EMPLOYMENT TRIBUNALS

Claimant: Ms E Farrow

Respondent: LTE Group

Heard at: Manchester (by CVP) **On:**19 & 20 May 2021

Before: Employment Judge Phil Allen (sitting alone)

REPRESENTATION:

Claimant: In person
Respondent: Mr S Chowdhury, solicitor

JUDGMENT

The judgment of the Tribunal is that:

1. The claimant was not dismissed within the meaning given to dismissal by section 95(1)(c) of the Employment Rights Act 1996 (constructive dismissal);

2. The unfair dismissal claim does not succeed and is dismissed.

REASONS

Introduction

1. The claimant was employed by the respondent as a counselling supervisor from 28 April 2016 until her resignation with immediate effect on 5 March 2019. The claimant claimed constructive unfair dismissal.

Claims and Issues

2. The claimant had brought two claims against the respondent and those two claims had a somewhat complicated history. For the purposes of this Judgment, the only claim to be determined was the claimant's constructive unfair dismissal claim. The claimant had brought her first Tribunal claim on 23 November 2018. The claim, of which this constructive unfair dismissal claim was a part, was entered at the Tribunal on 8 May 2019, following ACAS Early Conciliation on 24 to 25 April 2019. The claimant's discrimination claims had been struck out by Employment Judge

Sherratt and the claimant informed me that she was appealing against that decision. The claimant had been required to pay a deposit in order to proceed with her constructive unfair dismissal claim. Having paid that deposit, she was able to proceed with the claim and have it heard and determined.

3. Included in the bundle of documents was a list of issues prepared by the respondent in accordance with case management orders (194-196). That was highlighted to the parties at the start of the hearing as being the list of issues which the Tribunal would consider. The document addressed the issues legally, but not necessarily in practical and clearly understandable terms. The claimant explained to me that she was not able to address whether it was legally correct. She did not object to any part of it.

4. The claimant was not able to point to any specific document which recorded in writing why it was that she said she had no choice but to resign. However, she explained verbally at the start of the hearing that what she was relying upon was: the respondent forcing her into another role; or being pushed into another role (which she went on to explain she believed to have been with no rationale, being a decision which made no sense). Accordingly, that has been treated as the thing which the claimant relied upon as causing her to resign, that is the alleged fundamental or repudiatory breach of contract upon which she relied in pursuing her constructive dismissal claim.

5. At the start of the hearing it was outlined that the liability issues would be determined first. The remedy issues were left to be determined later, only if the claimant succeeded in her claim. However, issues 13(a)(ii), (iii) and (iv) (the chance that the claimant would have been dismissed in any event, contributory fault, and the alleged failure to follow the ACAS code), which were under the heading of remedy in the list of issues, were also outlined as issues which would be determined at the same time as the remedy issues. The parties agreed with that approach

6. The list of issues as they were to be determined, was as follows:

Was the claimant constructively dismissed?

In **Kaur v Leeds Teaching Hospitals NHS Trust** the Court of Appeal listed five questions that it should be sufficient to ask in order to determine whether an employee was constructively dismissed:

1. What was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, her resignation?

2. Has 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 nonetheless a part (applying the approach explained in **Waltham Forest v Omilaju**) of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a repudiatory breach of the implied term of trust and confidence?

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

If the claimant was constructively dismissed, was it nonetheless a fair dismissal?

6. If the claimant has been constructively dismissed, has the respondent shown the reason for dismissal?

7. Is the reason shown a potentially fair reason?

8. Was the dismissal procedurally fair?

9. Was dismissal within the range of reasonable responses?

10. If the decision was procedurally unfair what was the percentage chance of the claimant being fairly dismissed?

11. Did the claimant contribute to the dismissal?

12. If so, to what extent?

Remedy – but agreed to be determined alongside liability issues

13. (a)(ii) Where the dismissal was unfair on procedural grounds, would the claimant have been dismissed in any event and if so, when would this have occurred and should there be a reduction in any award for compensation (**Polkey v AE Dayton Services Ltd**)?

13(a)(iii) Did the claimant's conduct contribute to her dismissal and if so, would there be a reduction in compensation in accordance with sections 123(6) and 122(2) of the Employment Rights Act 1996?

13(a)(iv) Should the claimant, in respect of her unfair dismissal claim, be relying upon any alleged act or omission of the respondent which was not considered as part of the grievance procedure undertaken in 2018 or which occurred after that process had concluded, should there be a 25% reduction in any award of compensation due to the claimant's failure to raise a grievance in respect of these matters before she resigned?

Procedure

7. The claimant represented herself at the hearing. Mr Chowdhury, solicitor, represented the respondent.

8. The hearing was conducted by CVP remote video technology, with both parties and all witnesses attending remotely.

9. The claimant has various disabilities. As a result, on occasion during the hearing, she asked for longer breaks than had initially been proposed. Slightly longer breaks were taken on each occasion.

10. There was some dispute about documents. The respondent had prepared and provided to the Tribunal a paginated bundle of documents which (including witness statements) ran to 633 pages. Some elements of the bundle were explicitly indexed as having been included at the claimant's request even though the respondent did not consider those pages to be relevant. The claimant stated at the start of the hearing that the bundle was not complete and accordingly she provided a limited number of documents by email to the Tribunal on the morning of the first day, which were read. The respondent questioned the veracity of the documents provided, but did not object to me reading the documents provided. At lunchtime on the first day the respondent also provided the claimant's contract of employment, which had not been included in the bundle. I only read the following documents: those referred to in the witness statements; those to which I was explicitly referred during the evidence; and the pages mentioned by the claimant when she provided a list of pages which needed to be read at the start of the first day. Where I refer to a number in brackets in this Judgment, that is a reference to a page number in the bundle.

11. On the morning of the first day I read the witness statements of the claimant and the three witnesses for the respondent, as well as reading the documents referred to in those statements and the documents which the claimant requested be read. It is notable that the claimant's witness statement was rather short and did not provide a particularly detailed account of her evidence about the matters alleged.

12. I first heard evidence from the claimant, who was cross examined by the respondent's representative, before being asked questions by me.

