EMPLOYMENT TRIBUNALS

Claimant:	Mr Robert Elliott
Respondent:	Slough Children's Services Trust
Heard at:	Reading **On:** 11 May 2021
Before:	Employment Judge Gumbiti-Zimuto

Appearances
For the Claimant: In Person
For the Respondent: Ms L Veale, counsel

COVID-19 Statement on behalf of Sir Keith Lindblom, Senior President of Tribunals

"This has been a remote / paper hearing on the papers which has been consented to / not objected to by the parties. The form of remote hearing was [insert the code and description from the list above]. A face to face hearing was not held because [insert e.g. it was not practicable and no-one requested the same or it was not practicable and all issues could be determined in a remote hearing / on paper]. The documents that I was referred to are in a bundle of [x] pages, the contents of which I have recorded. The order made is described at the end of these reasons. [The parties said this about the process: [add]]"

RECORD OF A PRELIMINARY HEARING

JUDGMENT

1. The claimant's complaints about detriment for making protected disclosures pursuant to s.47B Employment Rights Act 1996 ('ERA'); automatically unfair constructive dismissal for making protected disclosures pursuant to s.103A ERA; automatically unfair constructive dismissal for a reason relating to time off for dependents pursuant to s.99 ERA; failure to deal with the Claimant's application for flexible working in accordance with s.80G(1) ERA pursuant to s.80H ERA; detriment for making a flexible working request under s.80F ERA pursuant to s.47E(1)(a) ERA; automatically unfair constructive dismissal for making a flexible

working application under s.80F ERA pursuant to s.104C ERA; and wrongful dismissal: failure to pay notice pay have no reasonable prospect of success and are dismissed.

2. The final hearing in the case will be to consider with the Claimant's complaints about detriment for a reason relating to time of for dependents s.47C ERA limited to the allegation concerning of detriment (a).

3. The final hearing will also consider the claimant's complaints direct discrimination on the ground of sex pursuant to s.13 Equality Act 2020; failure to pay untaken holiday under Regulation 14 of the Working Time Regulations 1998 ('WTR'); and unauthorised deductions from wages pursuant to s.13 ERA.

REASONS

1. The Claimant has brought claims against the Respondent for: Detriment for making protected disclosures - s.47B Employment Rights Act 1996 ('ERA'); Automatically unfair constructive dismissal for making protected disclosures - s.103A ERA; Detriment for a reason relating to time off for dependents - s.47C ERA; Automatically unfair constructive dismissal for a reason relating to time off for dependents - s.99 ERA; Failure to deal with the Claimant's application for flexible working in accordance with s.80G(1) ERA - s.80H ERA; Detriment for making a flexible working ('FW') request under s.80F ERA - s.47E(1)(a) ERA; Automatically unfair constructive dismissal for making a FW application under s.80F ERA - s.104C ERA; Wrongful dismissal: failure to pay notice pay; Direct discrimination on the ground of sex - s.13 Equality Act 2020; Failure to pay untaken holiday under Regulation 14 of the Working Time Regulations 1998 ('WTR'); and Unauthorised deductions from wages – s.13 ERA.

2. The Respondent seeks to strike all but the complaints of sex discrimination, failure to pay for untaken holiday under Regulation 14 and deductions from wages. In the alternative the Respondent asks that I make a deposit order pursuant to Rule 39.

3. The Respondent's application was made based on the the grounds of claim, the Claimant's answers to questions, further information, and the Claimant's witness statement.

Detriments

4. The EHRC Employment Code provides that 'Generally, a detriment is anything which the individual concerned might reasonably consider changed their position for the worse or put them at a disadvantage. This could include being rejected for promotion, denied an opportunity to represent the organisation at external events, excluded from opportunities to train, or overlooked in the allocation of discretionary bonuses or performance-related awards… A detriment might also include a threat made to the complainant which they take seriously and it is reasonable for them to take it seriously. There is no need to demonstrate physical or economic consequences. However, an unjustified

sense of grievance alone would not be enough to establish detriment'.[1] A detriment can encompass a range of treatment, a detriment exists if a reasonable worker would or might take the view that the treatment was in all the circumstances to his disadvantage, the test is not satisfied merely by the Claimant showing that he has suffered mental distress: it would have to be objectively reasonable in all the circumstances. The test of detriment has both subjective and objective elements. The situation must be looked at from the Claimant's point of view but his perception must be 'reasonable' in the circumstances. Whether or not a Claimant's sense of grievance is justified has to be decided with regard to all the circumstances.

