



EMPLOYMENT TRIBUNALS

Claimant: Ms N Lumley

Respondent: North Yorkshire County Council

CERTIFICATE OF CORRECTION **Employment Tribunals Rules of Procedure 2013**

Under the provisions of Rule 69, the Judgment sent to the parties on 20 October 2021, is corrected as set out in block type at paragraph 35.

G Johnson

Employment Judge Johnson

Date: 3 November 2021

Important note to parties:

Any dates for the filing of appeals or reviews are not changed by this certificate of correction and corrected judgment. These time limits still run from the date of the original judgment, or original judgment with reasons, when appealing.



EMPLOYMENT TRIBUNALS

Claimant: Ms N Lumley

Respondent: North Yorkshire County Council

Heard at: Teeside Justice Hearing Centre

On: 4-6 October 2021

Before: Employment Judge Johnson

REPRESENTATION:

Claimant: In person

Respondent: Ms B Clayton of Counsel

JUDGMENT

1. The claimant's application to amend her claim so as to include allegations of unlawful disability discrimination is dismissed upon withdrawal by the claimant.
2. The claimant's complaint of unfair constructive dismissal is not well-founded and is dismissed.

REASONS

Introduction

1. By a claim form presented on 21 October 2020, the claimant brought a single complaint of unfair constructive dismissal. In its response form presented on 23 November 2020, the respondent defended that claim.
2. On 26 October 2020, the parties were sent a Notice of Claim, confirming that the claimant's claim would be heard with a time estimate of 1 day, on Friday 19 February 2021. Following submissions from the respondent, it was agreed that the time limit would be extended to 2 days and an amended notice was sent to the parties on 18 November confirming that the hearing would take place on Friday 19 February 2021 and Monday 22 February 2021. Following further submissions by the

respondent, it was agreed that 3 days would be required for the case to be heard and an amended notice was sent to the parties on 11 December 2020 confirming that the hearing would take place on Friday 19 February, Monday 22 February and Tuesday 23 February 2021. Finally, as a result of the COVID restrictions, that hearing was postponed and by a notice dated 3 February 2021, the parties were informed that the hearing would take place over 3 days from Monday 4 October 2021 to Wednesday 6 October 2021 inclusive.

3. Case Management Orders had been made by the Tribunal on 26 October 2020. Those orders included provision for the preparation of hearing bundles and statements from all persons who were to attend the hearing to give evidence.

4. By a letter dated 16 August 2021, the claimant made a formal application for permission to amend her claim to include allegations of unlawful disability discrimination. The letter of application with supporting grounds, runs to 6 pages. By a letter dated 31 August 2021, the respondent opposed the application to amend.

5. By a letter dated 6 September 2021, the parties were informed that the claimant's application to amend would be considered at the start of the hearing on the morning of Monday 4 October 2021.

6. On the morning of Monday 4 October 2021, the claimant attended in person and was accompanied by her friend, Mrs Aylott, who was present to support and assist the claimant in the presentation of her claim. The respondent was represented by Ms Clayton of counsel. Ms Clayton had no objection to Mrs Aylott assisting the claimant. I explained to the claimant and Mrs Aylott that they must decide which of them was to put questions to the respondent's witnesses by way of cross-examination and which of them was to make any closing submissions. The claimant and Mrs Aylott both confirmed that Mrs Aylott would do that on behalf of the claimant.

7. I explained to Mrs Aylott that my first task was to consider the claimant's application for permission to amend her claim, so as to include allegations of unlawful disability discrimination which had not been included in the original claim form. I explained to Mrs Aylott that, if the application were to be granted, then the claims of unlawful disability discrimination would have to be heard by a full Tribunal panel comprising an Employment Judge and 2 lay members. That would mean that this hearing would inevitably have to be postponed. I further explained that, if permission to amend were to be granted, then the respondent would be entitled to amend its response to reply to the new allegations. That of itself would involve postponing the hearing, so that the respondent could provide instructions to its legal advisers after interviewing witnesses etc and examining documents which may be relevant to those new allegations. That would mean several weeks' worth of additional work and, again, a lengthy postponement. If today's hearing were to be postponed, and a new date of between 3 and 5 days had to be arranged, then it highly unlikely that a date could be found before August 2022.

8. At this stage, Mrs Aylott informed me that she had already discussed the amendment application with the claimant over the recent weekend and they had decided that they would not pursue the application for permission to amend the claim so as to include allegations of unlawful disability discrimination. Mrs Aylott confirmed that the application to amend was being withdrawn.

9. The Tribunal then proceeded to hear the claimant's remaining complaint of unfair constructive dismissal. I took some time to explain to the claimant and Mrs Aylott that the claimant would have to prove on the balance of probabilities that the respondent had committed a fundamental breach of her contract of employment and that she had resigned in response to that fundamental breach of contract in circumstances where she had not delayed her resignation to the extent that she could be regarded as having accepted any breach and thereby affirmed the contract. I explained to the claimant and Mrs Aylott what is meant by the implied term of trust and confidence which must exist between employer and employee. I explained to the claimant and Mrs Aylott that the claimant must establish exactly what had been said or done by the respondent, which should not have been said or done, or alternatively what ought to have been said or done, but had not been said or done. The claimant must then go on to show that such an act or omission amounted to conduct, without reasonable and proper cause, calculated or likely to destroy the mutual relationship of trust and confidence. I took further time to explain to the claimant and Mrs Aylott that it was for the claimant to establish those facts and that she would have to do so by means of her own evidence and her challenges to the evidence of the respondent's witnesses. When asked, Ms Clayton on behalf of the respondent confirmed that she had no objection to the description I had given to the claimant about what was required of her in this regard.

