EMPLOYMENT TRIBUNALS (SCOTLAND)

5 **Case No: 4103207/2020 (V)**

Final Hearing Held remotely on 30 and 31 March 2021

Employment Judge A Kemp

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Mrs M Tait	**Claimant** **Represented by:** **Mr R Brown** **Solicitor**
Biggar Medical Practice	**Respondent** **Represented by:** **Ms L Doyle** **Solicitor**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The claimant was not dismissed by the respondent and her Claim is dismissed.

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REASONS

Introduction

1. The claimant made what is normally referred to as a claim for constructive dismissal against the respondent. The Claim was denied.

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Issues

2. The Tribunal identified the following issues:

    (i) Had the respondent dismissed the claimant under section 95(1)(c) of the Employment Rights Act 1996 ("the Act")?

    (ii) If so, what was the reason or principal reason for that dismissal?

35 (iii) If the reason was potentially fair under section 98(2), was that dismissal unfair under section 98(4) of the Act?

(iv) If so, would a fair dismissal have resulted from a different procedure, and if so what reduction in compensation should be made for that?

(v) Had the claimant contributed to any dismissal?

(vi) If there was an unfair dismissal, what was the extent of the claimant's losses, and had she mitigated her losses?

Evidence

3. Evidence in the case was given remotely by Cloud Video Platform. I was satisfied that the method of doing so was effective, and that a decision could be reached from it, although there were several occasions when the audio quality was not good, and there was a need from time to time for those participating to re-connect. When that happened the evidence resumed from the point of lost connection. Whilst these difficulties made conducting the hearing more difficult, particularly for the two solicitors, they were not such as to cause insuperable problems.

4. The Tribunal heard evidence from the claimant, and from Mr Donald Stewart and Dr Ross Stewart of the respondent. Documents were spoken to from a single Bundle the parties had prepared. Not all documents in that Bundle were spoken to in evidence. Although the earlier Preliminary Hearing had referred to a Statement of Agreed Facts none had been concluded, but the solicitors did reach agreement on the extent of pension loss and the wages of the claimant when working three days per week. Two aspects of the evidence were heard under reservation, firstly in respect of a meeting between the claimant and Mr Stewart on or around 19 December 2019 which the claimant had not referred to in her pleadings, and secondly discussions said to have been held between the claimant and Mr Stewart in the period 7 November 2019 to 23 November 2019, and possibly to 5 December 2019, which had not been put to the claimant in cross examination. I refer to those matters further below.

5. The evidence was concluded mid way through the second day and the solicitors had agreed that they wished to have time to prepare written submissions. I agreed to that, and the submissions were duly tendered. They are summarised below, and clearly had involved much work by both agents. I am grateful to both for doing so.

Facts

6. The Tribunal found the following facts to have been established:

7. The claimant is Mrs Marjory Tait. Her date of birth is 11 August 1957. She is a Registered Nurse of over forty years' experience.

5 8. The respondent is Biggar Medical Practice. It is a partnership under the law of Scotland. Its partners are General Practitioners.

9. The claimant was employed by the respondent as a Practice Nurse from 5 January 2012 until 31 March 2020.

10. When the claimant commenced working for the respondent she worked
10 five days per week, a total of 37.5 hours per week. In about 2016 the claimant by agreement reduced the number of days to four, but continued to work the same total hours per week.

11. In January 2018 the claimant applied to the respondent to reduce her days to two per week, and the parties thereafter agreed that the claimant's days
15 be reduced to three per week. She worked shifts of 8am to 4pm or 10am to 6pm generally, although she worked an extended shift on Wednesday from 9.30am to 8pm, and provided cover for annual leave taken by the other two Practice Nurses. The claimant worked on either a Tuesday or Wednesday, normally alternate days each week, and a Thursday and
20 Friday.

12. The claimant was employed by the respondent under a written contract of employment. It contains the statement "The content of the employee Handbook forms part of your contract of employment and you will be required to sign that you understand this". The claimant signed the
25 contract on 29 March 2018. It records that her 22.5 hours per week, on the rota arrangement for three days per week referred to above.

13. The respondent's Handbook has reference to the right to request flexible working, and sets out what the application should contain, amongst other matters. The respondent had granted a number of requests for flexible
30 working to its employees.

14. A second Practice Nurse employed by the respondent was Barbara Muir. She worked all day on Monday, and the alternate Tuesday or Wednesday to that worked by the claimant. Her shifts were on the same hours as for the claimant.

15. A third Practice Nurse employed by the respondent was Mary Brownlie. She worked on Mondays, Tuesdays and Wednesdays, 9.30 to 3.30. She worked those hours to accommodate her children, who had health problems.

16. The Practice Nurses were Registered Nurses, who dealt with a variety of patient matters with particular emphasis on the management of chronic conditions.

17. The respondent also had an Advanced Nurse Practitioner, Joan Kane. She was qualified to work in areas that included diagnosis and treatment, and was considered by the respondent to operate more closely to the position of a General Practitioner than a Practice Nurse.