5. The detriments that the Claimant relies on were set out in the Case Management Summary created at the Preliminary Hearing on 30 September 2019. The Respondent contends that the Claimant has failed to establish a detriment in respect of each of the matters relied on. The Respondent contends that these cannot be detriments.

(a) On 28 August 2018 when C called in and spoke with his line manager Sadia Hanif about being absent to cover childcare and to care for his partner who was unwell, he felt bullied and harassed by Ms Hanif about his return to work and when he would return to work.

6. The Respondent contends that detriment (a) is incorrect. The Claimant was not bullied and harassed by Ms Hanif. She asked politely and in accordance with the Respondent's policies when the Claimant thought he would be able to return to work.

7. The Claimant's account of this incident is as follows:

> "37. On the 28/08/2018 I called in and spoke with Sadia Hanif in regard to being absent to cover parental and personal care to my children and partner Chanell Ward is diagnosed with sciatica which caused her to become bedbound.
>
> 38.Sadia Hanif harassed me about my about my absence and demanded that I informed her of the date of when I will return to work. From what I can recollect Sadia Hanif's words were - 'This is unacceptable, unacceptable. I need to know when you're going to be back as I need to make arrangements for when you can assist the families who are in need' In response, my delivery of informing her that I could not offer a definitive date on my return was shaky as I was extremely upset with how she addressed my situation. Due to the way in which this was handled, I informed Sadia Hanif that I will be contacting the operations manager, Vrushali Pendharkar as I was no longer comfortable in communicating with her."

Sadia Hanif's account of the same incident is set out as follows:

> "7. On 28/08/2018 the Claimant called me to advise that he would be unable to attend work due to his partner being unwell and him needing to care for his children. I asked if he wished to take the day off as annual leave, which he stated he did. I believe that I was being compassionate and stated things like I hope it's not serious and offered to rearrange things in his calendar to help. I requested that he contact

[1] Paragraphs 9.8 and 9.9 of The EHRC Employment Code

me the following morning if he was unable to attend work.

8. The Claimant has said in his claim form that I bullied and harassed him to return to work on 28/08. That is untrue. I was understanding of his situation while also trying to manage his absence in accordance with the absence policy. In fact, the Claimant breached the policy several times, but I didn't mention anything about this until 10 September because I knew he was in a tricky situation with his partner's ill-health."

8. The Claimant and Sadia Hanif give conflicting versions of the same episode. The Tribunal hearing the case would have to consider this conflict and decide where they consider the truth lies. The account given by the Claimant, if correct is capable of amounting to a detriment. It is for the Tribunal hearing the case to determine whether the Claimant's perception of being bullied and harassed was reasonable.

(b) *On 2 September 2018, the Respondent failed to respond to the Claimant's offer to provide access to his partner's medical records to confirm the severity of her illness.*

9. The Respondent contends that this alleged detriment, on its face, is incapable of amounting to disadvantage. It was a reasonable management request that did not put the Claimant at a disadvantage.

10. The Claimant's witness statement deals with this as follows:

"41. 02/09/2018 - I informed Vrushali Pendharkar that my partner was still unwell and was required to attend an appointment at the GP the following day. In this email I also offered access to my partner's medical records to confirm the severity of her illness.

42. 03/09/2018 - Vrushali Pendharkar confirmed receipt of my email. Additionally, the offer of my partner's medical record was not accepted and I was instructed to contact Sadia Hanif as opposed to directly communicating with her in regard to my absence."

The Claimant's email of the 2 September 2018 read as follows:

"Just to let you know, my partner is still unwell and the GP is due to see her tomorrow. I understand that this is short notice but the situation has not improved as she still cannot walk. If confirmation is required, my partner is happy to allow access to her medical file. Please let me know."

The reply from Vrushali Pendharker on 3 September 2018 read as follows:

"11. The Claimant to establish a detriment must show that a reasonable worker would or might take the view that the treatment was in all the circumstances to his disadvantage. What is the disadvantage? It appears to be not taking up an offer to access the Claimant's partner's medical file. I do not understand there to have been a dispute or challenge to the Claimant's partner's illness. In the circumstances there can be no disadvantage to the Claimant in not accessing her medical records.

