disciplinary action in February and July 2019; and that the meeting on the 31st July 2019 constituted a 'final straw' at which it was clear to the claimant that the position of management was entrenched and that a grievance would be fruitless.
55. The Tribunal had regard to their own Findings in respect of the alleged threats of disciplinary action. The Tribunal found that the terms of the email from Martin O'Neill of 20th February 2019 (**326**) were reasonable in that Martin O'Neill was then stating that if the claimant continued to refuse to undertake work allocated to him then disciplinary action could ensue. Insofar as the meeting on the 31st July was concerned, the Tribunal accepted that reference was made by Stuart Baird to the conduct policy at that meeting. However, the Tribunal found that this reference was reasonable and was made against a background of the claimant refusing to undertake work allocated to him.
56. On the issue of the meeting of the 31st July 2019, the Tribunal had regard to their Findings that Stuart Baird wished to resolve the outstanding issues with the claimant informally, and that his reference to the grievance procedure in that meeting was consistent with this desire and was made out of concern for the claimant who appeared agitated. In these circumstances the Tribunal concluded that the conduct and content of the meeting of 31st July 2019 did not amount to a breach of the implied term of trust and confidence on the part of the respondents. Neither could it amount to a 'last straw' in circumstances where the Tribunal found that there were no prior breaches of contract on the part of the

respondents and that the respondents' behaviour at the meeting of the 31st July was innocuous.

57. The Tribunal concluded that even if there were any doubts as to the true intentions of the respondents at the meeting on 31st July, the content of Stuart Baird's letter of 31st July 2019 **(392)**, and in particular the assertion that he was keen to meet again and to explore the allegations of bullying and harassment should have removed such concerns.

58. In reaching their conclusions the Tribunal kept in mind the clear evidence of both Martin O'Neill and Stuart Baird that the claimant was a talented analyst whom they wished to retain in the employment of the respondents.

59. Accordingly it is the decision of this Tribunal that the respondents did not breach the express and implied terms of the claimant's contract of employment at any stage of the claimant's employment with them, and therefore the claimant's claim of unfair constructive dismissal is dismissed.

15 **Breach of Contract**

60. The Tribunal finds that the respondents were not in breach of their contract with the claimant by failing to carry out a job evaluation in November 2015. The Tribunal finds that throughout Jacqueline Campbell's maternity leave the claimant carried out tasks commensurate with his Band 5 job description. Accordingly the claimant's claim of breach of contract is dismissed.

25 Employment Judge: Jane Porter
Date of Judgment: 12 November 2020
Entered in register: 16 November 2020
and copied to parties