18. The respondent also had a Healthcare worker who was not a registered nurse. She was trained to undertake certain procedures that a nurse also undertook, but not the main work of a Practice Nurse.

19. The policy operated by the respondent was to schedule the Practice Nurses such that there were two on duty on each work day. That allowed cover from 8am to 6pm in two different shifts, and generally meant that a Practice Nurse did not operate alone. There were some rare occasions when a Practice Nurse did operate alone, generally because of illness or some other unforeseen matter.

20. Practice Nurses were entitled to six weeks’ annual leave per annum. They also had periods when attending for study, either generally or for a particular qualification, which included periods at a College or similar place of study. The extent of that study leave varied from time to time. Periods of ill health tended to be rare. The claimant had not had a period of ill health during her employment with the respondent. There were other irregular and rare occasions when a Practice Nurse may be absent which included for bereavement.

21. There were seven partners in the respondent practice, none of whom worked five days per week. One of them Dr McGregor retired in March 2020 and in the period to that retirement worked two days per week.

22. In August and September 2019 the claimant's mother was admitted to hospital, where she stayed for about four weeks. Following her discharge the claimant decided that she needed to spend more time assisting her mother's care. The claimant has two sisters who were also able to assist in care for their mother.

23. The claimant had informal discussions with the Business Manager of the respondent Mr Donald Stewart, who also operated as the Practice Manager, at around that time. Mr Stewart indicated that he thought that the respondent would review any application favourably.

24. The claimant did not refer to the Handbook when she later composed a written request for working two days per week. Her letter was delivered to the respondent on 31 October 2019. It stated:

> "This letter is to inform you that I will be retiring from the position of Practice Nurse in December 2020. I would like to ask if you will allow me to reduce the number of days I work from 3 to 2, in my final year of working. I would be happy to work 2 long days of 8 – 6 ie 19 hours, or shifts of 10 – 6/8 – 4, ie 15 hours. I would also be happy to continue working on a rota on the late Wednesday night, 6 – 8, and would come in to do this 2 hour shift as and when needed. I would also be happy to cover for any sickness absences of my colleagues, as I currently already do."

25. Mr Stewart passed the letter on to the partners of the respondent, and they discussed it at a Practice Meeting on 7 November 2019. The respondent agreed that they should try to accommodate the request but there was concern that doing so would leave the team of Practice Nurses short, and cause problems for annual leave. Mr Stewart was instructed to take the matter to the claimant and other nurses and ask them for a solution that would accommodate the request and be acceptable to the respondent.

26. Shortly thereafter Mr Stewart met Ms Muir and Ms Brownlie separately, but neither of them agreed to increase their days to cover the reduction of one day by the claimant. Mr Stewart met the claimant from time to time during the normal working day, but did not ask her specifically about her request further. The claimant did however know that neither of her colleagues had agreed to work an extra day from discussions with one or both of them.

27. The matter was discussed again at a practice away day on 23 November 2019. A written note of that maintained by Mr Stewart at the time noted that he had spoken to Ms Muir, and that the other nurses were not able or willing to increase their days. The note made no mention of his having spoken further to the claimant. It noted that if an additional nurse was employed for one day per week that would involve additional costs, which were thought to be excessive. Such costs were not specified, but included those of recruitment, and of an induction process. He noted a suggestion of considering a Trainee Nurse scheme, which was partly funded. The partners decided that Mr Stewart should investigate that Trainee Nurse scheme, and bring it to the next practice meeting.

28. Mr Stewart investigated the Trainee Nurse scheme, and discovered that it commenced in September each year, such that the respondent had missed the chance to be involved in that for that year. He reported that to the practice meeting of the respondent on 5 December 2019. There was no minute of that meeting, but at it the respondent decided that it could not accommodate the request by the claimant to reduce her days from three to two. The reason for that was that the respondent was concerned that there would be a day per week when only one Practice Nurse would be on duty generally, and that there would be none if that Practice Nurse was on some form of leave, whether planned in the case of annual leave and study leave, or unplanned if for ill health or bereavement or similar, that that would impact on the ability to service patients. The respondent considered that if it was to accept the request it would not be consistent with their policy of having two nurses on duty each working day, which had been established to meet the clinical need required.

29. The claimant was to have had an annual appraisal with Dr Ross Stewart who was the Staff Partner of the respondent on 10 December 2019. The respondent decided that the claimant should be informed of their decision at that meeting, and that Mr Stewart should be involved with it. The claimant attended the meeting with Dr Stewart not aware that Mr Stewart was to be present, or that there would be a discussion about her request to reduce her days of work. At the meeting Dr Stewart confirmed that the issue was to be discussed, and then Mr Stewart told the claimant that the respondent had discussed the request at practice meetings and an away day, but that they could not approve the request as it would involve there being days when the practice would not have a nurse on duty which would adversely affect the service to patients, and no solution to the problem was proposed or found. The claimant was very disappointed by the decision, was upset, and said that she would miss the practice. Dr Stewart said that the claimant was a wonderful nurse, thanked her for her service, and said that he was sorry that she did not want to continue working three days per week. He said that if there had been a way to allow the request the partners of the respondent would have done so. He added that the respondent would welcome the claimant back to provide locum cover after March 2020 if there was a requirement. Mr Stewart left the meeting, and there was a discussion between Dr Stewart and the claimant about the appraisal, which it was agreed would not take place.

