EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4111258/2021

Final Hearing Held by Cloud Video Platform (CVP) on 10, 12, 14 January and 10 and 11 March 2022

Employment Judge: Russell Bradley

Fatima Tachti

Claimant
A McCormack
Solicitor

Avenue Care Services Limited

Respondent
M Allison
Advocate

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Tribunal is that the claimant was unfairly dismissed. The respondent is ordered to pay to the claimant: -

1. A basic award of ONE THOUSAND AND EIGHTY POUNDS (£1080.00); and
2. A compensatory award of ELEVEN THOUSAND FIVE HUNDRED AND FORTY POUNDS AND SIX PENCE (£11,540.06).

IWE;

REASONS

Introduction

1. In an ET1 presented on 3 September 2021 the Claimant maintained the single ciaim of unfair dismissal. She sought compensation, it was resisted, in accepting that it dismissed the claimant the respondent relied on "some *other substantial reason".* The case was initially listed for a three day final hearing (in .January) fixed to consider merits and if appropriate remedy. Those days were insufficient. The case resumed on 10 and concluded on 11 March.

2. Various indexed bundles were prepared prior to the start of the evidence. The hearing began with an indexed bundle of 769 pages. Prior to the resumption on 10 March a supplementary bundle was lodged. While its page indexing was incorrect taking account of the prior indexes, it was agreed that it should read on from page 770 to 788.

3. In January, evidence was heard for the respondent from Paul Campbell, former operations manager, Jane McLaren operations manager and Ross Bennet self-employed auditor. In March the claimant gave evidence.

4. By 11 March there was a degree of agreement on a number of matters for which I am grateful. They included the period of employment, between 3 April 2017 and 4 May 2021 and the claimant's rate of pay. There was an agreed statement of facts relating to the claimant's schedule of loss. I refer to it below.

5. On the final day of the hearing, 11 March, it was confirmed that the Claimant would exhibit copies of her payslips from her current employment to the Respondent. On 6 April in two emails parties notified the tribunal that this had taken place and it was agreed that (1) the sum of £493.27 should be deducted from any past loss in addition to the sum already given for bank work (£254.58) and (2) the average weekly wage of the claimant to be offset against any future loss is £177.90.

The issues

6 The issues for determination are:-

1. What was the reason for the claimant's dismissal? Was it, as argued by the respondent, some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the claimant held?

2. If so. was the dismissal fair or unfair in the context of section 98(4) of the Employment Rights Act 1996?

3. If the dismissal was unfair, to what compensation is the claimant entitled? In particular, to what extent should any compensatory award be reduced to reflect

    1. The question of mitigation of loss

    2. *Polkey* **and**

    3. Section 123(6) of the 1996 Act.

4. If the dismissal was unfair, to what basic award is the claimant entitled? In particular, to what extent should it be reduced?

Findings in Fact

7. From the parties' agreement, the evidence and the Tribunal forms, I found the following facts admitted or proved.

8. The Claimant is Fatima Tachti. Her first language is Spanish.

9. The respondent is Avenue Care Services Limited. It provides domiciliary care to its service users in their homes. The service users include vulnerable adults. A large proportion of them are elderly adults. That care includes personal care and the administration of medication. Its purpose is to support as fully as possible independent living at home. The respondent provides those services in a number of areas of Scotland including Edinburgh and Fife.

It employs about 225 staff. The respondent operates within a regulatory regime which includes the Scottish Social Services Council (SSSC) and the Care Inspectorate.

10. On or about 29 March 2017 the respondent issued to the claimant a *"contract of employment - principal terms and conditions/* (pages 58 to 64). It provided that; her .employment began on 3 April 2017 as a Social Care Officer; she was required to provide her own appropriately insured transport to visit clients; her hourly rate of pay was based on contact time, that being the allocated time spent in clients' homes delivering the care services; she was also to receive a payment equal to her hourly rate per shift to cover travel between clients' homes; her working week was up to 30 hours of contact time inclusive of the time taken travelling between clients with two periods of work, between 7.00am and 2.00 pm tl between 4.00pm and 11.00 pm; the holiday year was the calendar year: it was a condition of her employment to be registered with the SSSC or other recognised professional body. For certain matters it referred to the respondent's staff handbook (pages 76 to 148). The handbook made provision for questions related to tong term absence, defined as two or more consecutive weeks. In relation to absence management the handbook provides that "A *medical report may be obtained from your GP and/or consultant or an independent Occupational Health Specialist. You will be asked to give your permission for this in accordance with the access to medical report rules"* (page 89).