(c) On 5 September 2018 Ms Hanif emailed the Claimant to ask him to attend the office on 10 September 2018 to discuss his proposal for flexible working.

11. The Respondent says that this alleged detriment, on its face, is incapable of amounting to disadvantage. I agree. The Claimant had sent an email stating that he required flexible working arising from his home circumstances, he was then asked to attend a meeting to discuss his request for flexible working. The Claimant had not yet made a written request under s.80G ERA at this stage. The Claimant could only have benefitted by attending the meeting to discuss his request, the Respondent is required to deal with the Claimant's application in a reasonable manner. The ACAS Code of Practice 5 Handling In A Reasonable Manner Requests For Working Flexibly (2014) states that once a request has been received the employer must consider it, and arrange to talk to the employee as soon as possible after receiving their written request. To discuss a flexible working request before it is formally made is not likely to be a disadvantage

(d) On 10 September 2018 in a meeting with Claimant to discuss flexible working, Ms Hanif initiated a conversation about the Respondent's sickness policy;

12. The Respondent says that this alleged detriment, on its face, is incapable of amounting to disadvantage, it was a reasonable management action and could not have put the Claimant at a disadvantage.

13. The Claimant deals with this in his witness statement in the following way:

> "46. On 10/09/2018 I attended the office to discuss the proposed arrangement, as I stated that I could work between 09:30-14:30 to accommodate my children. Unexpectedly; Sadia Hanif also initiated a conversation in regard to a failure to adhere to the sickness policy as this had triggered an investigation.
>
> 47. I was shocked by this, as I had not been informed of any issues in regard to this, nor had I been advised that such a conversation was due to take place neither this day nor any planned date in the future. This was followed up with an email in regard to completing flexible working request form, as this was what had been advised to her by HR."

Sadia Hanif explains the position as follows:

> "In this one-to-one meeting, I advised him to put his request in writing on the Flexible Working (FW) request form. I also pointed out that the Claimant had failed to comply with the sickness absence policy on more than one occasion in that he had failed to contact me as his line manager; this was causing problems in terms of ensuring his role was fulfilled and also undermined policy."

Sadia Hanif sent the Claimant an email confirming the situation on the same day, 10 September 2018.

14. This scenario in my view cannot reasonably be considered a disadvantage

to the Claimant. There is no allegation that Sadia Hanif was acting outside the scope of her management responsibility for the Claimant or that she was behaving unreasonably in doing what she was doing. For there to be detriment the Claimant must do more than just show that he has suffered mental distress because of the Respondent's actions he has to show that it was objectively reasonable in all the circumstances for him to do so.

(e) On 13 September 2018 in two meetings, C's request for flexible working was refused by Ms Hanif and by Irene Rao from HR and the Claimant was told that he would have to return to work full-time on 18 September 2018.

15. The Claimant was informed verbally why his flexible working request could not be acceded to. The Claimant disagrees with the decision but does not establish that it was not properly made. For the reasons set out below it was refused on lawful grounds. While the Claimant may disagree with the decision and even have a sese of grievance about it, there cannot be a detriment where a decision lawfully made in these circumstances leaves the Claimant with an unjustified sense of grievance.

(f) R failed to provide C with the outcome of his request for FW in writing;

16. In respect of this alleged detriment the Respondent states that the Claimant resigned before the Respondent had the chance to provide the outcome of his flexible working request in writing. The Respondent had planned a meeting with the Claimant to discuss the request and alternative flexible working arrangements, however the Claimant failed to attend. This delayed the sending of the flexible working outcome.

17. Having regard to all the circumstances I am satisfied that this allegation is not capable of being a detriment in the circumstances. The Claimant had been told that he was not going to get his request for flexible working as he had sought. The Claimant had been given a verbal explanation for the rejection of his request. The Respondent was open to discussing with the Claimant alternative arrangements for flexible working. The delay in sending the reasons for the refusal which were completed on 19 September 2018 was because the Respondent was open to discussiOn alternative flexible working arrangements.