30. A few days after that meeting the respondent had its Christmas night out. During that the claimant became distressed when Dr McGregor one of the partners asked her why she was not herself. She remained upset about the decision not to allow her request.

31. On 19 December 2019 Mr Stewart met the claimant to give her a raffle prize from the night out, and they had a general discussion about the request she had made, and her distress about it. The claimant indicated that she did not feel that she had had a fair opportunity to put forward her request and asked to attend a practice meeting of the respondent. She was told that that request would not be granted.

32. Mr Stewart wrote to the claimant to confirm the decision reached on 7 January 2020 although in error the date has the year 2019 on the letter.

There was a delay in his doing so in light of the high volume of work he had to deal with. He referred in the letter to the meeting on 10 December 2019 and that the partners had agreed in principle that they wanted to accommodate the request, but that doing so would have resulted in days when the practice would not have a nurse on duty, which would adversely affect the service to patients. He added that a solution could not be found and the request was declined. He referred to her having a right to make an application to work flexibly and attached a form to do so and the part of the Handbook referring to such applications. He did so on advice from the Medical Defence Union of which the respondent is a member.

33. On 8 January 2020 the claimant went to the office of Mr Stewart to discuss the matter. She took the application form with her, to seek his assistance in completing it. They had a discussion about it. The claimant became angry and upset during that discussion, and although she had the impression that if she completed the application form it would not lead to any different outcome Mr Stewart did not state that to her specifically.

34. On 4 February 2020 the claimant wrote to the respondent to tender her resignation on eight weeks' notice. She referred to the meeting on 10 December 2019, and her need to commit greater time to her elderly mother. She said "Donald [Stewart] offered me the opportunity to complete a Flexible Working Application Form however on further discussion with Donald he informed me the outcome regarding reduced hours would be no different and that by law he had to enclose this form with his letter of 7/1/20." She thanked the respondent's partners, managers and staff for her 8 "wonderful years", indicated that it was time to "hang up" her uniform and spend more time with her family, and that she did not wish any fuss when she left. She wished the respondent success in finding a replacement.

35. The letter was forwarded to Dr Stewart who indicated that the resignation should be accepted.

36. The respondent, through Mr Stewart, replied to the claimant on 11 February 2020 accepting her resignation, confirming that her last day of employment was 31 March 2020 with annual leave booked from

23 March 2020. There was an expression of sorrow at her not wishing any formal or informal farewell.

37. On or about 19 February 2019 the respondent placed an advertisement for a Practice Nurse to replace the claimant. They had twelve responses, interviewed five on about 17 March 2020 and decided to appoint one of those five who was a student nurse, and had been a receptionist at the respondent. She was expected to qualify as a Registered Nurse by September 2020 but there was a possibility of her doing so earlier in light of steps taken because of the Covid-19 virus.

38. By that time the Covid-19 virus had become known, and as a result, the respondent ceased almost all of the work of the Practice Nurses it employed. Face to face meetings had been largely cancelled, taking place only if there was a sufficient need to do so. Routine Practice Nurse appointments had been cancelled.

39. In April 2020 the claimant telephoned one of the partners, Dr Goldie, to offer her assistance working two days per week. The respondent discussed that at a practice meeting, and asked Mr Campbell to reply. He did so on 23 April 2020 to say that there was no requirement for additional cover, but that the partners wished to thank her for the very kind offer and wish her well for the future. The claimant then responded to refer to her having contacted ACAS. Mr Campbell did not reply further, on advice from the Medical Defence Union.

40. The claimant commenced Early Conciliation on 16 April 2020, the Certificate was issued on 7 May 2020 and the Claim Form presented on 5 June 2020.

41. Had the claimant's application to work two days per week been accepted she would have earned £222.02 per week net. The claimant also had an entitlement to pension contribution under the auto-enrolment scheme and an employers' contribution of 3%. After the termination of her employment on 31 March 2020 she sought new employment. She worked as a locum Practice Nurse in the period 8 September 2020 to 27 November 2020 earning £1,830.16, then as a Bank Nurse in the period 2 October 2020 to

13 December earning £1,454.51 and as a Locum Practice Nurse on 23 December 2020 earning £137.33.

Submissions for claimant

42. Mr Brown provided as indicated above a written submission, and the following is a basic summary only. He invited the Tribunal to prefer the claimant's evidence, set out suggested findings in fact, and arguments as to why the claimant's evidence should be preferred particularly to that of Mr Stewart. He argued that there had not been an adequate consideration of the claimant's request or discussion with her as to how it could be accommodated. She had solutions to the concerns, but they were not discussed with her. She had been discouraged from making a formal flexible working request by Mr Stewart. The respondent had been in fundamental breach of contract, that being a breach of the implied term as to trust and confidence, by failing to deal with the application reasonably, not investigating the matter with the claimant personally, not communicating the reason for the decision effectively, failing to consider the claimant's stated willingness to be flexible, and positively discouraging the claimant from making a formal application. The claimant had resigned in response to that breach, in resigning, and there was no affirmation. Her later offer to provide her services to the respondent was not itself determinative of the relationship not having broken down. Reference was made to the case of ***Sharp***, and to ***Wright,*** both referred to below. The Tribunal should award the sums in the Schedule of Loss together with an agreed sum for pension loss.