10. At the outset, Mrs Aylott informed me that the claimant suffers from stress, anxiety, depression, IBS (Irritable Bowel Syndrome) and OCD (Obsessive Compulsive Disorder). Furthermore, Mrs Aylott herself informed me that she too suffers from stress, anxiety depression and autism. Mrs Aylott asked that the Tribunal take these matters into account in its conduct of the hearing. In particular, Mrs Aylott asked that the claimant be permitted to take a break of 10 minutes approximately every hour, that the start time of the Tribunal be managed each day to suit the claimant, that questions put to the claimant be couched in simple and straightforward terms and that the claimant be allowed to use a pen and paper to make notes whilst subject to cross examination. Ms Clayton for the respondent and the Tribunal were content with all of those, save for that referring to the use of a pen and paper to make notes during cross examination. It was agreed that cross examination would be conducted in the normal way, without the use of pen and paper, so that the Tribunal could assess whether there was any prejudice or disadvantage to the claimant by not being permitted to make notes during cross examination. In the event, the claimant managed quite adequately to answer those questions put to her by Ms Clayton and by the Tribunal. At no stage during her cross examination did the claimant request the use of pen and paper.

11. The claimant and Mrs Aylott had agreed that Mrs Aylott would undertake presentation of the claimant's claim, including cross-examination of the respondent's witnesses. The claimant's evidence began at 1.40pm on the afternoon of Monday 4 October 2021. During the course of cross-examination of the claimant by Ms Clayton, the Tribunal expressed concern to Mrs Aylott that she appeared to be nodding or shaking her head when questions were being put to the claimant by Ms Clayton. The Tribunal informed Mrs Aylott that this was inappropriate, as it may appear that she was indicating to the claimant how those questions should be answered. Mrs Aylott apologised and stated that was not her intention or purpose, that the nodding and shaking of her head was a result of her autism, and that she would endeavour not to do so.

12. Following a break of 10 minutes at 2.55pm, Mrs Aylott returned to the Tribunal hearing room and stated that she was personally distressed to the extent that she no longer felt able to continue to represent the claimant this afternoon, but that the claimant would continue in Mrs Aylott's absence. Mrs Aylott then left the hearing room and did not return for the remainder of the proceedings.

13. The Tribunal attempted to agree with the claimant a list of issues (the questions which the Employment Tribunal would have to decide) arising out of her complaint of unfair constructive dismissal. The Tribunal urged the claimant to focus upon her claim form, as that sets out the allegations which she maintains amount to a fundamental breach of her contract of employment which led her to resign. The Tribunal found it necessary on a number of occasions to remind the claimant that she must focus her attention upon those allegations. The statement of claim itself states as follows:-

“2008 Northallerton Locality Support Team Leader, Health and Adult Services.

2013 Admin restructure. Central area Finance Admin Business Support Team Leader. Health and Adult Services and Disabled Children Services.

2019 Asked line managers for specific training, not ever given within post regarding financial admin tasks and processes, but expected to teach staff and create guide. E-learning courses dedicated to operational roles not administrative. Senior management fully aware. Complete change in role undertaking extra work from other teams with no training, guidance, resources or support. Bullied/harassed at work by line manager, Linda Wiley, threatened me with my job, discriminated in Occupational Health referral regarding health issues rather than acknowledging work-related stress. Raised issues with Head of Business Support, Kevin Tharby – lied when called as a witness. Caused unnecessary work-related stress, referred by GP to IAPT. Returned to work and informed under investigation, felt suicidal and self-harmed, referred to CAMHS. Investigation Officer, Vicky Truman, didn't respond kindly or answer grievance completely. Evidence I produced was not read. Would have shown investigated with unfair and unfounded allegations of poor performance. Had to resign from North Yorkshire County Council, can't trust them as an employer. Panel made unfair decision before disciplinary hearing undertaken. Disciplinary outcome letter stated employer couldn't trust me. Demoted to lower paid job under several managers involved throughout disciplinary process, access to numerous credit cards for purchasing. Caused damage to my health and career. North Yorkshire County Council stated disciplinary would be kept on my file for 15 months and declared to any future employer.

If I had done something wrong I would hold my hands up but I haven't done anything. I have done the same job since 2013, for whatsoever reason the manager in 2017 has taken a dislike to me and put me through unnecessary stress causing me so many health issues and distress. This should never be allowed to happen in any workplace,

especially a council. The allegations made against me refer to 2016/17 and then brought up in May 2019, there were not performance or capability issues, my supervisions and appraisals were outstanding and had been given thank you payments over the last few years. If I really hadn't been doing my job properly then thank you payments wouldn't have been issued and supporting documents such as appraisals would have reflected this. I have seen the council get rid of people before and I thought it wouldn't happen to me, but it has, and it's disgusting that they keep getting away with it. I have had mental health issues (depression, anxiety and OCD) in all the time I have worked for the council and I have always gone above and beyond to make sure that my health issues are not detrimental to my work. I am also aware that there are people that pretend or play on mental health issues, and that's why even more, so I don't let it impact on my work as there is a stigma attached and it is so much harder to get a job when you have health issues of any kind. I still feel as though no-one has listened to me throughout the disciplinary hearing and in correspondence since. I even wrote to the Chief Executive hoping he would look at all the evidence, but he just took the manager's word for it and said he wouldn't get involved even though I said I didn't ever want anything like this to happen to anyone else. I am big believer in fairness and doing the right thing and I will fight for what is right. I cannot believe that any organisation/company can put someone through something like this or treat someone like this and just not be bothered about how it impacts on that person. I am not a number I am a person and should be treated as such."