13. Ms Rachael Galston, Senior HR Shared Services Co-ordinator, Mr Michael Sivori, Course Lead for Counselling, and Mr Barry Atkins, Vice Principal, all gave evidence for the respondent. They were each cross examined by the claimant and I asked them questions.

14. Towards the end of the claimant's cross-examination of Mr Sivori, there was a discussion about the need to ensure that the case (or at least the evidence) was heard during the time allocated. At that point and in the light of the questions asked, the claimant was encouraged to conclude her cross-examination of Mr Sivori before lunch time on the second day. When that point was reached and she had finished her questioning of him, the claimant did express the view that she had felt rushed. The claimant was asked what questions she had left to ask and replied only that she did not feel that she had received a full answer to her last question (being a question which related to events after June 2018). In the light of the questions that had been asked, and Mr Sivori's limited involvement in matters after June 2018, I was satisfied that the claimant was provided with an opportunity to ask Mr Sivori all the questions that she needed to (and indeed had done so). It was ultimately possible to hear all the evidence and both parties' submissions in the time allocated.

15. After the evidence was heard, each of the parties was given the opportunity to make submissions. Both parties made submissions orally. Neither party referred to any case law, save for the respondent's representative referring to **Waltham Forest v Omilaju** (in general terms).

16. At the end of the time allocated for hearing there was insufficient time remaining for a decision to be reached and Judgment delivered to the parties.

Accordingly, Judgment was reserved and I therefore provide the Judgment and reasons outlined below.

Facts

17. The Manchester College is a trading name of the respondent. The claimant's duties were undertaken as part of The Manchester College.

18. The claimant worked for the respondent one day per week as a counselling supervisor. It was the respondent's evidence that part of the reason why she was recruited in 2016 was because she was accredited by the British Association for Counselling and Psychotherapy (BACP) and that had been an essential requirement for the role when she was recruited. The claimant provided supervision to those enrolled on the respondent's level 5 counselling course. That course was BACP accredited between October 1999 and August 2015 (and has again been accredited again since 2018). At the time that the claimant was recruited, the respondent was endeavouring to regain accreditation from the BACP. The respondent had faced a significant issue with a particular cohort of students who had been enrolled on the course on the understanding that the course was BACP accredited, but for whom it had ceased to be so accredited by the time the course was completed. This had a notable financial and reputational impact for the respondent.

19. The claimant's contract of employment recorded that her employment commenced on 28 April 2016 and her job title was Counselling Supervisor. Clauses 2.2 to 2.4 of the contract addressed the claimant's duties. In defining the claimant's duties, the contract referred to a job description, but I was not provided with any job description for the claimant's role. Clause 2.3 said "*The College reserves the right to require you to perform such other or additional duties, for the College, as the College may reasonably determine from time to time commensurate with post/grade*". It was not an express requirement of the claimant's contract that she was a member of the BACP, or that she remained a member of it.

20. The claimant was a member of the BACP at the relevant time, but is no longer a member. The claimant emphasised in her evidence that the BACP is not a regulatory supervisory body, nor is membership a requirement of practice. It is a voluntary membership organisation. It is unregulated. A counsellor is able to be a member of a number of other voluntary bodies which also regulate counselling and related services. In her evidence, the claimant referred to an open letter (600) from an organisation called Ayanay Psychological Accreditation (APA) to the therapeutic community, which criticised what was felt to be a growing perception from many employers and organisations that the BACP was a governing body for the therapeutic profession, highlighting that was not in fact correct. The claimant, in her evidence, made clear her view of the BACP and also emphasised that she is now a member of other bodies.

21. The BACP has a monthly journal, Therapy Today. The respondent's evidence was that it was read by its staff and students. In the February 2018 issue, the journal included a Professional Conduct Notice for the claimant (464). It is not necessary for me to reproduce all the details of that notice save to confirm that it: referred to the claimant by name; detailed a complaint made against her; recorded findings, including that some of the allegations had been upheld; and imposed a sanction

made up of two parts, the first being a written submission to be provided within two months, and the second a report to be completed within eight months after the completion of the first part. The claimant was highly critical of the BACP's processes and the outcome. The claimant's evidence was that: she did complete the first part of the sanction; the time for completion of the second part of the sanction was extended; but the second part of the sanction was never completed. The claimant's evidence was that the latter was because she left the BACP. The sanction did not stop the claimant working, nor did it include any explicit limitation upon what she was able to do. There was no part of the sanction itself which inhibited or restricted the claimant from continuing to fulfil her supervisory role or duties for the respondent.

22. Mr Sivori, the departmental team leader for counselling at the time, read the notice in the journal. He was not informed by the claimant. He was concerned that the sanction might have an impact on the course accreditation. He informed the BACP that he had seen the notice, for reasons of candour (and to avoid there being any adverse impact on the accreditation application of not doing so). He also mentioned it at a counselling team meeting on 20 March 2018, when the claimant was not present because she did not work on the day of the meeting. The claimant was, understandably, not happy about Mr Sivori having done so.

23. I was shown the respondent's submission to the BACP for course accreditation and the BACP response. The accreditation process had clearly taken a long time. As Mr Sivori evidenced, there had been a number of things required to achieve the accreditation. The BACP stated that requirements B2.1 and B2.2 had not been met (275), because all course staff were not appropriately qualified and able to demonstrate competence between them to cover all elements of the course. Specifically, the report stated that the condition would not be met if the claimant (personally) and another named employee, continued to see course supervisees. This was repeated as a condition for accreditation (308).

24. Mr Sivori's evidence was that the respondent was aware of this on 23 April 2018 by reference to an internal email (230). The written report was provided on 11 May. In answers to questions, he also referred to a conversation with a member of BACP staff at an earlier conference when he had been informed what the BACP's position would be. The claimant highlighted that her membership of both the BACP and other professional organisations appeared to fulfil the BACP's recorded criteria. Nonetheless, the position taken by the BACP was as I have explained.