Submissions for respondent

43. Ms Doyle also provided a written submission and again the following is a basic summary only. She referred in particular to the case of ***Kaur,*** again referred to below, and five questions that should be sufficient to ask in such a claim. The first was the most recent act or omission, said to be the failure to grant the informal request. The second was whether there had been affirmation since then, and it is argued that there was, with reference to authority. The third was, if not, was the act repudiatory, and it was argued that it was not, again with reference to authority. The fourth was, if

not, was it nevertheless a part of a course of conduct cumulatively amounting to a repudiatory breach, and it was argued that it was not. The fifth is whether the claimant resigned in response to the breach. It was accepted that she did, but argued that the acts did not constitute a breakdown of trust and confidence or a repudiatory breach. She invited the Tribunal to find that the claimant had not been constructively dismissed.

Law

44. Section 95 of the Act provides, so far as material for this case, as follows:

> “**95 Circumstances in which an employee is dismissed**
>
> (1) For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2) only if)—
>
> ……………..
>
> (c) 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.”

45. Section 98 of the Act provides, so far as material for this case, as follows:

> **“98 General**
>
> (1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—
>
> (a) the reason (or, if more than one, the principal reason) for the dismissal, and
>
> (b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.
>
> (2) A reason falls within this subsection if it—
>
> (a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,
>
> (b) relates to the conduct of the employee,
>
> (c) is that the employee was redundant, or

(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.

5 ……………

(4) Where the employer has fulfilled the requirements of subsection (1), 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
10 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."………………..

15 46. The onus of proving such a dismissal where that is denied by the respondent falls on the claimant. From the case of ***Western Excavating Ltd v Sharp [1978] IRLR 27*** followed in subsequent authorities, in order for an employee to be able to claim constructive dismissal, four conditions must be met:

20 (1) There must be a breach of contract by the employer, actual or anticipatory.

(2) That breach must be significant, going to the root of the contract, such that it is repudiatory

(3) The employee must leave in response to the breach and not for some
25 other, unconnected reason.

(4) She must not delay too long in terminating the contract in response to the employer's breach, otherwise she may have acquiesced in the breach.

47. In every contract of employment there is an implied term derived from
30 ***Malik v BCCI SA (in liquidation) [1998] AC 20***, which was slightly amended subsequently. The term was held in ***Malik*** to be as follows:

"The employer shall not without reasonable and proper cause conduct itself in a manner calculated and likely to destroy or seriously damage

the relationship of confidence and trust between employer and employee."

48. In ***Baldwin v Brighton and Hove City Council [2007] IRLR 232*** the EAT held that the use of the word "and" following "calculated" in the passage quoted above was an error of transcription of the previous authorities, and that the relevant test is satisfied if either of the requirements is met such that the test should be "calculated or likely". That was reaffirmed by the EAT in ***Leeds Dental Team Ltd v Rose [2014] IRLR 8, EAT:***

"The test does not require a Tribunal to make a factual finding as to what the actual intention of the employer was; the employer's subjective intention is irrelevant. If the employer acts in such a way, considered objectively, that his conduct is likely to destroy or seriously damage the relationship of trust and confidence, then he is taken to have the objective intention spoken of…"

49. The law relating to constructive dismissals was reviewed in ***Wright v North Lanarkshire Council [2014] ICR 77***, which in turn referred to ***Meikle v Nottinghamshire Council [2004] IRLR 703*** on the issue of causation. The reasonableness or otherwise of the employer's actions may be evidence as to whether there has been a constructive dismissal, although the test is contractual: ***Courtaulds Northern Spinning Ltd v Sibson and Transport and General Workers' Union [1988] IRLR 305***, ***Prestwick Circuits Ltd v McAndrew [1990] IRLR 191***. There is in general no *contractual* right to observance of statutory rights, especially where the statute itself provides a remedy: ***Doherty v British Midland Airways [2006] IRLR 90,*** where an employee left because of alleged victimisation on trade union grounds which was held not to be a constructive dismissal. In ***Green v Barnsley Metropolitan Borough Council [2006] IRLR 98*** it was held that a failure to make reasonable adjustments for disability over a period of time was a constructive dismissal because it constituted a breach of trust and respect. Where, however, the alleged breach of trust and confidence consists solely of an exercise of a discretion granted to the employer by the contract of employment, an employee who is disadvantaged by it can only challenge it by showing that no reasonable employer would have done so ***IBM UK***

Holdings Ltd [2018] IRLR 4 (applying ***Braganza v BP Shipping Ltd [2015] UKSC 17, [2015] IRLR 487***).