14. The claimant had prepared her own "List of Issues" for the hearing, which list ran to 4 pages containing some 64 separate issues. However, of those only 25 related to the complaint of unfair constructive dismissal, as the others related to the allegations of unlawful disability discrimination, which did not proceed. I then went through the 25 issues listed by the claimant as those arising from her complaint of unfair constructive dismissal. In general terms, the claimant's case was that she had worked for the respondent without complaint from April 2001 until she went on extended sick leave on 2 May 2019. The claimant was absent on sick leave for 4 months until she was due to return to work on 4 September 2019. During her absence, the respondent arranged for other employees to undertake the work which the claimant had been undertaking. The respondent's case is that during the claimant's absence matters came to light which were of such concern as to justify a formal investigation into the claimant's performance and/or conduct.

15. Upon her return to work on 4 September, the claimant was immediately suspended on full pay, whilst that formal investigation was undertaken. Following that investigation, formal disciplinary proceedings were commenced which led to a formal disciplinary hearing which took place over 7 days between 16 June and 4 August 2020. By this time, the claimant had raised 2 formal grievances, both of which were dealt with as part of that same disciplinary process. The outcome of all of this was set out in an outcome letter dated 19 August 2020. The decision was that the claimant should be redeployed into a role which did not have management responsibility for a team, that a final written warning be placed on her file for a period of 15 months and that the respondent's flexitime policy be withdrawn from the

claimant for the same period of time. The claimant resigned by a letter dated 26 August 2020, stating:

“Because of the various sanctions imposed on me I believe working relationships have broken down and have become untenable and I believe I have no option now but to resign citing constructive dismissal.”

16. The claimant accepted that the matters which she now alleges amount to behaviour calculated or likely to destroy the relationship of trust and confidence were those which took place between her going on sick leave at the beginning of May 2019 and her resignation on 26 August 2020. In particular, the claimant alleged that the respondent had conducted an unreasonable investigation into the allegations against her, that the disciplinary panel had prejudged her case by the time of the disciplinary hearing and failed to give due weight to her health conditions when considering both her capability and culpability. The claimant further alleged that the respondent had failed to reasonably consider her grievances which were raised during the disciplinary process. Having established that those were the real issues in the claimant’s case, I urged the claimant to concentrate upon those issues when presenting her claim to the Tribunal.

17. Throughout the hearing the claimant continued to refer to her health conditions as her “disabilities”. On several occasions I had to politely remind the claimant that hers was not a complaint of unlawful disability discrimination and that, whilst the respondent accepted that the claimant suffered from those ailments described above, there had never been a formal allegation that those amounted to a disability and there had certainly be no concession by the respondent that the claimant's satisfied the definition of disability set out in section 6 of the Equality Act 2010. I had to remind the claimant that it was for her to establish that, on the balance of probabilities, those physical and mental ailments had some relevance to those matters which led the respondent to suspend the claimant, conduct an investigation, instigate formal disciplinary proceedings and impose those sanctions described above. I am satisfied that the claimant understood what was required of her.

Findings of Fact

18. The Tribunal made the following findings of fact on a balance of probability.

19. The claimant was employed by the respondent as a Central Area Finance Administrative Business Support Team Leader. Her employment began on 23 April 2001. The claimant was initially employed as an Administrative Assistant on scale 2. Following an internal restructure of the council’s administrative staff in 2013, the claimant became a Central Area Finance Admin (CAFA) Business Support Team Leader on Band 9. The claimant managed 11 staff members who undertook a range of functional administrative support activities, mainly focussed on finance. The role of that team was to undertake high level complex business support activities, to monitor and reconcile large budgets, to produce complex financial reports and statements and to deal with the close down of accounts. The claimant’s role was to manage the team and its performance which included supervision, appraisals, identification of training needs, supporting and managing recruitment, induction and training of business support staff. The claimant was also responsible for planning and coordinating the deployment of staff and the work undertaken by those staff.

20. Between 2013 and November 2017, the claimant had several line managers. The respondent accepts that none of those raised any concerns at the relevant time about the claimant or her performance. The claimant's appraisals were all satisfactory.

21. In November 2017 Miss Linda Wiley took over as the claimant's line manager. On 22 November 2017 the claimant met with Miss Wiley following an investigation into petty cash discrepancies involving another member of staff. The claimant found that incident stressful and shared with Miss Wiley that she was suffering from anxiety, depression and OCD. Miss Wiley accepts that the claimant informed her about her personal and health issues and that, as a result, she agreed with the claimant that she would be allowed to work in any office which she found to be most convenient, including from home when necessary, as long as Miss Wiley and the claimant's team knew where she was working and that she remained contactable. The claimant's evidence to the Tribunal was that once Miss Wiley was informed of the claimant's health issues, Miss Wiley should have immediately referred the claimant for an Occupational Health examination. Miss Wiley's explanation was that this was not necessary because the claimant had not had any absences from work nor were there any concerns at that time about her performance.

22. Miss Wiley did acknowledge in her evidence that the claimant had a reputation of "not being easy to work with", that she did not respond to colleagues' queries as quickly as was appropriate and that there were frequent delays in completion of work being handled by the claimant and her team.