11. The claimant was issued with a job description (pages 210 to 212). It provided that the purpose of her rote was "*To provide persona! care and support to people who, because of illness or disability, require intensive support to remain in their own homes and reduce the likelihood of them entering into continuing care (Hospital or care Home)."* It set out various tasks and requirements for the job of Social Care Officer. The claimant used her own car in carrying out her job role to travel to the service users' homes.

12. The claimant's rate of pay whilst employed by the respondent was £300 per week gross, £274.86 net. She participated in the respondent's pension

scheme. It was provided by The People's Pension. Both parties contributed to it. The resp ent contributed £5.33 per week.

13. For a time during her employment the claimant's husband was also employed by the respondent. In large measure their shifts were arranged *"opposite"* each other. This arrangement was intended to assist them with the care of their two children.

14. Some time prior to 2020 the claimant made allegations of discrimination related to pregnancy in a claim in the employment tribunal against the respondent.

15. In about June 2020 the claimant returned from a period of maternity leave.

16. By emailed tetter dated 26 September 2020 the respondent (Jane McLaren) wrote to the claimant (pages 213, 214 and 754). The letter referred to two meetings with her. on 15 July and 2 September. It was about a concern raised by the claimant as to her holiday entitlement. She believed it was 28 days per annum. The respondent's position was that her entitlement was 22 days. On that issue, Ms McLaren wrote, '7 *am satisfied you have been paid the correct holidays during your employment with the Company, and although you disagreed with this, the facts remain your entitlement of 22 days is correct for the period you are querying."* The letter concluded, *7 *trust this resolves any outstanding concerns you have. All other points were addressed via the Employment Tribunal claim and therefore I am comfortable we have put the appropriate steps in place. Should you have any further concerns or questions please raise with me directly."*

17. In the time between Tuesday 6 October 2020 (8.27am) and Wednesday 7 October (20.50) Paul Campbell and the claimant exchanged 9 emails (pages 215 to 218). The first email from Mr Campbell said, *"Hi Fatima, The office staff have made me aware they've had to remind you to use real-time monitoring this morning and that you found this funny and laughed, can I ask what you've meant by this as I note I have had no response to the RTM emails I've sent you recently? Are you aware of how important this is and the*

expectations we have on care staff to use the solution?" Reference to real-time monitoring and RTM was to the respondent's system of time management of some staff, including the claimant It required them to "log *in'* using a telephone handset. A percentage score was generated for its users. One of Mr Campbell's responsibilities was to have staff, including the claimant, produce a score of 80% or better, In the exchange that followed; the claimant denied that she had laughed; she sought the source of the allegation; its basis was said to be *"office staff'* when she had been on the telephone to the respondent the previous morning; and Mr Campbell suggested a fact finding with the member of staff if the claimant disagreed. The email chain suggests that this became one issue of several to be discussed at a meeting on Friday 9 October at 8.10am.

18. On 9 October, the claimant replied to Ms McLaren's emailed letter of 29 September (pag 3 and 754). In it she said that her contract is up 30 hours since she started but the respondent did not give her those hours or shifts. Ms McLaren replied on 11 October. She explained that her contract was up to 30 hours, and as advised in her letter she did not have the availability to work full time, working 4 shifts per week. She noted that from the meeting this had increased to 5 days.

19. The meeting with Mr Campbell on 9 October was very short. It lasted less than two minutes. Mr Campbell's opinion was that the claimant was very defensive.

20. On 16 October, Pat Carr signed a completed pro forma *"planned support and supervision form"* about the claimant (pages 316 to 318). She did so as manager/team leader. She noted that the discussion was by telephone. In the form she noted a concern to do with a service user about whom the claimant had raised an issue with a colleague, for which she had had no response and for whom she had been *"taken off the ruff'.* Ms Carr noted that she would speak to another colleague to ask that a response be sent to the claimant. The same issue was noted as a *"communication concern"* in that the claimant

felt her concern was being ignored. On RTM, Ms Carr noted *"logged 75 3% length of time stayed 70.4%".*

21. On Sunday 25 October and while working the claimant was involved in a car accident. She felt well enough to finish her shift that day. On arriving home, she felt unwell. The next day she contacted her GP. Their advice was to take a week off from work. The claimant telephoned the respondent that day. She explained what had happened, that she was unfit for work and that she would send in a sick line.