50. The employer's conduct subsequent to a resignation cannot convert that resignation into a constructive dismissal (***Gaelic Oil Co Ltd v Hamilton [1977] IRLR 27***). There is however no need to specify the reason for the employee leaving as a constructive dismissal ***Chemcen Scotland Ltd v Ure UKEAT/0036/19***.

51. Where it is argued that there was a final straw, being a last act in a series of acts that cumulatively lead to repudiation, that last straw must not be entirely trivial – ***Kaur v Leeds Teaching Hospitals NHS Trust [2018] IRLR 833.*** The five matters summarised above may arise.

52. If there is held to be a dismissal, there must then be consideration of what the reason, or principal reason, for that dismissal was, and if it was a potentially fair reason under section 98(2) whether or not it was fair under section 98(4) of the Employment Rights Act 1996 ***Savoia v Chiltern Herb Farms Ltd [1982] IRLR 166.*** It is possible, if somewhat unusual, for a dismissal under section 95(1)(c) to be fair.

53. It is relevant to note the provisions as to requests for flexible working. The Employment Act 2002 gave a right to employees with 26 weeks' service to request a change in their terms and conditions of employment to allow flexible working patterns. The right has since been extended on three occasions, including by the Children and Families Act 2014 which included caring for an adult relative within one of the prescribed categories of relationship, which includes a mother. There is a general duty to consider requests reasonably, which is explained in an ACAS Code of Practice, together with non-statutory guidance.

54. Details of the right are set out in Employment Rights Act 1996 Part 8A, and in regulations made thereunder being the Flexible Working Regulations 2014. The employer is obliged to consider the request in a reasonable manner, and notify the employee of its decision within three months, or such longer period as may be agreed, either in advance or retrospectively, by the parties. There is no specific right to a meeting or to an appeal but such steps are recommended in the ACAS Code as good

practice. The employer may only refuse the application on one or more of a number of grounds set out in section 80(G)(2) of the Act. There is no right of complaint on the grounds that the employer's reasons are insufficient on their merits to justify the refusal.

5 **Discussion**

(i) Observations on the evidence

55. All of the witnesses who gave evidence were clearly seeking to be honest.

56. I was entirely satisfied that Dr Stewart was a reliable witness. He was clear indicating what he knew, and what he did not. He was candid in accepting
10 propositions put to him where appropriate to do so.

57. The evidence of the claimant was not always reliable. For example she gave detailed evidence on events on 19 December 2019, but they had not been referred to in her pleadings, either the Claim Form or Further and Better Particulars, at all. She had asked for reduced days, but had not
15 considered the terms of the Handbook when doing so, and it was clear, as I shall come to, that this was not a statutory application when it might have been made as such. She did not make a statutory application at any stage, and in her evidence stated that she regretted that. The claimant was perhaps a little naïve in thinking that her application would be granted as
20 she had given long and excellent service. Her evidence of what Mr Stewart said or did on 8 January 2020 was at best vague, and she latterly accepted that it was formed by way of impression from non-verbal cues rather than words specifically used by him. There was then a material delay of about four weeks to the date of her giving her notice of termination. That letter
25 was written in relatively amicable terms, and did not give the impression of a breakdown in trust and confidence or similar having occurred, an impression fortified later when the claimant after termination approached the respondent about returning to work for them.

58. The evidence of Mr Stewart was also not always reliable. For example his
30 evidence about telling Dr Stewart of the meeting on 8 January 2020 was contradicted by Dr Stewart. Notes of meetings with the claimant were not always taken, and those that were taken were extremely brief, and on

occasion when that might have been expected (particularly on 5 December 2019) not taken at all. He did explain that he was very busy during this period, but the lack of a comprehensive written record does not assist in establishing what happened. The claimant's letter of resignation had alleged that he had informed her that outcome of a formal flexible working application would be no different, and did not dispute that in the response accepting her application.

59. It was not easy to determine which of the claimant or Mr Stewart was more likely to be reliable on material issues of disputed fact. The claimant said in her evidence that Mr Stewart had not sought her views about her request in the period between making her application on 31 October 2019, and the meeting on 10 December 2019 when she was informed that it was refused. It was not put to her in cross examination that there had been any such meetings, but Mr Stewart alleged in his evidence that he had met the claimant several times and discussed matters with her. He said that during those discussions she had not agreed to cover annual leave (referred to further below) and had not provided any solution to the problem identified of lack of cover. As that was not put to her I am not prepared to accept that evidence.

60. There was no note taken of Mr Stewart's meetings with any of the three Practice Nurses. The only note is a very brief one, taken at the away day meeting on 23 November. That refers specifically to BM, meaning Nurse Muir. There is no record of any discussion with the claimant. That is surprising if there were several. Dr Stewart could recall mention of Mr Stewart having met Nurses Muir and Brownlie, but not in relation to the claimant. I consider it more likely that the claimant is correct in that there was no specific discussion with her about the request after she made it, and that although there may have been some discussion in passing I can make no finding about that in the absence of clear evidence on that, and in particular that the point had not been put to the claimant in cross examination.