23. At her appraisal in January 2019, Miss Wiley asked that the claimant "ensure processes are followed by the team", whilst acknowledging that the claimant and her team had undergone a lot of changes and that workload had been high. Miss Wiley identified that there had not been any service failures but that the only negative area in the claimant's team was that its response to queries was sometimes slow. The claimant's explanation was that those queries should have been directed to other teams. In March 2019 in an email to the claimant Miss Wiley acknowledged that, "I know that I have added to some of the work pressures you are feeling as I am approached for updates etc I come to you for them". Miss Wiley also noted the claimant's "personal health issues".

24. On 23 April 2019 the claimant received a letter from the respondent, congratulating her on her 15 years' continuous service.

25. Miss Wiley's evidence was that in early 2019, the claimant's remote working was not working as well as it had done previously. Miss Wiley said that it was no longer easy for her or the claimant's team to contact the claimant or to locate where she was. There were times when the claimant was expected in her office, but did not turn up/. Miss Wiley's evidence was that more and more complaints were being raised with her via email by operational managers, the contracting section and external providers. At this time, the claimant was undergoing an NVQ course and the NVQ assessor raised concerns that the claimant was not producing any work for her course and was cancelling or rescheduling meetings at short notice. Miss Wiley learned that the claimant had informed her NVQ assessor that she was struggling with health issues and that this was contributing towards the delay in completing the NVQ coursework.

26. In April 2019 the claimant missed a year-end deadline which was of considerable importance to the respondent. Miss Wiley secured an extension of time with the respondent's Finance section, but Miss Wiley's position was that the deadline should not have been missed. The other two area Finance teams had both submitted their returns on time and without any errors. Miss Wiley raised the difficulty with the claimant and the claimant said that she felt "overworked and stressed". As a result, Miss Wiley completed with the claimant the stress risk assessment which appears at page 239 in the bundle. Miss Wiley noticed that the claimant appeared to be doing a lot of work herself, which could and should have been done by subordinates. This failure to delegate work appropriately indicated to Miss Wiley that the claimant was not properly undertaking the duties of a team leader. It was agreed that an Occupational Health referral should be made. However, when Miss Wiley completed the referral form she gave as the reason for the referral "work deterioration" instead of "work related stress". Miss Wiley immediately conceded that this had been an error and confirmed that when giving evidence to the Tribunal. The claimant's response to that error was to inform Miss Wiley in an email dated 29 April 2019, "I have now lost trust in you as a manager as I feel that the action plan was not accurate as per discussion." The Tribunal found this not to be the case. The Tribunal accepted Miss Wiley's explanation that this had been a genuine error.

27. At their meeting to discuss the stress risk assessment form on 30 April, Miss Wiley mentioned to the claimant that she had received another complaint from a senior service manager relating to the claimant's team. The claimant again became upset at being told this. The Tribunal found that it was not unreasonable for Miss Wiley to raise this particular issue at the meeting.

28. The claimant commenced a period of sickness absence on 3 May 2019 due to "work related stress". The claimant remained on sickness absence until 2 September 2019.

29. During the claimant's absence, Miss Wiley arranged for two other Business Support team leaders to work with the claimant's team. Whilst working with the claimant's team, those managers learned that there were a number of problems within the team that were of considerable concern. In general terms, there were a number of issues, some very significant, going back a number of years, including processes which had been agreed by all three Area Finance Teams and services which had not been implemented or communicated to the claimant's team. A member of the claimant's team had been overpaid due to the claimant not properly processing their request for extended unpaid leave, and as a result that overpayment had to be recouped from the employee. Examples of poor practice surfaced throughout this period of time. Examples appear on the list of concerns which is at pages 289-290 in the bundle. Miss Wiley concluded that it would be appropriate to commence a formal capability investigation once the claimant returned to work. However, as the number of issues kept increasing and because of the serious nature of those issues, Miss Wiley and her colleague Mr Tharby (Head of Business Support) agreed that a full investigation should be carried out as part of a formal disciplinary process, rather than the capability process. Miss Wiley's evidence was that this was because of the serious nature of the shortcomings which had been uncovered.

30. Of particular concern to Miss Wiley was that “Nicola had not always been honest with me”. Invoices which the claimant had assured Miss Wiley had been paid, had not in fact been paid. Miss Wiley suspected that she had not always been told the truth by the claimant.

31. It was decided that the claimant should be suspended on full pay whilst a formal investigation was carried out into these matters. Miss Wiley sought HR advice, which was that due to the reason for the claimant's absence, she should not be informed about the investigation until she was fit to return to work.

32. The claimant was due to return to work on 2 September 2019, when a return to work interview was organised. At that meeting, the claimant was given a letter suspending her from duties on full pay pending the outcome of a formal investigation. The suspension letter dated 2 September 2019 appears at page 301 in the bundle and states as follows:-

“I write to confirm that a decision has been made to temporarily suspend you from your current post of Business Support Team Leader as a precautionary measure, with immediate effect, pending the outcome of an investigation into the following allegations of misconduct:-

- Serious negligence or wilful failure which has or might cause financial and wider implications to the organisation.
- Behaviour which has brought the County Council or its services into serious disrepute.”

33. The letter goes on to state as follows:

“You must not visit your place of work or discuss the matter with any customer or employee of the Authority or arrange for any documents to be forwarded to you without prior permission from Kevin Tharby, Head of Business Support.”