25. In an exchange of emails of 10 May 2018 (238 & 240) Mr Sivori was informed by the BACP that because of serious professional concerns about the claimant and another person, they would not regard the course as having met the criteria laid down and would not be able to grant accreditation. Mr Sivori had sought to clarify whether the BACP required the termination of the claimant's employment (for accreditation to be granted) and/or whether it required the respondent to remove all of the claimant's contact with learners. The BACP confirmed that the employment of the claimant on other College courses was only of interest to the BACP if accreditation was sought for the course on which she worked. The email also went on to say that the situation would be reviewed if the claimant met the sanctions imposed.

26. These emails and the BACP report, were matters addressed between the BACP and the respondent. That is, the claimant was neither copied into nor made aware of their content at the time. The claimant in her evidence, and in the course of the hearing, described this as being covert. It was not covert, inasmuch as there was no evidence of any attempt to conceal what was being addressed. It was not, however, a process which the respondent chose to inform the claimant of at the time, nor did the respondent engage the claimant in addressing the BACP's concerns/requests. The respondent could have done so, but did not.

27. Mr Sivori, in his answers to questions, made clear that he did not agree with what the BACP required. In his evidence he also referred to just being focussed on the goal of achieving the accreditation and being dedicated to achieving it. That evidence appears to explain why the respondent accepted the BACP's position and did not genuinely challenge it (I am a little surprised that it did not do so), or engage the claimant in doing so. I accept that, as the BACP was the body from whom the respondent was seeking accreditation, the respondent needed to take the steps the BACP required for the accreditation to be achieved, whatever the merits of the BACP's requirements/decision.

28. One allegation which the claimant put in cross-examination, albeit she did not actually evidence it in her own witness statement, was that Mr Sivori had raised serious concerns with the BACP about the claimant because (and only after) the claimant had raised an informal complaint about him within the respondent. There was some limited evidence before the Tribunal that the claimant had complained that Mr Sivori was not supervising her to the extent required. I do not find that this was why the issues were raised by the BACP or that Mr Sivori set out to raise issues with the BACP of which it was not already aware. I accept Mr Sivori's evidence that he did not raise the issues with the BACP, save that he acknowledged the Professional Conduct Notice as I have explained (when the BACP would in any event have been aware of it). It is clear, and I find, that Mr Sivori's aim was to achieve BACP accreditation for the level 5 counselling course and what he did was intended to further that objective. There was no genuine evidence before me which evidenced Mr Sivori himself raising issues (save as I have already described) or which supported the claimant's allegation that the reason why the issue arose was because Mr Sivori wished to retaliate for a complaint raised by the claimant about his supervision of her. The decision to impose the requirement on accreditation regarding the claimant, was the BACP's and was not as a result of Mr Sivori's decisions or actions.

29. On 24 May 2018 the claimant was telephoned while she was away on holiday. The claimant responded by email (310) as she thought the calls were about approval of leave. An employee of the respondent emailed the claimant in response on the same day, in which she: explained that Mr Atkins had invited the claimant to a meeting a couple of weeks previously; addressed the importance of the meeting and the difficulties in meeting due to annual leave; and suggested that Mr Atkins could meet with the claimant the following Thursday, that is 31 May. The meeting did take place on 31 May as proposed, albeit without any formal arrangements for a time and place having been made. The claimant was critical of the way in which the meeting took place and how it was arranged. I can understand why she believed that more formal arrangements would have been beneficial (as indeed would a meeting earlier in the process), but in the light of the fact that she worked only one day each week,

had not responded to a meeting request, had been on leave on 24 May and was again due to be on leave after 31 May, I accept that it was not inappropriate or unreasonable for the meeting to occur in the way that it did.

30. The claimant was informed about what the BACP had required, in the meeting with Mr Atkins on 31 May 2018. This was a relatively brief meeting on the last day of term. The claimant and Mr Atkins' accounts of the meeting differed. There was no dispute that it was proposed to the claimant that she should stop supervising those on the level 5 counselling course for reasons relating to the BACP, and she was offered an alternative role as Placement Co-ordinator. The extent to which and how clearly this was explained, was the area of dispute. The claimant's evidence was that Mr Atkins said he did not understand the BACP issue and suggested that she could slide back into the role when the accreditation had been achieved. Mr Atkins' evidence was that he explained the process and did not say what the claimant alleged, albeit there was an expectation that the change of role would be temporary as the claimant would be able to return to supervising the level 5 counselling course once she had completed the sanctions imposed by the BACP.

31. There were no notes of the meeting available to the Tribunal. Mr Atkins' witness statement provided a brief account and explained that the meeting was no more than ten or fifteen minutes. The claimant's witness statement provided a very limited account of the meeting. It did state that the meeting took place in a corridor. The claimant accepted during the hearing that was not the case. The meeting took place in her supervision room. Mr Atkins evidence was clear and credible and his statement provided a more detailed account of what occurred. As a result, and in the light of the fact that some of the detail from the claimant's statement was incorrect (as I have described and as accepted), where there is any dispute between Mr Atkins' evidence and that of the claimant regarding what was said in this meeting and its duration, I accept Mr Atkins' evidence as being accurate. However, as Mr Atkins' evidence was that he could not recall whether the claimant was told exactly when she would cease undertaking supervision, I accept the claimant's evidence that she was not (in this meeting) given a date when supervision would cease.

32. The claimant said on 31 May that she would think about the alternative role. She did not agree to the change in role. She was not given a management instruction to perform other specific duties. There was no dispute that both the claimant and Mr Atkins intended to meet again following the claimant's return from leave, to discuss the proposed alternative role and its suitability for the claimant. In the light of subsequent events and, in particular, the claimant's ill health absence, that meeting never took place.