61. That conclusion is fortified by consideration of the evidence from Mr Stewart that he had mentioned the discussion held with the claimant on 8 January 2020 to Dr Stewart, which Dr Stewart was clear had not

happened. I accepted Dr Stewart's evidence on that, and I rejected that of Mr Stewart in that regard.

62. An issue of particular importance was what happened at that meeting on 8 January 2020 by Mr Stewart. The claimant's evidence was that he had by non-verbal means indicated to her that the flexible working application form was a tick box exercise, and that there was to be no change to the outcome if it was made. But she came to that conclusion, on her evidence, from only such non verbal communication, and that was not consistent with her letter of resignation which stated that he had "informed" her of that. There was, as I understood her evidence, simply an impression she gained from him in some way, and it appeared to me to be an impression she had formed when receiving the letter dated 7 January 2020, which she considered was not contradicted by Mr Stewart at the meeting on the following day although he had not said so. That is not a sound basis to conclude that Mr Stewart had informed her as alleged, and in addition she knew or should have known that he was not the decision maker. Although she then did refer to that issue in her resignation letter, and it was not challenged by Mr Stewart in his reply, he was clear in his evidence that he had not said that there would be no difference, and that he had acted on advice from the Medical Defence Union to refer to it. He had done so in his letter of 7 January 2020. It does not appear to me to be likely that the day after writing on the basis of advice received he would have made any comment or given the impression by non-verbal means as is alleged by the claimant. I therefore on this issue considered that Mr Stewart's evidence was to be preferred to that of the claimant.

63. In any event, as stated Mr Stewart was not the decision maker. The letter of 7 January 2020 referred to the practice and the Partners views. It was suggested in Mr Stewart's evidence that the claimant had made a flexible working application formally when moving to four days per week, but that was not put to her and it was not in the Bundle, accordingly I make no finding on that. It does appear however that the claimant could have made such a formal request, on or around 8 January 2020, but she did not do so. She might also have made a formal request in October 2019, but it is clear that her request was an informal one, and for the avoidance of doubt

cannot be regarded as a formal application as it did not meet the minimum requirements for a request set out in the statutory provisions or in the ACAS Code of Practice. Even if the claimant did have the impression that making a formal application would make no difference from Mr Stewart the claimant did not in fact make such an application, she did not at that time raise any issue about that with the respondent, and she could have made a formal application then and now regrets not having done so.

(ii) Was there a dismissal?

64. The first issue I require to address is whether or not there was a dismissal under section 95(1)(c) of the Act. It is not a straightforward issue, and there are arguments both ways. I have however come to the conclusion that there was not. There are a number of reasons for that.

65. Firstly, the application on 31 October 2019 was an informal request, not one that met the statutory requirements. It is not therefore surprising that it was dealt with relatively informally, with less note-taking than would have been the case with a formal application. It may be that the claimant was proceeding on the basis, from a discussion with Mr Stewart that indicated that it was likely to be favourably received, that such an informal request was sufficient. It was suggested by Mr Stewart that the claimant had referred to the practice in the NHS of those in the last year before retirement being entitled to work two days per week, but that had not been put to her in cross examination and no finding is made about it. Whatever the background, the request was not one made in accordance with the statutory provisions either then, or later, and was accordingly an informal one.

66. Secondly, the respondent clearly did wish to grant it if they felt that they could, that was their position at the practice meeting on 7 November 2019, and matters were discussed to see if that were possible. A number of potential solutions were explored. The respondent did seek to accommodate that request, but found that it could not. In addition Mr Stewart initially was also supportive of the application in principle when that was first raised with him.

67. Thirdly, I accepted Dr Stewart's evidence that the respondent had a policy of having two Practice Nurses on duty each working day. There were good clinical reasons for that, and in any event it is not for me to dictate how a respondent such as this one conducts its business. The policy was there to meet clinical need, and there was a perfectly legitimate concern that having one day a week less of Practice Nurse cover may affect patients detrimentally. The arrangements that existed prior to the request made by the claimant meant that, in general, there were two Practice Nurses working either 8am to 4pm or 10am to 6pm for Mondays to Fridays. That gave cover between 8am and 6pm. The policy on annual leave was that save in exceptional circumstances only one of them was permitted to be off at a time. If other issues arose that was managed as best it could be. The rota however meant that there was considered to be adequate cover for Practice Nurse duties. If one day less per week was provided, the cover was not considered adequate. The claimant sought to suggest that she would be able to provide cover, but the evidence from Dr Stewart was that such an informal arrangement was not sufficiently certain to be acceptable. I consider that he was entitled to have that view, that it was based on clinical concerns, and as a matter of practicality if the claimant was not on a working day and had made other arrangements, such as being away from home for example, she could not have come in to the practice at short notice.