34. Enclosed with that letter was a copy of the respondent's disciplinary policy and procedure.

35. Miss Wiley's unchallenged evidence by the claimant was that she had begun to have doubts about the claimant's integrity from April 2019, but that it was only in the claimant's absence that the performance issues were highlighted. **Following the claimant's suspension, the team which she had led begun to work “well and consistently with the other two area finance teams, with good working relationships, regular meetings and established trust and confidence”**. Miss Wiley concluded that:-

“Despite concerns raised by other people about Nicola, particularly from 2019, I always felt that she was honest with me and worked hard. I was aware that her post could be challenging, and I generally gave her the benefit of the doubt. It was a shock to me to learn the extent to which Nicola had not been carrying out her role as a team leader.”

36. The investigation was carried out under the supervision of Vicky Truman, Business Support Manager for Health and Adult Services. Ms Truman had never

managed or had any working relationship with the claimant prior to undertaking the investigation. Ms Truman's evidence was that she was an experienced manager with over 10 years' experience of managing staff, performance and capability and had undertaken disciplinary policy/investigation hearing training in July 2011. Ms Truman's remit was to undertake a full investigation in line with the allegations posed by the service and to review such evidence as was provided.

37. Ms Truman commenced her investigation by obtaining background information from Kevin Tharby and Linda Wiley in an informal discussion. That was followed up by a formal interview of Miss Wiley on 22 October 2019. From those discussions, Ms Truman acknowledged that there were major concerns about the claimant's performance of her duties. Again, those were set out in the list of concerns at page 289.

38. On 24 September 2019, the claimant raised a formal grievance (page 307). The claimant complained that she had been told at the return to work meeting on 2 September that she was being suspended on full pay pending an investigation. The claimant complained that she should have been notified in advance that she was to be told at the return to work that she was being suspended. The claimant complained that having worked for the respondent for 18 years she was "really not happy about how this has been handled". The claimant sought answers to the following questions:-

- "An explanation about the issues that were going to be raised by my line manager or what the details are that need to be investigated to help me understand why this is happening.
- An explanation why the issues are being addressed through the disciplinary policy.
- An explanation why the investigation wasn't carried out whilst I was absent from work with sickness between 3 May and 1 September prior to my planned phased return to work.
- An explanation why a letter suspending me from duty was issued in my phased return to work meeting on 2 September without prior warning whilst knowing my reasons for absence and leading me to believe I would not be returning to work.

I would like my health to be taken into account due to the fact that it has been work related stress that has made me ill and why I have been off sick."

39. Because those matters all related to the conduct of the suspension, investigation and disciplinary policy, it was decided that the grievance should be dealt with as part of the investigation and disciplinary policy. The claimant accepts that this decision was in accordance with the respondent's grievance and disciplinary policy.

40. Ms Truman's evidence to the Tribunal about the investigation was that:-

“The investigation was lengthy and complex. There was a considerable amount of documents to go through and a number of concerns, some historic, which needed in depth exploration. I also interviewed a number of the staff who had worked with Nicola, had managed her or had raised concerns about her or about work not being carried out or not being carried out in a timely manner by Nicola, and this all took time. I completed the investigation as quickly as I could in the circumstances. Occupational Health advice had been sought as to whether Nicola would be fit to engage in the investigation process. The response from OH was that Nicola was fit to engage and would benefit from being involved in the process as soon as possible so she felt supported and able to give her side of the story.”

41. Ms Truman interviewed the claimant on 4 separate occasions on 24 October, 8 November, 24 January and 7 February. Ms Truman also interviewed 22 other employees as part of her investigation. The minutes of each of those interviews were kept and provided to the claimant.

42. The investigation was concluded by February 2020 and on 2 March 2020 Ms Truman carried out a review of all of the evidence and data which had been collected. Ms Truman formed the opinion that the evidence was such that it should be accelerated to a formal disciplinary hearing and that the allegations against the claimant could, if proven, amount to gross misconduct and should be dealt with under the disciplinary policy rather than the capability policy. By a letter dated 4 March 2020 the claimant was invited to attend a formal disciplinary hearing to answer the following allegations:

- Serious negligence which might have caused unacceptable loss.
- Behaviour which has brought the County Council or its services into serious disrepute.
- Negligence in carrying out duties and responsibilities.

43. The claimant was told that she would be notified of the date and time and place of the disciplinary hearing.

44. The claimant raised a second grievance by a letter dated 2 March 2020 (page 655). The claimant again complained about being told at the return to work meeting that she was being suspended. The claimant again says, “I would still like to know full details of what has happened for me to receive a letter of suspension from duty, as the allegations that have been made against me for misconduct seem to be farcical”. The claimant goes on to say, “Since 2 September 2019 I wasn’t told exactly how long the investigation and process would take, I was informed fortnightly or monthly about timescales, but was all very vague and you informed me that you were working around your day-to-day job”. The claimant goes on to allege, “The information produced at the investigatory interview meeting as evidence had not been checked and was incorrect, you presented off-hand comments and you informed me that only snapshots had been collated for evidence. Why wasn’t everything looked at as part of the investigation?”. The claimant lists the following as the matters which are of concern and which she requires to be addressed:

- An explanation about what the issues are that were going to be raised by my line manager and what the details are that need to be investigated to help me understand why this is happening.
- An explanation why the issues are being addressed through the disciplinary policy.
- An explanation why the investigation wasn't carried out whilst I was absent from work with sickness between 3 May and 1 September prior to my planned phased return to work.
- An explanation why a letter suspending me from duty was issued in my phased return to work meeting on 2 September without prior warning and whilst knowing my reasons for absence and leading me to believe I would be returning to work.
- An explanation of why the disciplinary process was followed when the allegations had no basis or evidence.
- An explanation why the disciplinary policy hasn't been followed and the grievance been dealt with promptly.
- An explanation as to why NYCC didn't give clear timescales of the investigation process.
- An explanation of why only snapshots of information were collated for evidence for the investigation, not everything looked at as part of the investigation.
- An explanation of why the collated information produced wasn't checked and correct.
- An explanation why the actual computer spreadsheets, contracts, notifications weren't produced in the investigatory meetings to support the information, or shown as evidence.