(g)On 17 September 2018 Ms Hanif told the Claimant in a phone call that she expected him to be in work full-time the following day even though the Claimant informed her that his partner was still unwell and he was the only person available to care for his children.

18. In respect of this alleged detriment the Respondent states that Ms Hanif called the Claimant to remind him of their agreement that the Claimant would attend work the next day because he was not ill and had been absent from work for 3 weeks which was sufficient time to arrange childcare.

19. This allegation is not capable of being a detriment in the circumstances,

the Claimant was reminded of an agreement he had made with Ms Hanif. The Claimant could not have reasonably considered that his position was changed for the worse or put at a disadvantage by being so reminded.

(h) On 18 September 2018, the Respondent's operations manager Vrushali Pendharkar in an email to the Claimant suggested that the Claimant attend his workplace for a further meeting with her and Ms Hanif even though he was signed off sick by his doctor.

20. The Respondent contends that this alleged detriment, on its face, is incapable of amounting to disadvantage. I agree. The circumstances were that Vrushali Pendharkar in an email to the Claimant suggested that the Claimant attend his workplace for a further meeting. The Claimant could not have reasonably considered that his position was changed for the worse or put at a disadvantage by being so reminded.

(i) On 20 September 2018 Ms Pendharkar asked the Claimant to send his partner's medical records directly to Ms Hanif and failed to respond to the Claimant's email saying that he would not be comfortable to hand the records to Ms Hanif.

21. The Respondent contends that this alleged detriment, on its face, is incapable of amounting to disadvantage.

22. The Claimant offered the Respondent his partner's medical records in an email dated 2 September 2018. The Claimant complained that it is a detriment to not respond to the request and at another point it is a detriment to accept that offer. On the 18 September the Claimant reminded Vrushali Pendharker that "the offer of my partner's medical records is still open". The response from Vrushali Pendharker was:

> "I'm sorry to hear that your partner is still unwell. I hope she recovers soon. I suggest I meet with you and Sadia to explore options regarding your request for flexible working / reduced hours."

23. The Claimant replied on the 19 September 2018 stating that he had been signed off with stress. Vrushali Pemdharker replied saying that she hoped that the Claimant will get better soon and asking him to send his medical certificate. This was followed by a further email on 20 September 2018 when Vrushali Pendharker wrote to the Claimant as follows:

> "I note that you did not confirm or decline the offer to meet with Sadia and me today. I think it would be helpful to meet and consider proposals to find a way forward. Sadia has been in contact with you so can you please respond to her? As always, please feel free to copy me in if you prefer.
>
> Thank you offering to share your partner's medical records. Can you please send these to Sadia? Please also send your GP certificate to her. Please let Sadia know if your GP will charge for your sickness certificate and the Trust will offer to pay the fees."

The Claimant's response on the same day was to reply in the following terms:

> "I am happy to provide you with the information in regard to my partner's medical records, but due to the sensitivity of the information, and how Sadia has dealt with this situation, I do not feel comfortable in allowing her to view my partner's information. May I also ask why the offer is being accepted now, as it was previously unacknowledged?"

24. This chronology of correspondence in my view does not show that the Claimant was subjected to any detriment by the Respondent in accepting his offer of his partner's medical records.

(j) On 20 September 2018 Ms Hanif continued to make attempts to communicate with C while he was signed off for work-related stress.

25. The Respondent states that this alleged detriment amounts to Sadia Hanif attempting to contact the Claimant because he had agreed to attend a meeting with her and Vrushali Pendharkar on that day but did he not attend and did not notify them that he would not attend. There is no disadvantage to the claimant in this. I agree.

(k) On 24 September 2018 in a referral to an occupational therapist for the Claimant, Ms Hanif stated the business reasons for the refusal of the Claimant's statutory flexible working request and stated that the Claimant had the right to appeal against this decision; when the Claimant had not been made aware of this information and had not been made aware of the option to appeal the decision.

26. The Respondent states that this alleged detriment, on its face, is incapable of amounting to disadvantage. I agree. There is nothing the OH referral that would amount to a detriment to the Claimant.

(l) On 28 September 2018 Ms Hanif sent to the Claimant an email which included an invitation to a meeting and said that if the Claimant wishes to be accompanied to the meeting he needed to inform Respondent by 26 September, when this date had already passed.