68. It was suggested in cross examination that the Advance Nurse Practitioner or Healthcare Worker could cover some absences, which was true in part but only a small part given the respective roles and competencies. The Advance Nurse Practitioner was not conducting the same kind of work as a Practice Nurse, and had a different set of skills and experience such that she could not simply step into the shoes of a Practice Nurse, save as a matter of urgency.

69. It was suggested that the difficulties arose only when there was some form of leave or absence of a Practice Nurse which would lead to one Nurse on duty or none, which is true, but such periods of leave and absence do occur, should be planned for, and do impact on patient care if not properly managed. The fact of the matter is that one day of Practice Nurse cover

less per week would impact negatively on patient care in the opinion of the respondent. The respondent is best placed to make those judgments. There was certainly a rational and reasonable basis for it, as explained in the evidence.

5 70. Fourthly the respondent investigated the possibilities reasonably. They asked the other two Practice Nurses if they would work an extra day, but neither was able or willing to do so. They looked into having a new staff member for one day, but that was not thought to be financially viable. They considered a Trainee Nurse, but the scheme operated from September 10 each year, and would not provide a realistic solution. There is a real issue as to what the clamant said that she would provide as to cover. She said in her request letter that she would cover sickness absence "etc". What that etc meant was not set out. Her evidence to the Tribunal was that she could cover annual leave of her colleagues, and other absences, and that 15 she had not been asked about that. Mr Stewart in his evidence said that he had had a number of discussions with the claimant and she had said that she would cover sickness absence, but not annual leave. That point however had not been put to her in cross examination. That is therefore an unsatisfactory evidence base.

20 71. What I consider as particularly important in this regard is the evidence of Dr Stewart. His view was that there was in effect a risk to patients of relying on a Practice Nurse such as the claimant agreeing to provide extra cover on an informal basis. The risk for the respondent, and its patients, was that for what were perfectly good reasons from the claimant's point of view 25 she could not, or would not, agree to do so. I consider that that is an entirely rational and reasonable position for the respondent to take.

72. That position is I consider supported by the acceptance by the claimant in evidence that if there was a policy of two Practice Nurses required each day, her request could not be accommodated. That acceptance appears 30 to me to confirm that the claimant was in effect accepting that she could not always work whenever required to provide that cover beyond a normal two day a week rota if that had been agreed.

73. The respondent came to the view that there was no practical solution, and that the informal application should be refused. That was not outwith the acts of a reasonable employer in my opinion. The claimant wanted to have a meeting with the partners, and some partnerships may have permitted her to do so, but the respondent did not. That is not however, in my judgment, a decision that was not one that they could have taken as a reasonable employer. The respondent had delegated the investigation of issues around the request, which was as stated an informal one, to Mr Stewart. They were entitled to do so.

74. That decision was communicated to the claimant by Mr Stewart at a meeting which Dr Stewart attended, it originally having been arranged for an appraisal. That was not necessarily the best way to do so, but it was not unreasonable I consider. She was upset by the decision, and did not agree with it, but she had not made a formal application under the statutory provisions, and informing her in that manner of the outcome of her informal request was not outwith the acts of a reasonable employer.

75. She held a disputed meeting with Mr Stewart on 8 January 2020, but I do not accept her evidence that he communicated to her that a formal flexible working application would not be worth making as there would not be a different outcome, for the reasons given above. It is also relevant in this context that there was no obligation in law to provide her with either information as to making a formal request under the statutory provisions, or the application form. Indeed there was no requirement in law to write a letter of confirmation of the decision of her informal request at all, although it is clearly good practice to do so. It is therefore contrary to a common sense view of the position for Mr Stewart, having been advised by the Medical Defence Union of the benefit of referring to the statutory application process, to say or indicate non-verbally (when he was not the decision maker) as the claimant claimed something to the effect that doing so would not make any difference.

76. It is not easy to understand why the claimant did not make the formal application referred to even if such a comment or indication had been made. There is an obvious difference between an informal request, and one made on the basis of a statutory right to make such a request which

she had been specifically informed about which would then require to be addressed by the respondent. But she did not, and there is no suggestion, entirely properly, that this claim includes a breach of the statutory provisions for such an application. A formal request was not made. Nor was any grievance raised about what the claimant says Mr Stewart said or indicated to her about the formal application.

77. In any event, even if I had accepted that evidence that Mr Stewart had said or indicated that there would be no point in a formal application, I require to assess whether there was a fundamental breach of contract, in particular a breach of the implied term as to trust and confidence set out in the authorities referred to above. This case is not one of breach of duty, such as the duty to make reasonable adjustments for a disabled person. The right is not to work flexibly. The right is to request to work flexibly. There is then no statutory requirement to grant the request. The statutory requirement is to consider that request reasonably.

78. In my judgment, whilst this was not a case of a formal statutory request, it was considered reasonably by the respondent, who has not acted overall in a manner that meets the statutory definition of dismissal. There are issues in relation to how matters were handled, and good practice (including that referred to in the ACAS Code of Practice if that had applied) may well not have been followed in a number of respects, but that does not mean that there was a dismissal. I require to judge matters from all the circumstances, looking at substance and form, and having done so I do not consider that there was a repudiatory breach of contract including one of the said implied term. That is also my conclusion in relation to the meeting on 8 January 2020, if there is an argument that that was a final straw. That meeting did not occur as the claimant alleged, and I do not regard that there was anything in it that could properly be the basis of such a final straw.