45. Again, the respondent concluded that this second grievance should be dealt with in the same way as the first grievance, namely as part of its disciplinary policy. During the Tribunal proceedings, the claimant conceded that this was the correct approach for the respondent to adopt. Accordingly, both grievances would be dealt with by the same panel who would undertake the disciplinary hearing, as part of the same process.

46. The disciplinary hearing took 7 days to complete on 16 and 18 June, 2, 14 and 15 July and 3 and 4 August 2020. During that hearing, Ms Truman outlined the evidence collected by her as part of her investigation, a summary of which is set out in the document "Management Script" prepared by Ms Truman and which appears at pages 674-725 in the bundle.

47. On each day of the disciplinary hearing, the claimant attended in person and was accompanied by Miss Sarah Dewar (an NHS Employment Advisor). Mr Howard Emmett (Assistant Director of Strategic Resources) was Chair of the disciplinary

panel. Prior to the hearing, the panel considered 3 large bundles of documents, which had been produced as part of the investigation. Ms Truman's "Management Script" was produced and considered. Notes from the interviews from all of those members of staff who had been interviewed were produced. The claimant's opening statement (page 733) was considered, as were a number of witness statements produced by the claimant.

48. Questions were raised of the claimant both about the disciplinary allegations and the claimant's two grievances. The panel concluded that, due to the high volume of complex issues and concerns about the claimant's conduct, the number of witnesses interviewed and the number of documents involved, the length of the suspension and the length of the investigation was reasonable and justified, particularly in the light of the COVID-19 restrictions which were then in place. It was acknowledged that Ms Truman also had to undertake her normal day-to-day duties whilst undertaking the investigation.

49. On the final day of the hearing on 4 August 2020 the claimant was asked if she was satisfied that she had been given the opportunity to raise all the points she wished to raise. The claimant confirmed that she had.

50. The panel met on 7, 11, 17 and 18 August 2020. At the end of their deliberations all were in agreement as to the correct outcome. Their decision was that, whilst there was insufficient evidence produced by management in respect of some of the allegations, on the balance of probabilities, a large number of the allegations were proven. The panel considered whether each of those allegations taken in isolation could amount to serious misconduct and whether, taken together, they could also amount to gross misconduct. The panel's decision was that, taken together, the proven allegations could easily have resulted in the claimant's dismissal. However, given the exceptional circumstances of the claimant's case, and in particular the state of her health, the panel decided that action short of dismissal was appropriate in all the circumstances. The panel's decision was that the claimant should be redeployed into a role which did not have line management responsibility for a team. It would be for others to determine the appropriate post and grading to which the claimant would be redeployed. The panel also recommended that a final written warning be placed on the claimant's personnel file for a period of 15 months and that during those 15 months benefits of the respondent's flexitime working policy should be withdrawn from the claimant. However, the panel also recommended that "a detailed conversation should take place with Nicola and her new line manager to identify appropriate reasonable adjustments, which may have included adjustments to Nicola's working pattern, to help Nicola manage her health condition".

51. The outcome was sent to the claimant in a formal outcome letter dated 19 August 2020, which appears at pages 772-776 in the bundle.

52. One of the allegations made by the claimant about the disciplinary hearing was that it was "prejudged". The claimant maintained that she had recorded the hearing (or at least part of it) and that she had also overheard through an open window Mr Emmett stating as follows:

"We're going to be lucky to get rid of them after this. Lucky. We're going to be lucky with all of them."

53. The claimant interpreted this to mean that Mr Emmett had already decided that she would be “difficult to get rid of”. When asked about this in cross-examination, Mr Emmett stated that he had no recollection of making that statement. Mr Emmett said he could not recall what had been said outside the formal hearing itself. When it had been put to the claimant by Ms Clayton for the respondent, the claimant had accepted that she had not in fact been “got rid of”. The claimant accepted that the panel’s view was that they may well have had sufficient justification to dismiss her but had decided not to do so.

54. In her evidence to the Tribunal, the claimant insisted that the disciplinary panel had failed to take into account her “disabilities”. The claimant was again reminded that hers was not a complaint of unlawful disability discrimination and that there had been no concession by the respondent that her health conditions amounted to a disability. Nevertheless, Mr Emmett confirmed (and it is indeed clear from the outcome letter) that the claimant’s health issues were a material factor taken into account by the panel in deciding not to impose the ultimate sanction of dismissal. It is clear from the outcome letter that the panel did indeed taken into account the claimant’s health issues in mitigation for the matters which formed the subject matter of the investigation, the disciplinary process and the panel’s findings.

55. The claimant’s evidence to the Tribunal was that those matters which were found to be proven by the panel were in fact due to the claimant’s heavy and unreasonable workload, lack of training and a failure by her line managers to recognise that she was suffering from work related stress and ought to have been referred to Occupational Health. The claimant maintained that the appropriate sanction would have been a transfer to a team leader role on the same grade/band, but which not involve finance administration.