27. This allegation was not made on the material produced by the Claimant. There appears to be no prospect of this allegation being established. Were the matter established it appears to me that there was a genuine invitation for the Claimant to attend a meeting to discuss the support he needed for his return to work, if there was a mismatch of dates as alleged by the Claimant in my view this was unarguably an error by the Respondent. This was not part of a deliberate ploy to disadvantage the Claimant.

(m)On 2 October 2018 Ms Rao sent the Claimant an email after the Claimant had resigned to challenge the points he had raised in his resignation and a further email after the Claimant told her he felt insulted and did not wish to be harassed.

28. On 30 September 2018 the Claimant resigned his employment with the

Respondent. Irena Rao wrote to the claimant on the 2 October 2018 confirming the Claimant's resignation, then proceeding to set out a number of points about the chronology of events leading up to the Claimant's resignation including the following points; that the claimant was invited to attend a meeting to discuss support he needed for return to work and did not attend, the Respondent was not given the opportunity to feed back to the Claimant formally and discuss his application for flexible working further, the Claimant had not responded to offers to discuss his allegations of bullying.

29. The Respondent contends that the alleged detriment is not capable of amounting to disadvantage. In the circumstances, it did not amount to a detriment. It was a reasonable management correspondence which did not put the Claimant at a disadvantage. I agree with that point.

30. In his submissions the Claimant did not address the points that were made by the Respondent and set out in the written submissions. I have come to the conclusion that of all the alleged detriments only the matters at (a) and (e) are capable of amounting to a detriment.

The whistle-blowing claims

31. The Respondent contends that the Claimant's alleged disclosures were not protected because the Claimant relies on the contents of emails, a grievance and assertions in meetings between 28 November 2017 to 14 June 2018 made to several different managers which he says disclosed information which tended to show that there was a failure to comply with a legal obligation (s.43B(b) ERA); and/or a danger to health and safety (s.43B(d) ERA).

32. The 11 disclosures all relate to the same single incident in November 2017 when at a staff meeting, a manager, Ms Askew, allegedly told the staff team that she could tarnish their names. This was in the context of a discussion about social workers' performance, in particular the fact that statutory visits of vulnerable children and young persons were not being completed. The Claimant deals with this incident in his witness statement in the following way.

> "6. I attended a hub meeting which was led by Kirsty Askew on 27/11/2017. In this meeting Kirsty vocalised her disappointment with the team as she received a call in regard to the Hub on 24/11/2017- as this is a day when Kirsty Askew worked from home. Allegedly, our team was not available to support families on this day, there were home visits which were past the due date and some of the staff calendar entries were not up to date. In response to this, Kirsty commented to say that she was 'disgusted' and stated that she could tarnish our names, as her words held weight. Subsequent to this statement the whole team spoke of their individual concerns with what Kirsty stated, and the mood within our hub was low. As Kirsty's statement had a greater impacted than I anticipated, in the early hours of 28/11/2017 I wrote an email to Kirsty Askew addressing my concerns highlighting the comment she made about tarnishing our names as I was still in shock.
>
> 7. However, Kirsty did not immediately respond to my email, but she did acknowledge a subsequent email I sent in regard to a case as she came over to our Hub to discuss with

> us as a team. As I felt awkward approaching her, I waited 7 days for an email response from Kirsty Askew (No response was received within this time) and then I approached the operations manager Vrushali Pendharkar by email with my whistleblowing disclosure. I communicated my uneasiness which was mainly due to the manner in which Kirsty vocalised her authority and I also communicated an awkwardness I felt in regard to approaching Kirsty directly."

33. These matters the Claimant alleges amount to a breach of a legal obligation which he considers to be contained in various legal provisions listed by the Claimant at paragraphs 49 to 57 of his witness statement and also the 'Standards of Proficiency for Social Workers in England' of the Health & Care Professions Council; the 'Code of Ethics for Social Work' of the British Association of Social Workers; Section 2 of the Health and Safety at Work Act 1974; and 'The Management Standards' of the Health and Safety Executive.

34. Accepting the Claimant's allegations as correct for the purpose of considering the Respondent's application, it is my view that the comments alleged to Ms Askew did not amount to any breach of a legal obligation.