22. On Thursday 12 November the claimant and Ms Carr signed a completed pro forma return to work interview form (pages 319 to 320). It recorded, her period of absence was between Tuesday 27 October and Sunday 8 November inclusive; the claimant's opinion that she would need to return to work before saying if any restrictions were needed; she was due back on Friday 13 November and she would advise the respondent how she got on. A separate typed note dated 12 November and apparently signed by Claire-Louise Gill (page 321) noted; the claimant's return to work the next day, 13; her period of absence; her confirmation of fitness to return and the claimant's opinion that she would need to see how she felt after her return. The claimant worked her shift on 13 November. During her shift she realised that she was not 100% fit. On returning home she telephoned her GP. He recommended another week off work. The claimant notified the respondent of that advice. She believed that either she sent in another sick line or her husband dropped it off with the respondent for her. The claimant remained absent from work throughout December 2020.

23. In emails of 3 and 4 December Mr Campbell asked the claimant to attend a welfare call (pages 338 and 339). Its intended purpose included considering support options with a view to her returning to work.

24. The call took place on Tuesday 15 December. A note of it was made by Mr Campbell (pages 340 to 345). The note suggests it lasted 17 minutes. It noted that; the claimant completed an AM (morning) shift on 13 November;

she had taken 4 days holiday then contacted the respondent to say she had another sick line; the then current line was due to expire on *"Monday 20 December";* in her opinion whiplash and injury to neck and lower back caused or contributed to her current health issue; she had not seen her GP due to the covid-19 pandemic; she was waiting on being referred to a specialist for physiotherapy; she was feeling constantly dizzy; she tried to drive and still felt dizzy and tired; she was taking Tramadol (15mg per day) because paracetamol had not been helping enough; and its effect was lack of energy, feeling sleepy and having dizzy spells. It also noted Mr Campbell's offer of (and the claimant's agreement to) a referral to a wellbeing officer who could discuss *"support options."* It further noted that the claimant was not sure when she would be able to return to work as she was still in pain and having effects from medication; she was not allowed to drive and still felt dizzy on occasions. Mr Campbell assumed that it was her GP's advice that she should not drive. The claimant asked if the respondent could look at *"close runs or walker runs''* The note also recorded; discussions about the possibility of a phased return to work which the claimant agreed would be good to support her and agreed she would discuss with her GP the following Monday after which she would contact the respondent's office. The claimant raised the issue of holidays and pay for them. Mr Campbell advised that he would look into it and email her, confirming that holiday accrual would be paid at the year end during the final payroll week. By email on Friday 18 December Mr Campbell updated the claimant after the call on 15. On physiotherapy sessions, he sought dates on which the claimant could attend Perth for them; he sought her view on whether a wellbeing session was something she wished to take up; he was clear that the respondent would support a phased return and advised that she had a few holidays left which would go forward and be paid within the fortnightly payroll process, meaning they should be paid by early January at the latest.

25. On Monday 21 December the claimant's GP completed and signed a sick note (page 752) advising; he had assessed her case that day; she was unfit for work by reason of a whiplash injury which would be the case-for 1 week.

26. On Monday 28 December Mr Campbell forwarded on his earlier email of 18th and sought a reply (pages 336 and 337). The claimant replied later that day (page 336). In it she said; she had decided to pay a physiotherapist in Edinburgh given that her place of work was Edinburgh and she felt really dizzy when she drove; her rota had no shift for her on one day allegedly without her permission; and she sought information on how much annual leave she needed to take before the year end. Mr Campbell replied the next day (pages 335 and 336). In it, he; rioted his concern about feeling dizzy when she drove and indicated that he would look for consent with her GP for additional information to help support return to work; explained that the shift was not taken away but the respondent was trying to make reasonable adjustments of support as had been discussed in *"the welfare session"* and with Pat Carr; reiterated the offer of physiotherapy and a wellbeing session; and advised that she need not take holidays which instead could be carried forward. In her reply that day (page 335) the claimant said; she would like to participate in any decision about rotas and shifts on her return the following week; and again asked for the number of holiday days left.