56. On receipt of the outcome letter, the claimant informed the Tribunal that she took advice from a solicitor and also discussed the matter with ACAS. With the benefit of advice from both, the claimant drafted a letter of appeal on 26 August 2020 and sent it to the respondent at 13:47. The appeal letter runs to 3 sides of A4 paper. The basic grounds of appeal were:-

- There was no support or training given with regards to the CHC project work.
- I did manage my team performance through monitoring logs, I ensured that invoices were chased, paid and service user invoices were raised as there are no gaps on the monitoring logs which show this has been monitored.
- One financial year end deadline was missed, I acknowledged and apologised for this at the time, I also informed that I had been confused due to being stressed at work.
- There is evidence to show what training my team received from me and what was given. You have ignored this and taken word of mouth from witness statements which is incorrect.
- Emails and issues were dealt with in a timely manner.

- I had developed good working relationships with my team, managers, colleagues, internal and external customers and stakeholders.
- Timekeeping had not been an issue. This hasn't ever been raised.
- The allegations were a farce. My line manager has looked to see how they could try to get rid of me, regarding carrying out the investigation while I was off sick they could have done this. My health had not been considered in all this at all.

57. Only 6 minutes after submitting the appeal letter, the claimant tendered her resignation in the following terms:-

“I have informed you throughout the process that I have been seeking legal advice and since receiving the outcome of the disciplinary hearing because of the various sanctions imposed on me I believe working relationships have broken down and has become untenable and I believe I have no option now but to resign citing constructive dismissal. I know I am bound by my contract terms and conditions so therefore I am resigning giving one month's notice as from 31 August 2020 which means my last official day with NYCC will be 30 September 2020. Please can you confirm you have received my email.”

58. Although the claimant had by then resigned, the respondent agreed to continue to hear the claimant's appeal. The appeal was undertaken by Ms Louise Wallace (Director of Public Health). The hearing took place on 27 October 2020. The claimant attended in person, again accompanied by Sarah Dewar. Ms Wallace sat with Mr Alan McVeigh to consider the claimant's appeal. Ms Wallace and Mr McVeigh met to consider their decision on 2 November. The outcome letter was sent on 5 November and appears at pages 808-810 in the bundle. All the grounds of appeal were dismissed.

59. During her evidence to the Tribunal, it was explained to the claimant that her decision to resign on 26 August and to claim constructive dismissal, must mean that her resignation was in response to events which had occurred prior to that date. Accordingly, the conduct of the appeal process could not have been a contributory factor to the claimant's decision to resign. In any event, the claimant made no real challenge to Ms Wallace's evidence. The Tribunal was satisfied that the appeal process had been conducted in a fair and reasonable manner.

The Law

60. The claimant's complaint of unfair constructive dismissal engages the provisions of the Employment Rights Act 1996.

61. Section 94 of the Employment Rights Act 1996 states:-

- (1) An employee has the right not to be unfairly dismissed by his employer.
- (2) Subsection (1) has effect subject to the following provisions of this Part (in particular sections 108 to 110) and to the provisions of the Trade Union and Labour Relations (Consolidation) Act 1992 (in particular sections 237 to 239).

62. Section 95 of the Employment Rights Act 1996 states:-

- (1) For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2) ..., only if) –
 - (a) the contract under which he is employed is terminated by the employer (whether with or without notice),
 - (b) he is employed under a limited-term contract and that contract terminates by virtue of the limiting event without being renewed under the same contract, or
 - (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.
- (2) An employee shall be taken to be dismissed by his employer for the purposes of this Part if –
 - (a) the employer gives notice to the employee to terminate his contract of employment, and
 - (b) at a time within the period of that notice the employee gives notice to the employer to terminate the contract of employment on a date earlier than the date on which the employer's notice is due to expire;

and the reason for the dismissal is to be taken to be the reason for which the employer's notice is given.

63. Section 98 of the Employment Rights Act 1996 states:-

- (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.
- (3) In subsection (2)(a) –
- (a) "capability", in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality, and
 - (b) "qualifications", in relation to an employee, means any degree, diploma or other academic, technical or professional qualification relevant to the position which he held.
- (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 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.

64. It was said by the Court of Appeal in **Western Excavating (ECC) Limited v Sharp [1978] ICR 221**, that 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/herself as discharged from any further performance of the contract. If he/she does so, then he/she terminates the contract by reason of the employer's conduct. He/she is constructively dismissed.

65. The elements required to establish a claim of constructive unfair dismissal are therefore:-

- A repudiatory breach by the employer, which may come from a series of acts of omissions.
- The employee elects to accept the breach and treat the contract as at an end. The employee must resign in response to the breach.
- The employee must not delay too long as otherwise he/she may be regarded as having accepted the breach and thereby affirmed the contract.

66. In establishing whether there has been a repudiatory breach, the Tribunal must seek to identify the alleged breach of contract, establish the evidential basis for

that and consider whether the facts are sufficient in law to amount to a repudiatory breach of contract. That is essentially a question of fact and degree.

67. The term breached may be an express term in the contract, or may be an implied term of the contract. The most significant implied term is that which was redefined in **Malik v Bank of Credit and Commerce International SA [1998] AC20**. An employer must not, without reasonable and proper cause, conduct itself in a manner which is calculated or likely to undermine the relationship of trust and confidence which ought to exist between the employer and the employee.

68. It is often not possible to point to a single event which amounts to a fundamental breach of contract. The employee may point to a series of breaches of contract, or a course of conduct by their employer which, taken cumulatively, amounts to a breach of the implied term of trust and confidence. (**Kaur v Leeds Teaching Hospitals NHS Trust [2018] EWCA Civ 978**).