35. The Claimant also claims that the incident tended to show a danger to health and safety, on the basis that hearing this comment made him feel "uneasy", which amounts to a danger to his mental health. The Respondent states that on any objective view, the incident does not tend to show any danger to anyone's health.

36. I am of the view that there is no qualifying disclosure in this case. The Claimant says that *"Kirsty commented to say that she was 'disgusted' and stated that she could tarnish our names, as her words held weight"*. This is neither a breach of a legal obligation or threat to health and safety of any person. It cannot be a protected disclosure because a protected disclosure is a qualifying disclosure as defined by section 43B ERA.

37. The Respondent further submits that the complaints and grievance which relate to this incident are not disclosures made in the public interest because the Claimant never made any mention of the public interest in any of his disclosures. The disclosures are limited to the Claimant's personal emotive reaction to Ms Askew's alleged comment. The Claimant did not believe in the public interest of his disclosures at the time of making them. The subjective part of the test is not made out. The Respondent contends that a single one-off comment made by a manager in a work meeting and addressed at 4 or 5 social workers (the Claimant is not a social worker) does not engage the public interest. The objective part of the test is not made out.

38. In Chesterton Global Ltd & Anor v Nurmohamed & Anor [2017] EWCA Civ 979 it was stated by the Master if Rolls that "In a whistleblower case where the disclosure relates to a breach of the worker's own contract of employment (or some other matter under section 43B (1) where the interest in question is personal in character), there may nevertheless be features of the case that make it reasonable to regard disclosure as being in the public interest as well as in the personal interest of the worker. Mr Reade's example of doctors' hours is particularly obvious, but there may be many

other kinds of case where it may reasonably be thought that such a disclosure was in the public interest. The question is one to be answered by the Tribunal on a consideration of all the circumstances of the particular case, but Mr Laddie's fourfold classification of relevant factors which I have reproduced at para. 34 above may be a useful tool. As he says, the number of employees whose interests the matter disclosed affects may be relevant, but that is subject to the strong note of caution which I have sounded in the previous paragraph."

39. The fourfold classification referred to is as follows:

> "(a) the numbers in the group whose interests the disclosure served – see above;
>
> (b) the nature of the interests affected and the extent to which they are affected by the wrongdoing disclosed – a disclosure of wrongdoing directly affecting a very important interest is more likely to be in the public interest than a disclosure of trivial wrongdoing affecting the same number of people, and all the more so if the effect is marginal or indirect;
>
> (c) the nature of the wrongdoing disclosed – disclosure of deliberate wrongdoing is more likely to be in the public interest than the disclosure of inadvertent wrongdoing affecting the same number of people;
>
> (d) the identity of the alleged wrongdoer – as Mr Laddie put it in his skeleton argument, "the larger or more prominent the wrongdoer (in terms of the size of its relevant community, i.e. staff, suppliers and clients), the more obviously should a disclosure about its activities engage the public interest" – though he goes on to say that this should not be taken too far."

40. Taking these matters into account in considering the alleged disclosure I am of the view that the alleged disclosure was not in the public interest. The disclosure affected 5 people plus the Claimant; the nature of the interests protected were encapsulated in the following passage from the Claimant's witness statement as follows: *"Kirsty commented to say that she was 'disgusted' and stated that she could tarnish our names, as her words held weight"*.

41. The complaints about detriment because the Claimant made protected disclosure have no reasonable prospect of success and are dismissed. The Claimant's complaint that he was automatically unfairly constructively dismissed for making protected disclosures has no reasonable prospect of success and is dismissed.

Constructive dismissal

42. Section 95 (1) of the Employment Rights Act 1996 provides that "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. "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. The employee is entitled in those circumstances to leave at the instant without giving any notice at all or, alternatively, he may give notice and say he is leaving at the end of the notice. But the conduct must in either case 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 as having elected to affirm the contract."[2]

43. It is an implied term of any contract of employment 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. Any breach of the implied term of trust and confidence will amount to a repudiation of the contract. The very essence of the breach of the implied term is that it is calculated or likely to destroy or seriously damage the relationship.

44. The test of whether there has been a breach of the implied term of trust and confidence is objective. The conduct relied on as constituting the breach must "impinge on the relationship in the sense that, looked at objectively, it is likely to destroy or seriously damage the degree of trust and confidence the employee is reasonably entitled to have in his employer".