79. The next issue is the terms of the claimant's resignation letter. It was not written very shortly after the 8 January 2020 meeting, but about four weeks later. She did not there state that she was accepting a repudiatory breach or words to any similar effect, instead she thanked the partners of the respondent, amongst others. That is far from determinative, but it is not

irrelevant in considering the matter in my opinion. She wished, entirely understandably, to spend more time caring for her elderly mother, and wished to work only two days per week. The respondent had not been able to accommodate that. That it appears to me is why she resigned, and her letter referring to hanging up her uniform and spending more time with family supports that.

80. That conclusion is also fortified by the claimant contacting the respondent in April 2020 and offering to work for it. That is not I consider the act of someone whose trust and confidence in her employer has been destroyed or seriously damaged. As it occurred after intimation of dismissal it is not directly relevant to the assessment, but it is I consider supportive of the conclusion in the foregoing paragraph.

81. I do not consider that the conclusion I have reached is affected by the steps taken by the respondent to seek to replace the claimant. They were the result of her resignation. At about the same time the Covid-19 pandemic, as it now is, started to have an effect. Events after a termination of employment do not turn it into a dismissal. The assessment must be made at the time the claimant intimated that termination, in this case on 4 February 2020. The claimant served notice, as she is entitled to do, and that does not affect the determination of whether or not there is a dismissal. She did so as she wished to give notice to allow time for a replacement which was entirely responsible of her. The recruitment of a replacement however was the natural consequence of her resignation.

82. The final matter to consider, even if the other aspects are found in favour of the claimant, is whether the respondent had reasonable and proper cause for acting as it did. If so, even if there was a repudiation or breach of the implied term, that does not amount to a dismissal. I consider that, looking at the evidence as a whole, the respondent did have reasonable and proper cause for its actings. For the reasons set out above its policy was to have two Practice Nurses on duty for two different shifts Monday to Friday, thus having ten such shifts covered. The claimant covered three days, as did one colleague, and the other colleague covered four days. That ten days of cover in total provided just the necessary shifts. There was no slack in that rota arrangement, but it was sufficient. The claimant

was not, and in reality could not, guarantee to provide cover when required for all occasions for one of her colleagues on what would have been the day less work if her request for a change of contract from three to two days per week had been granted. Any number of reasons might have meant that it was not possible for her to do so on what would then have been a non-working day. Fundamentally, there was no real solution to the problem that would have led the respondent to consider that the arrangements for the care of its patients were adequate, save the hiring of a new staff member for that one day which would have added materially, and in their view unacceptably, to the cost.

83. The conclusion I reached is that there was not a dismissal of the claimant under section 95(1)(c) of the Act. As I have found that there was not a dismissal the claim for unfair dismissal must fail, and the claim is dismissed.

84. In coming to that conclusion, I do so notwithstanding that there were several areas where the respondent did not follow what may be described as best practice. Firstly when the application for reduced days was made, the respondent might at that point have referred the claimant to its Handbook and the right to make a request formally. Secondly, it might well have been appropriate to record in writing all of the discussions about the request, including with the Practice Nurses, and the meeting on 5 December 2019 which was not minuted at all. Mr Stewart accepted that, but explained that he was working under substantial pressures at that time. Thirdly the reasons for the refusal might have been explored with the claimant at a meeting with both Mr Stewart and Dr Stewart as Staff Partner, before a final decision was taken, as the effect was liable to be the loss of a very experienced and effective Practice Nurse, who had indicated a retirement at the end of 2020 in any event, at a meeting that was documented and if appropriate followed up. Finally, after it was clear that the claimant was distressed at latest at the Christmas night out, a more proactive approach to the claimant to discuss that with her further might have been made, and if that was at the meeting on 19 December 2019 a note of that meeting, and the later one on 8 January 2020, maintained.

85. What I cannot do however is say that because of failing to follow best practice there was a dismissal. That is not the test in law. The law puts the onus of proof on the claimant, and unreasonable conduct, even if it exists, is not of itself sufficient to constitute a dismissal.

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Conclusion

86. The Claim must be dismissed accordingly. I do so with regret, firstly as the claimant had clearly given lengthy, and indeed exceptional, service to the respondent, and decided that she required to spend more time caring for her mother which was the reason for the request to reduce her days before

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her retirement at the end of 2020, and secondly as the matter might have been handled more sympathetically and more effectively by the respondent. In summary however in my judgment this is a sad case where the claimant had perfectly reasonable reasons for asking to move to two days per week, and the respondent had different but equally reasonable

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grounds for saying that it could not accede to her request.

87. I would like to thank both agents for the manner in which they presented their respective cases.

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Employment Judge: Sandy Kemp
Date of Judgment: 12 May 2021
Entered in register: 14 May 2021

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and copied to parties