33. As the subsequent meeting never took place, there was no genuine discussion with the claimant about the role of Placement Co-ordinator, nor was there any discussion about the reasons she had for not wishing to take up the role. The previous post-holder had been a supervisor who was retiring. Mr Sivori's evidence was that he ultimately took on the responsibilities himself. However, for both the previous co-ordinator and Mr Sivori, this was a part of their responsibilities, undertaken alongside other teaching and/or supervision. For the claimant, what was being proposed was a move away entirely from a clinical or educational role, into a role which was more administrative in nature and neither clinical nor genuinely educational. There was no dispute between the parties that it was a significant role

which was important to the students and which somebody needed to undertake. Alongside not wishing to accept a different role of this nature, the claimant also said she did not wish to undertake the role because of her disabilities, which she clarified to mean that: she had difficulties with remaining in one place for the length of time required for the administrative tasks; had limited mobility which inhibited her ability to visit placements; and had dyslexia which impacted upon her ability to undertake a role which was entirely about paperwork, documentation and record-keeping. For these entirely understandable reasons, the claimant did not wish to undertake the role. She never agreed to do it and, because there was never a follow up meeting to the discussion on 31 May, there was never any exploration with the claimant about alternatives or why she did not wish to undertake the role. She was never actually assigned any duties as such.

34. Following the 31 May meeting, the claimant was on pre-booked annual leave during which she travelled abroad. She was not due to work on 14 June 2018, which was the last potential working day before she was to cease supervision. The claimant was not therefore able to hand over her supervisees or speak to them about the changes. Mr Sivori's evidence was that she was given two weeks notice of the cessation of her involvement in the course, which in his view provided sufficient time to ensure that supervisees were not adversely affected and that the cessation of supervision did not adversely impact upon the claimant herself. In the light of the claimant's annual leave, the limited amount of time she worked each week, and the fact that she was not told of the date in her meeting on 31 May, the claimant was not given time to ensure a smooth transition of students and responsibilities and I do not accept Mr Sivori's evidence in this respect.

35. On 14 June 2018, while the claimant was away on leave, she was emailed by Mr Sivori (320) and provided written "confirmation" that from Friday 15th June she was not to work with students for supervision. There were subsequent emails exchanged about who had been informed about this. The claimant's evidence was that a number of students contacted her as they had attended at the time of appointments which had not been cancelled.

36. On 27 June (325) the claimant emailed Mr Sivori and a colleague to say that she would not be attending work on 28 June as she felt too ill. She said she would be submitting a fit note. Mr Sivori responded in an email on 28 June (323) and addressed issues about contact with students. He also reiterated that the claimant was not to hold supervision sessions with students.

37. On 28 June 2018 the claimant commenced a period of leave on ill health grounds, from which she never actually returned. There was limited evidence available, but the claimant accepted that she continued to receive pay for a period during her sickness absence. The claimant provided fit notes to the respondent to cover her absence.

38. On 19 July 2018 the claimant raised a grievance (331). A grievance hearing took place on 16 August 2018. An outcome was sent in a letter of 26 September 2018 (374). The decision was made by Ms Galston. The claimant's grievance related to two issues: the BACP process and her change in role; and Mr Silvari's management of, and communication with, the claimant. The element of the grievance about the directives from the respondent regarding the BACP and not

following process, was not upheld. The grievance that there had been poor management of the claimant and communication with her, by Mr Silvari, was upheld. The grievance outcome recommended that the claimant and Mr Silvari should enter into mediation to reach an agreement to work together effectively and build on the identified fractured working relationship. The claimant made clear during the Tribunal hearing that she had no issue at all with the outcome regarding Mr Silvari and the mediation recommendation. The recommendation was never in practice actioned, as the claimant did not return to work due to ill health and her subsequent resignation.

39. The claimant appealed against the outcome of the grievance on 3 October 2018. The claimant did not attend the appeal hearing, but it was heard on 25 October 2018. An appeal outcome was provided in a letter of 16 November 2018 (398). It was considered by Ms Connor, Head of Facilities, from whom I did not hear evidence. The appeal outcome agreed with the findings and recommendations of Ms Galston. The decision letter made clear that the outcome of the grievance appeal was final and there was no further right of appeal under the respondent's grievance procedure. Accordingly, the respondent's grievance procedure (including the appeal) concluded on 16 November 2018.

40. During her absence, the respondent did make contact with the claimant and asked her to attend meetings to discuss her ill health and role. The claimant's evidence was that she was unable to do so. This was because of her health, but also a number of life events which she explained in evidence (including that the claimant had needed to relocate some distance from the respondent's premises). One other reason given in evidence by the claimant was that meetings were arranged at too short notice, however for at least one of the meetings arranged she was given two weeks notice. Letters were sent to the claimant which explained why a meeting was being arranged and which invited the claimant to such a meeting with Mr Atkins. These included letters on: 17 January 2019 (439); 30 January (449); 14 February (454); 21 February (459); and (in an email) 5 March (477). It is not necessary for me to reproduce the content of those letters, as the claimant did not raise any complaint about them or address them at all in her witness statement. The content was entirely appropriate. Mr Atkins' evidence, which I accept, was that had a meeting been arranged he would have discussed with the claimant: the placement co-ordinator role; her disabilities; and what other options or opportunities there were within the College. The letters emphasised to the claimant that she remained employed (477).

41. Shortly before the claimant's resignation, Mr Atkins did exchange letters with the BACP (461 and 462). His letter to the BACP of 25 February 2019 sought information about whether the claimant had met the sanctions imposed and, if she had, whether she could now return to supervising attendees on the BACP accredited level 5 course. He also asked about the timescale if she had not yet met the requirements of the BACP sanctions. The BACP response dated 1 March 2019 identified where Mr Atkins could see the information about whether the claimant had met the sanctions. As the claimant quite rightly identified in the course of the hearing, this particular letter from the BACP appeared to be written in terms which demonstrated a greater concern about data protection issues and confidentiality than the earlier BACP correspondence which was provided to the Tribunal.

42. The claimant entered an Employment Tribunal claim on 23 November 2018. There was a preliminary hearing (case management) in that case heard by

Employment Judge Robinson conducted in Manchester Employment Tribunal on 4 March 2019 (39). The hearing was attended by the claimant. The case management order recorded that the claimant had stated that she no intention of going back to the College to work. It also stated (40) that Employment Judge Robinson explained what a constructive unfair dismissal claim was and that he could not advise the claimant to resign, as that was a matter for her. From the evidence it appeared that this was the first time that the claimant became aware that she needed to resign in order to be able to claim constructive dismissal.