45. A relatively minor act may be sufficient to entitle the employee to resign and leave his employment if it is the last straw in a series of incidents. I do not understand the claimant to be relying on a last straw in this case.

46. The respondent contends that the Claimant's complaint of constructive dismissal has no reasonable prospect of success. The Claimant confirmed at the Preliminary Hearing on 30 September 2019 that the detriments (a) to (l) are the acts and omissions relied upon to claim that the Respondent breached the implied term of trust and confidence. Of these only (a) has any reasonable prospect of being established. That is

> "(a) On 28 August 2018 when the Claimant called in and spoke with his line manager Sadia Hanif about being absent to cover childcare and to care for his partner who was unwell, he felt bullied and harassed by Ms Hanif about his return to work and when he would return to work."

47. On the basis of my findings, aside from the two matters above, the listed detriments cannot be viewed as having put the Claimant at a disadvantage and so taken collectively or individually they cannot amount to conduct which, without reasonable and proper cause, was calculated or likely to destroy or seriously damage the relationship of trust and confidence between the Respondent and the Claimant.

[2] Western Excavating (ECC) Limited v Sharp [1978] 1 QB 761

48. It is clear from the Claimant's many emails in the weeks before his resignation and after his resignation, that the Claimant resigned because he was unhappy with the Respondent's decision to refuse his flexible working request. The resignation email stated in terms:

> "I hereby request for my contract to be terminated with immediate effect. This request is as a result of unfair treatment, following a statutory application for flexible working which was refused without a written explanation of your reasons. The procedure was also not in line with ACAS's guidance of handling requests in a reasonable manner."

49. The Respondent submits that the Claimant has no prospect of successfully arguing that his resignation was in response to the Respondent's breach of the implied term of trust and confidence. His resignation was the result of his own personal decision to prioritise his family's needs over his employer's. The matters at (a) might be a detriment if the tribunal prefer the Claimant's account. Whether it is a serious breach of contract entitling the Claimant to terminate his contract, on the claimant's version of event, is moot. However, it is clear that the Claimant affirmed the contract after the 28 August 2018. The Claimant applied to vary his contract of employment pursuant to s.80F ERA he did not resign until 30 September 2018 after his request for flexible working was turned down complaining about the procedure used. The claimant was not constructively dismissed.

Detriment for a reason relating to time off for dependants

50. The Respondent contends that the Claimant was not entitled to time off under s.57A ERA Section 57A ERA provides (in so far as relevant the Claimant's claim) that an employee is entitled to be permitted by his employer to take a reasonable amount of time off during the employee's working hours in order to take action which is necessary, to provide assistance on an occasion when a dependant falls ill, gives birth or is injured or assaulted, to make arrangements for the provision of care for a dependant who is ill or injured, because of the unexpected disruption or termination of arrangements for the care of a dependant. This does not apply unless the employee tells his employer the reason for his absence as soon as reasonably practicable, and where that cannot be complied with until after the employee has returned to work, tells his employer for how long he expects to be absent. A employee must not be subject to a detriment for taking time off for dependants (section 47C ERA).

51. The Respondent contends that the Claimant was absent from 28 August 2018 until his resignation on 30 September 2018. From 28 August to 18 September, the Claimant was absent because his partner was ill and could not drop off and pick up their children at school. From 18 September 2018 the Claimant was signed off work with stress.

52. It is the Respondent's case that the amount of time that the Claimant took off for dependents (from 28 August to 18 September, amounting to 15 working days) was not reasonable. This is an excessive amount of time to arrange alternative childcare arrangements. Further the Respondent says that the time off was not necessary because within a number of days, the Claimant could

have arranged that his children be taken to school by a relative, friend, neighbour or a parent of other attendees to the children's school. Likewise, the Claimant could have cared for his partner around working hours and Claimant's partner could have rested during the day when Claimant attended work. The Respondent says subsection (1) of s.57A ERA therefore does not apply to the Claimant.

53. The Respondent also says that the Claimant did not inform the Respondent of the reason for his absence as soon as reasonably practicable. Respondent thus states that the requirements of subsection (2) of s.57A ERA were not met, therefore subsection (1) does not apply.