69. In considering the “last straw” question, the Tribunal must ask whether the final straw was the last in a series of acts or incidents which cumulatively amounted to a repudiation of the contract. What is alleged to be the final straw must contribute something, even if it is relatively insignificant, to the breach. It must not be utterly trivial, but does not have to have the same character as earlier acts. It is not necessary to characterise a final straw as unreasonable or blameworthy in isolation. However, an entirely innocuous act cannot be a final straw, even if the employee genuinely but mistakenly interprets that act as hurtful and destructive of their trust and confidence in the employer.

70. The test of whether the employee’s trust and confidence has been undermined is objective.

71. The implied term of mutual trust and confidence was further considered in **Morrow v Safeway Stores Limited [2002] IRLR 9**. It is recognised that a failure by the employer to provide an impartial grievance procedure and to fairly and reasonably consider the employee’s grievance, can amount to a fundamental breach of the implied term of trust and confidence (**Blackburn v Aldi Stores Limited UKEAT/0184/12**).

72. Whether there has been a repudiatory breach is tested objectively. It is not necessary that the employer intended any breach of contract. The circumstances which led to the employer being in breach of contract or the circumstances which led the employee to accept that repudiation should not really be taken into account when determining whether or not there has been a breach.

73. It is generally accepted that a breach of the implied term of trust and confidence will inevitably be serious enough to constitute a fundamental breach of contract which is repudiatory and which entitles the employee to resign.

74. The claimant alleges that the respondent failed to properly consider her grievances. As was said by His Honour Judge David Richardson in the Employment Appeal Tribunal in **Blackburn v Aldi Stores Limited UKEAT/0185/12**:-

“In our judgment, failure to adhere to a grievance procedure is capable of amounting to or contributing to such a breach. Whether on any particular

case it does so, is a matter for the Tribunal to assess. Breaches of grievance procedures come in all shapes and sizes. On the one hand, it is not uncommon for grievance procedures to lay down a quite short timetable. The fact that such a timetable is not met will not necessarily contribute to, still less amount to, a breach of the implied term of trust and confidence. On the other hand, there may be a wholesale failure to respond to a grievance. It is not difficult to see that such a breach may amount to or contribute to a breach of the implied term of trust and confidence. Where such an allegation is made, the Tribunal's task is to assess what occurred against the **Malik** test."

Conclusions

75. The tribunal found that the respondent was entitled to deal with both grievances raised by the claimant as part of its disciplinary policy. It is clear from that written policy that where the grievances relate to matters which form the subject matter of the disciplinary investigation, then they should be dealt with as part of that process. In cross-examination, the claimant accepted this. The tribunal found that the respondent's decision to deal with the claimant's grievances as part of the disciplinary policy could not and did not amount to a fundamental breach of contract, nor did it amount to a breach of the implied term of trust and confidence.

76. The claimant has challenged the time taken by the respondent to conduct its investigation. The disciplinary panel accepted that the investigation had taken a long time, during which the claimant was suspended from work. However, the investigation was conducted by someone who also had her own day-to-day job to undertake. There were 3 bundles of documents produced for the disciplinary hearing. 22 witnesses were interviewed, in addition to the claimant. All of this was taking place at times when restrictions were imposed as a result of COVID-19. The Tribunal was satisfied that the time taken by the respondent to conduct its investigation was not unreasonable and did not amount to or contribute to any fundamental breach of the claimant's contract of employment, nor a breach of the implied term of trust and confidence.

77. The claimant has challenged generally the fairness of the process adopted by the respondent in terms of the suspension, investigation and disciplinary process. In particular, the claimant has alleged that the respondent failed to give due weight to the claimant's health condition, both during the period of time covered by the allegations and the time taken to conduct the investigation and disciplinary process. The claimant accepted that Occupational Health had confirmed that the claimant was fit to take part in the investigation and disciplinary process. It is clear from the outcome letter and from the evidence given by Mr Emmett, that the claimant's health condition was considered, both as mitigation for the incidents which formed the subject matter of the investigation and in terms of what would be a fair and reasonable sanction to impose at the end of the process.

78. The Tribunal found that it was reasonable for the respondent to suspend the claimant upon her return to work. It was not unreasonable to wait until then, rather than inform her during her absence due to illness. In so doing, the respondent did not commit any breach of the claimant's contract, nor any breach of the implied term of trust and confidence.

79. The Tribunal found that the conduct of the investigation was fair and reasonable in all the circumstances. No part of that investigation amounted to a breach of the claimant's contract of employment, nor did it amount to a breach of the implied term of trust and confidence.

80. The Tribunal found that the outcome of the disciplinary process as set out in the outcome letter, was fair and reasonable in all the circumstances. The Tribunal was satisfied that the claimant may well have been dismissed by some reasonable employers in all the circumstances. The Tribunal was satisfied that the disciplinary panel had taken into account all the matters raised by the claimant, including her health, before deciding to impose a sanction other than dismissal.

81. The Tribunal found that the claimant has failed to establish that there has been any fundamental breach of her contract of employment and in has failed to establish any breach of the implied term of trust and confidence.

82. For those reasons the claimant's complaint of unfair constructive dismissal is not well-founded and is dismissed.

G Johnson

Employment Judge Johnson

Date 20 October 2021

JUDGMENT AND REASONS SENT TO THE PARTIES ON
20 October 2021

S Dodds
FOR THE TRIBUNAL OFFICE

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