43. The claimant resigned in an email on 5 March 2019, with immediate effect (481). She stated in that email she had resigned because she could not return to the current situation. She said that the respondent had been given every opportunity to resolve issues, but this had not occurred. She referred to the fact that she believed that the respondent had stopped her working and outlined that she believed the alternative role was not appropriate for a clinician or someone with her longstanding disabilities. The resignation email went on to address various issues, including the claimant's criticism of the BACP accreditation process and the change in her role.

44. The claimant's witness statement did not expressly explain what triggered her resignation. When asked about this at the start of the hearing, she made it clear that she resigned because the respondent forced her into another role or pushed her into another role (which she went on to explain she believed to have been with no rationale and was a decision which made no sense). In answer to a question about why she resigned in March 2019 when the role was changed in June 2018, the claimant referred to being absent with stress, and also that she was hopeful that these things would be resolved, but they weren't. When asked why she did not resign after the grievance appeal outcome in November 2018, the claimant said that, at the end of the day, she still hoped the College would see that what it had done was inappropriate, whilst also referring to her ill health and PTSD and explaining that, because her life was in turmoil, it was very low on her list of priorities. She emphasised that she always remained hopeful that the respondent would change its decision. When asked why she did not meet with Mr Atkins before she resigned, the claimant explained that, in her view, trust had broken down.

The Law

45. The unfair dismissal claim was brought under Part X of the Employment Rights Act 1996.

46. An unfair dismissal claim can be pursued only if the employee has been dismissed as defined by Section 95. Section 95(1)(c) provides that an employee is dismissed by her 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."**

47. The principles behind such a constructive dismissal were set out by the Court of Appeal in **Western Excavating (ECC) Limited v Sharp [1978] ICR 221**. The statutory language incorporates the law of contract, which means that the employee

is entitled to treat herself as constructively dismissed only 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.

48. Lord Denning said in that case (at 226B):

> "**the conduct must … be sufficiently serious to entitle him to leave at once. Moreover, he must make up his mind soon after the conduct of which he complains: for, if he continues for any length of time without leaving, he will lose his right to treat himself as discharged. He will be regarded to have elected to affirm the contract.**"

49. One term of the contract is the implied term of trust and confidence. In **Malik and Mahmud v Bank of Credit and Commerce International SA [1997] ICR 606** the House of Lords considered the scope of that implied term and the Court approved a formulation which imposed an obligation that the employer shall not:

> **"…without reasonable and proper cause, conduct itself in a manner calculated [or] likely to destroy or seriously damage the relationship of confidence and trust between employer and employee."**

50. It is also apparent from the decision of the House of Lords that the test is an objective one in which the subjective perception of the employee can be relevant but is not determinative. The objective test also means that the intention or motive of the employer is not determinative. An employer with good intentions can still commit a repudiatory breach of contract. Not every action by an employer which can properly give rise to complaint by an employee amounts to a breach of trust and confidence. The formulation approved in **Malik** recognises that the conduct must be likely to destroy or seriously damage the relationship of confidence and trust.

51. In some cases, the breach of trust and confidence may be established by a succession of events culminating in a "last straw" which triggers the resignation. In such cases the decision of the Court of Appeal in **London Borough of Waltham Forest v Omilaju [2005] ICR 481** demonstrates that the last straw itself need not be a repudiatory breach as long as it adds something to what has gone before, so that when viewed cumulatively a repudiatory breach of contract is established. However, the last straw cannot be an entirely innocuous act or be something which is utterly trivial.

52. If an individual delays too long in resigning, they will have affirmed the contract and waived the breach. In **W. E. Cox Toner (International) Ltd v Crook [1981] ICR 823** Browne-Wilkinson LJ in his Judgment emphasised that continued performance of the employment contract is evidence of affirmation. He summarised the position by saying:

> "**there must be some limit to the length of time during which an employee can continue to be employed and receive his salary at**

> **the same time as keeping open his right to say that the employer has repudiated the contract under which he is being paid**"

53. The list of issues identified the authority of **Kaur v Leeds Teaching Hospitals NHS Trust [2019] ICR 1**. In **Kaur** Underhill LJ said:

> "**In the normal case where an employee claims to have been constructively dismissed it is sufficient for a tribunal to ask itself the following questions:**
>
> **(1) What was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, his or her resignation?**
>
> **(2) Has he or she affirmed the contract since that act?**
>
> **(3) If not, was that act (or omission) by itself a repudiatory breach of contract?**
>
> **(4) If not, was it nevertheless a part (applying the approach explained in Omilaju) of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a (repudiatory) breach of the Malik term? (If it was, there is no need for any separate consideration of a possible previous affirmation, for the reasons given…)**
>
> (5) **Did the employee resign in response (or partly in response) to that breach?**"

54. **Kaur** is also authority for the fact that an employee does not become unable to accept a repudiation because she chooses to seek a resolution by means of a grievance procedure before resigning. Whether or not an employee has waived or accepted a fundamental or repudiatory breach of contract, depends upon all the facts of the case. However, an employee is able to pursue an internal grievance and to endeavour to resolve matters through an employer's internal procedures, without necessarily waiving or accepting a breach whilst doing so.

55. The respondent also relied upon the contended fair reasons for dismissal of capability and/or some other substantial reason. The respondent bears the burden of proving, on a balance of probabilities, that the reason for the dismissal was capability or SOSR. If the respondent does persuade the Tribunal that it held the genuine belief and that it did dismiss the claimant for that reason, the dismissal is only potentially fair. The Tribunal must then go on and consider the general reasonableness of the dismissal under section 98(4) of the Employment Rights Act 1996.

56. Section 98(3)(a) of the Employment Rights Act 1996 provides that ""*capability" in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality".*

57. Section 98(1)(b) provides that the employer must show the dismissal is for "*some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held*".