54. The Respondent says that because the Claimant was not entitled to time off for dependents under s.57A ERA, this cannot be a reason why the Claimant suffered any detriment under s.47C ERA so the Claimant claim under s.47C ERA has no reasonable prospect of success. I cannot agree with this, the questions whether the amount of time that the Claimant took off was reasonable and whether the Claimant informed the Respondent of the reason for his absence as soon as reasonably practicable are matters of fact for the Tribunal hearing the case to determine. The material before me at this preliminary hearing is not so clear that there can only be one possible answer. While the Respondent's case may appear strong on certain issues, where there is an arguable case it is not for me to decide those issues on a paper consideration those matters should be tested at the hearing.

55. The Claimant's alleged detriment at (a) revolves around the Claimant needing to take time off. It cannot be said without hearing from the relevant witnesses and reaching conclusions on disputed facts that the Claimant's complaint about these detriments has no reasonable prospect of success.

56. The Respondent contends that the Claimant's complaint of unfair constructive dismissal for a reason relating to time off for dependants based on s.99 ERA should be dismissed because it has no reasonable prospect of success. The Claimant's complaint that he was constructively dismissed has not reasonable prospect of success. The Claimant's complaint about automatically unfair dismissal pursuant to s.99 has no reasonable prospect of success.

Flexible working claims

57. The Respondent contends that the Claimant's application for flexible working was dealt with in a reasonable manner. In accordance with the ACAS Code of Practice on Flexible Working Requests (section 4), the Respondent arranged to discuss the request with the Claimant as soon as possible after receiving the Claimant's flexible working request. In accordance with the ACAS Code (section 8), the Respondent discussed with the Claimant the reasons for the request, the impact of the proposed change on operational issues and whether this could be overcome. The Claimant's working hours were 9am to 5pm. In his flexible working request the Claimant asked to reduce his hours to 9.30am to 2.30pm, on an indefinite basis. This would have a significant effect on the Claimant's ability to carry out his role and on the Respondent's provision of services. It would also prevent the Claimant from visiting vulnerable children outside of school hours,

which was a requirement in his role.

58. The Respondent further contends that the Claimant was notified of the decision within the decision period of three months. The Respondent took 2 days to inform the Claimant verbally that his request was not capable of being granted. The Respondent sent the formal written flexible working decision (with reasons) 3 weeks after the application had been made. The reason the Claimant was not sent the written outcome earlier was because the Claimant had been offered a meeting on 20 September to discuss the request and in particular to explore alternative flexible working arrangements which the Respondent could accommodate but the Claimant did not attend. The Claimant also complained that the Respondent attempted to contact him during his sickness absence, therefore the Respondent delayed sending the outcome letter.

59. Finally, the Respondent states that the application was refused on lawful grounds, the flexible working request was refused on grounds that engaged 5 of the lawful grounds in s.80G ERA: Detrimental effect on ability to meet customer demand; Inability to re-organise work among existing staff; Detrimental impact on quality; Detrimental impact on performance; Insufficiency of work during the periods the employee proposes to work.

60. The Claimant has not presented an argument against the points made by the Respondent. He has not explained why these matters, which on the face of the material before me appear incontestable, can be realistically contested. I agree with the Respondent that any suggestion that the Claimant can succeed in respect of his claim on this ground,s is fanciful. The s.80G claim has no reasonable prospect of success.

61. The Claimant's request for flexible working was made after the alleged detriment at (a), the only arguable detriment, occurred. If it is found that the Claimant was subjected to the detriment, it was not because he made an application under s.80F ERA.

62. The Claimant's complaint of automatically unfair constructive dismissal for making a flexible working application under s.80F ERA - s.104C ERA has no reasonable prospect of success because the Claimant's complain that he was constructively dismissed has not reasonable prospect of success.

63. The Respondent will say that if the Claimant was constructively dismissed, it was not for making a flexible working request. The only detriment was not because the Claimant made a flexible working request. I agree.

The breach of contract claim

64. The Respondent says that the Claimant resigned without notice and is not entitled to notice pay in these circumstances. The Claimant's complaint of breach of contract has no reasonable prospect of success because the claim is dependant on the Claimant having been constructively dismissed. The claim for constructive dismissal has no reasonable prospect of success.

Employment Judge Gumbiti-Zimuto
Date: 12 May 2021

Sent to the parties on: .....

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For the Tribunals Office

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