58. The correct starting point in relation to the question of whether the dismissal is fair in the circumstances is section 98(4) of the Employment Rights Act 1996, which provides as follows:

> *"the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –*
>
> *(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and*
>
> *(b) shall be determined in accordance with equity and the substantial merits of the case."*

59. It is not the Tribunal's function to determine whether or not the Tribunal itself would have dismissed the claimant.

60. The Employment Tribunal is also required to, and did, take into account the ACAS Code of Practice on Disciplinary and Grievance Procedures.

61. In **Polkey** the House of Lords held that the fact that the employer can show that the claimant would have been dismissed anyway (even if a fair procedure had been adopted) does not make fair an otherwise unfair dismissal. However, such evidence (if accepted by the Tribunal) *may* be taken into account when assessing compensation and can have a severely limiting effect on the compensatory award. If the evidence shows that the employee may have been dismissed properly in any event, if a proper procedure had been carried out, the Tribunal should normally make a percentage assessment of the likelihood and apply that when assessing the compensation. In applying a **Polkey** reduction the Tribunal may have to speculate on uncertainties to a significant degree. **Hill v Governing Body of Great Tey Primary School [2013] IRLR 274** is authority for how **Polkey** should be applied and that the Tribunal must make the decision based upon the actions of the employer who is before the Tribunal, on the assumption that the employer would this time have acted fairly though it did not do so beforehand. The onus is on the respondent to adduce evidence to show that the dismissal would (or might) have occurred in any event. However, the Tribunal must have regard to all the evidence when making that assessment, including any evidence from the claimant.

62. Section 122(2) of the Employment Rights Act 1996 provides that the basic award shall be reduced where the conduct of the employee before dismissal was such that it would be just and equitable to do so. It is important to note that a key part of the test is determining if it is just and equitable to do so. Section 123(6) of the Employment Rights Act 1996 provides that if the Tribunal finds that the claimant has, by any action, to any extent caused or contributed to her dismissal, it shall reduce the amount of the compensatory award by such amount as it considers just and equitable having regard to that finding. This test differs from the test which applies to the basic award. The deduction for contributory fault can be made only in respect of conduct that persisted during the employment and which caused or contributed to the employer's decision to dismiss. There are three factors required to be satisfied for the Tribunal to find contributory conduct: the conduct must be culpable or

blameworthy; it must have cause or contributed to the dismissal; and it must be just and equitable to reduce the award by the proportion specified (**Nelson v BBC (No 2) [1979] IRLR 346**).

Conclusions – applying the Law to the Facts

Other issues

63. It is important to highlight that the issues which I have been able to determine, are limited to: those things which fall within the jurisdiction of the Employment Tribunal; and the issues identified in the claim which I have heard. A constructive dismissal claim is a claim brought against the claimant's former employer. I have determined only claims brought against this respondent (LTE Group).

64. I have not determined any complaints which the claimant has against the BACP. I have not heard evidence from anyone from the BACP. Much of the claimant's questioning during the hearing was directed at demonstrating her view of the BACP's accreditation requirements as imposed on the respondent. She believed those requirements were inconsistent with the sanction applied, illogical, and, broadly speaking, unfair. It was not my role to determine the claimant's complaints about the BACP's accreditation decisions, nor did I need to do so to decide the claim which I have heard. It may be that those issues are raised by the claimant in other proceedings. I have not determined any claims against the BACP.

65. However, there are two important things which relate to the BACP accreditation decision, which it is appropriate for me to address in this Judgment:

1. I can fully understand the claimant's grievance with the actions of the BACP in relation to the accreditation of the respondent's level 5 counselling course. The BACP had imposed a sanction on the claimant which did not restrict her practice. I can entirely understand why the claimant believed that it was inequitable for the BACP to impose a requirement on the respondent that, if it wished to have its course accredited by the BACP, the claimant must not have a supervisory role with anyone on the course. I agree that the requirement imposed by the BACP on the respondent if it wished to receive BACP accreditation, appeared (based on the evidence which I heard) not to be consistent with the sanction applied to the claimant and I can see why she believed it effectively amounted to a further sanction being imposed on her by the BACP without fair process; and

2. The evidence which I have seen proved that the BACP made very clear to the respondent that, for the course to receive BACP accreditation, the claimant must not be involved in supervision of those undertaking the course. That was a requirement imposed by the BACP, which the respondent needed to meet if it wished to obtain BACP accreditation.

66. The claimant referred in her submissions and during the hearing to the correspondence between the respondent and the BACP amounting to a breach of data protection obligations. I have no jurisdiction to determine issues relating to data

protection or breach of any data protection legislation (including GDPR). The claimant did not identify any specific breach. Inasmuch as it is relevant to the constructive dismissal claim, I do not find that the correspondence entered into by the respondent with the BACP seeking accreditation and naming the claimant, was necessarily a breach of the respondent's data protection obligations (as processing was necessary for the respondent's legitimate interests and as the BACP sanction had already been published), nor was it (of itself) a fundamental or repudiatory breach of the claimant's employment contract, even if it was a breach at all.

Issue 1

67. The issues which I am required to determine are set out at paragraph 6 above. Issues 1-5, from the list of issues, follow from the Judgment in **Kaur v Leeds Teaching Hospitals NHS Trust**.

68. In respect of issue 1, the only act which the claimant relied upon as causing or triggering her resignation was the respondent's decision to move her out of the role she had previously fulfilled, that is counselling supervisor (related to the level 5 counselling course).

Issue 2 – affirming the breach (delay before resigning)

69. For issue 2, the question is whether the claimant had affirmed the contract after the act identified at issue 1? The claimant was made aware that she was being asked to move out of her role when Mr Atkins met with her on 31 May 2018. She was aware that she had been moved out of her role when she received the email of 14 June 2018 (320). The claimant did not resign until 5 March 2019. The question is whether, by remaining employed during that period, the claimant affirmed her contract (that is did she delay too long before resigning to be able to rely upon that breach)?

70. Whilst the claimant was absent on ill health grounds from 28 June 2018, she received pay for some of the period and provided fit notes. She corresponded with the respondent about meetings. She was not fit enough to work, but was fit enough to engage with the respondent and to make decisions about things such as remaining in employment and bringing a Tribunal claim. As recorded at paragraph 44, the claimant's evidence was that she was hopeful that things would be resolved and that the respondent would change its decision. That evidence demonstrated that remaining in employment was a conscious decision from the claimant, albeit one based upon an understandable hope that matters would be resolved in the way the claimant wanted without her needing to resign. The claimant delayed resigning for eight and a half months from the date when she knew she was being moved out of the counselling supervisor role (14 June 2018).

71. The delay was partly explained by the claimant with reference to her ill health and personal circumstances. However, her evidence was clear that she made the decision to resign when she did, and she had chosen not to do so earlier. The claimant was able, and did, enter an Employment Tribunal claim on 23 November 2018, demonstrating that whilst the claimant was not well at the time and was facing a number of life challenges (as she explained during the hearing), she was

nonetheless able to make important decisions and would have been able to resign earlier had she decided to do so.

72. The contention that the claimant did not affirm the contract, despite the lengthy delay in resigning between breach and resignation, would have been far stronger had the claimant resigned during the grievance process or shortly after it had concluded. The grievance, in part, was the claimant raising with the respondent her dissatisfaction with the decision made to take her role away. It was her providing the respondent with an opportunity to resolve that issue, utilising its own processes for doing so. This was also consistent with the claimant's evidence that she continued to hope that the respondent would change its approach. However, the grievance process including the grievance appeal, concluded on 16 November 2018. There was a further delay of three and a half months before the claimant resigned. Whilst it may have been the case that the claimant did not waive the breach by remaining employed during the grievance process (even though that was a long period of time), nonetheless the further three and a half month period post-grievance, was significant.

73. I have cited from what was said in the cases of **Western Excavating (ECC) Limited v Sharp** and **W. E. Cox Toner (International) Ltd v Crook** (see paragraphs 48 and 52 above) about affirmation and delay in resigning. By continuing in employment for over eight months, I find that the claimant: continued for a length of time without leaving such that she was to be regarded as having elected to affirm the contract and lost her right to treat herself as discharged from it; and remained employed beyond the limit to the length of time during which she could continue to be employed and keep open her right to say that the respondent had repudiated the contract under which she was employed. She had therefore affirmed the contract by remaining employed. Even if the claimant had not affirmed the contract by 16 November 2018 as a result of the ongoing grievance procedure (including appeal), by remaining in employment for a further three and a half months after that date (in the context of the breach having occurred in June 2018) the claimant in any event affirmed the contract by remaining employed. I find that she waived the breach. The delay was not a reasonable one. On the facts of this case, I find that the delay of eight months and a half before resigning (and three and a half months from the end of the grievance appeal) did constitute an affirmation of the contract.

The other constructive dismissal issues (3-5)

74. The fact that I have found that the claimant affirmed the contract and remained employed too long to be able to rely upon the respondent removing her from her role in 2018 as the basis for her constructive dismissal claim, means that I do not have to go on to decide whether that breach was fundamental/repudiatory (issue 3). Nevertheless, as I have heard evidence upon it and as it was a central part of the claimant's claim, I will provide my decision.

75. The claimant was employed as a counselling supervisor. On 31 May 2018 she was informed that she would need to stop being a counselling supervisor and an alternative role was suggested. On 14 June 2018, before that alternative role was further discussed or explored, the claimant was told that she must stop being a counselling supervisor and must cease to undertake any supervision. At the point she was instructed to do so, she was on annual leave. That is, she was told to stop

undertaking the duties for which she was employed, and no alternative role had been fully explored or agreed with her.

76. In those circumstances, I do find that requiring someone employed as a counselling supervisor to cease undertaking any supervision, was a fundamental (or repudiatory) breach of contract. The claimant's contract stated that she was employed to undertake that role. Taking that role away was a fundamental breach. In any event, telling the claimant to cease undertaking the supervision for which she was employed was a fundamental breach of the duty of trust and confidence, being an instruction which was likely to destroy or seriously damage the relationship of trust and confidence. This unilateral decision about the entirety of the claimant's duties was such a breach in any event, but in circumstances where the only discussion with the claimant about alternatives had been the short meeting with Mr Atkins, I find that requiring her to cease undertaking her role was a fundamental breach by the respondent of the duty of trust and confidence.

77. I would add that I fully understand the respondent's reasons for making the decision. The decision was made to ensure that the level 5 course received BACP accreditation, in the light of the clear instruction from the BACP about what was required to achieve that accreditation. I also accept that BACP accreditation of the course was important to the respondent. However, instructing the claimant to cease undertaking all of the duties for which she was employed as a clinical supervisor was nonetheless a fundamental breach of contract, particularly in circumstances and at a time when the claimant had not agreed to an alternative role.

78. I accept that the respondent did (at least to an extent) endeavour to identify other work for the claimant to do. The offer of the role of Placement Supervisor was well intentioned and might have averted the issues, if the claimant had been happy to accept the role. The claimant did not wish to undertake the role, which she perceived to be purely administrative in nature and involved no clinical practice or supervision. I accept that the role was an important one for the respondent and its students. The claimant had perfectly appropriate and reasonable reasons for not wishing to fulfil an entirely non-supervisory (or non-clinical) role, particularly in the light of her disabilities and the fact that they meant she had particular difficulty with a role of this kind. Those issues were, however, never genuinely explored with the claimant, as that was intended to happen at the next meeting after 31 May (which never took place). Genuine consideration of what was required in the potential alternative role, and the claimant's reasons for rejecting it, had not been discussed at the time that she was told to cease clinical supervision. The respondent did not place significant emphasis on clause 2.3 of the contract (see paragraph 19), but, in any event, I find that the position on 14 June 2018 was not that the respondent had required the claimant to perform other duties commensurate with her post and grade. The discussions about the alternative role had not reached that point. What occurred on that date was simply that the claimant was required to cease undertaking clinical supervision (that is the very thing she was employed to do), and that instruction was a fundamental (or repudiatory) breach of her contract and/or a breach of the duty of trust and confidence.

79. There was no course of conduct comprising several acts to be considered (issue 4). The claimant did not allege there was. The claimant had no particular issue with the grievance process or its outcome. There was no further breach or last straw

relied upon in relation to the absence management of the claimant or the requests to meet with her in 2019. The reason for the claimant's resignation was her removal from her role, something which was decided in June 2018.There was therefore no further breach or last straw to be considered.

80. I do find that the claimant did resign in response to the fundamental breach relied upon (issue 5). Whilst the claimant delayed a long time before resigning, she still resigned from employment for the reason that she gave, that is because she had been removed from her role. The respondent submitted that the reason for resignation was the claimant's discovery that she needed to resign in order to pursue a constructive dismissal claim (and not the change in her role). It is correct that she resigned partly because she became aware that she could only pursue a constructive dismissal claim if she was no longer employed, that was clear from the timing of the resignation occurring on the day after the need to resign to claim constructive dismissal was explained to her by an Employment Judge. However, that does not alter the fact that the underlying and real reason for her resignation was the fact that she had been removed from her role.

The fairness of the constructive dismissal (issues 6-9)

81. The respondent contended that the dismissal was fair, even if the claimant had been constructively dismissed, relying upon both capability and some other substantial reason (issues 6-9). As I have found that the claimant was not constructively dismissed, this issue does not impact upon the outcome of the claimant's claim. It is also fair to say that the respondent's primary argument was that the claimant had not been constructively dismissed at all. As I heard argument on the fairness of the constructive dismissal I will however record my findings on what was contended.

82. One difficulty in determining this issue, is the timing of the alleged fundamental breach of contract. Whilst the arguments put forward by the respondent about the potential fairness of the contractive dismissal focussed upon the time of the claimant's resignation (in March 2019), in practice if the claimant was constructively dismissed as alleged, that occurred in May and June 2018. The reason for the constructive dismissal and the fairness of it therefore could only be appropriately considered as at the time when the respondent took the action which resulted in the termination of the claimant's contract.

83. The respondent did not remove the claimant from her role due to capability. There was no evidence that the reason she was removed from her duties was because she was not capable of fulfilling the role. Even considering capability as at 5 March 2019, whilst it might ultimately have been possible that the claimant could fairly have been dismissed by reason of capability on the basis that she was not fit to return to work had a fair procedure subsequently been followed and exhausted, the respondent had not reached that point as at the date of resignation. The respondent had not determined that the claimant was incapable of undertaking the role, as for example evidenced by Mr Atkins exchange of correspondence with the BACP (see paragraph 41). That was not genuinely the reason for dismissal. In any event a fair procedure had not been undertaken which would have enabled a capability dismissal to be fair in all the circumstances of the case, at the point that the claimant resigned. That is why Mr Atkins had written to the claimant inviting her to a meeting, because

there were still further matters to be discussed when the claimant was able to attend such a meeting, before a decision could be fairly reached.

84. For some other substantial reason, there was simply no evidence given by any of the respondent's witnesses that they had or would have dismissed the claimant for that reason. The respondent's representative submitted that the reason existed in March 2019, but the reality was that the moment when the respondent removed the claimant from her role was May or June 2018, and at that time the decision reached was not to dismiss her but to try to identify some other role for her. There was no evidence that there was a decision to dismiss the claimant because of the BACP's requirements. Indeed, Mr Atkins' clear evidence was that the respondent decided not to dismiss the claimant because of the BACP's accreditation requirements, the decision was to keep her in employment. Whilst the decision to remove the claimant from her role may have been due to third party pressure, the respondent did not contend that this made the dismissal fair, nor would I have find that it did so in the circumstances for the reasons which I have explained.

85. Accordingly, I do not find that had the claimant been constructively dismissed on 5 March 2019, the dismissal would have been fair.

Would the claimant have been dismissed in any event – Polkey (issues 10 and 13(ii))

86. With regard to issues 10 and 13(ii), there is no doubt that by the time of the claimant's resignation there was a strong possibility that the claimant would otherwise in any event have been dismissed by reason of capability (that is her health). Her evidence to the Tribunal was that she was unable at the time to return to work. She had been absent on ill health grounds for over eight months and there was no positive prognosis for a return. The claimant did not feel able to meet with the respondent. Had it been necessary to do so, I would have decided that a significant reduction to the compensatory award would have needed to be made, to reflect the strong possibility that the claimant would in any event have been dismissed on capability (health) grounds (**Polkey**). I believe that the appropriate reduction would have been 80%. However, as I have decided that the claimant was not constructively dismissed, this does not in fact apply.

Contributory fault (issues 11, 12 and 13(iii))

87. The respondent also contended that any award should be reduced for contributory fault (issues 11, 12 and 13(iii)). Based upon the submission made, the contributory fault was contended to arise from the claimant's non-engagement with the respondent and the offers of meetings in 2019. This alleged non-engagement was not genuinely culpable or blameworthy conduct. It did not cause or contribute to the dismissal as it did not cause or contribute to the alleged fundamental breach relied upon. It would not be just and equitable to reduce any award. It was not submitted that the matters which led to the BACP sanction were themselves contributory conduct.

Failure to comply with the ACAS code/raise a grievance (issue 13(iv))

88. In practice this issue did not need to be determined. Issue 13(iv) in the list of issues clearly records this issue as only applying if any alleged act or omission on

the part of the respondent which was relied upon was not considered as part of the grievance procedure undertaken in 2018. The issue upon which the claimant relied as constituting a fundamental breach was raised as part of that grievance. No subsequent issues were relied upon. There was no failure to follow the ACAS code, as the claimant did raise a grievance which included within it the matters which led her to resign.

Summary

89. For the reasons explained above, I do find that the respondent fundamentally breached the claimant's contract of employment in June 2018 and the claimant did resign in response to that breach. Any such dismissal would not have been fair. However, as the claimant waited eight and a half months from the breach before resigning and three and a half months after the end of the grievance process (including the appeal), she waived the breach and affirmed the contract – that is she delayed too long in resigning and therefore lost the right to be able to rely upon that breach to be able to claim constructive dismissal.

Employment Judge Phil Allen

28 May 2021

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON

2 June 2021

FOR THE TRIBUNAL OFFICE