27. On Tuesday 29 December the claimant's GP completed and signed another sick note (page 751) advising; he had assessed her case that day; she remained unfit for work by reason of a whiplash injury which would be the case until 4 January.

28. Mr Campbell replied on Wednesday 30 December (page 334). In it he: advised of 7 days annual leave; explained the respondent s rota rationale ("you *didn't want to do a double shift on the same day and wanted to look at a phased return to see how you felt. You've also advised you'd want to do singles and not double ups which is surprising given you would have colleague support there if you didn't feel right but we must endeavour to try and support this request");* sought a further welfare call to discuss her desired changes to rotas; and expressed concern that on two occasions she had initially advised of her ability to return but on the days in question she then said she could not; and advised that a GP consent form had been sent, for

which he sought confirmation of receipt. The claimant replied on 3 January (pages 333 and 334). In it she; suggested she may have more than 7 holiday days; put a proposal on work days saying that she would like to be involved in any decisions regarding shifts; suggested Monday (4 January) for a call; and sought more information on the necessity of a medical report.

29. On 4 January, Mr Campbell replied (pages 332 and 333). In it he: anticipated a call that day with her at 4pm; detailed the holidays taken (17 of 24); and explained the respondent's rationale for access to GP records, *"This is* ***because for the last 4 weeks you have advised you have been coming back but then on the return day you have advised you are unable to return and subsequently have another fit note. We require access to your GP as you've*** *advised your doctor has not seen you, you have advised him so we aren't* ***sure how you can make the decision to return and then on the same day say you can't this must be because you are advising him you are no fit so we need to be sure that you are okay to return so as not to do any further*** *damage to yourself. We also note from previous communication you are still* ***having dizzy spells when driving therefor we'd like to consult with your GP to ensure a safe return for all parties:'***

30. The claimant and Mr Campbell spoke briefly by telephone on 4 January. At 5.31pm that day Mr Campbell emailed the claimant (page 330) saying that after further advice and for the good of all she should not go to work the next day, she would be paid for planned shifts and asked her to be available for another call. At 5.48pm that day (page 331) he asked her to acknowledge receipt and ask any questions she had about holidays. At 11.59pm the claimant replied (page 331) to say she had received it.

31. On 5 January the claimant's GP completed and signed another sick note (page 752) advising; he had assessed her case that day; she may be fit to return to work on a phased basis and/or amended duties, suggesting that the claimant be assessed by occupational health with regard to her professional duties

32. Also on Tuesday 5 January Mr Campbell emailed the claimant (at 2.47pm) (page 330). In it he; explained the request for access to GP/rnedical records saying, "we *acknowledge your hesitation to consent to a medical report being prepared, the only access we require is to medical information around your recent road traffic incident and the subsequent injury you have received, treatment and medication, as well as the prognosis from your GP. We don't envisage requiring anything additional to this at this stage":* further explained its need in the context of the respondent's duties of care, its insurance and the need for her to be fit to drive; and set out that if unable to obtain the information requested, the respondent would have to base any future decisions on the available information.

33. The next day Wednesday 6 January the claimant replied (page 330) to; ask for the form by email as she had moved house; and advise that she had sent the medical certificate confirming that she was fit to work from 5 January which had been handed in by her husband on 5 January. Mr Campbell replied later that day (page 320). He; confirmed that the letter/form seeking GP consent would be emailed; sought information on when and to where she had moved house and if she or her husband had let anyone at work know; and advised, on receipt of the sick One via her husband, of the need for an occupational health review before a return to work, that no alternative work was available, she was thus placed on medical suspension, and that a return to work was dependent on an occupational health review, her GP's advice on dizzy spells and what had been told to DVLA. About 75 minutes later the claimant replied (pages 328 to 3 ; provide information on when and to where was her house move; say that; she did not feel dizzy any longer, was fit to return to work as per her discussion with her GP on 5 January, she was fit to drive albeit her role did not necessarily involve driving as per her contract; and she did not understand the term *"medical suspension paf,* asking if it would be based on her normal 30 hours per week because she had *"been off for tojp] long so I can't afford not being working as this impacts on my financial situation:'* The suggestion that the claimant was fit to return to work was a surprise for Mr Campbell because it did not coincide with the

information provided on the GP sick line. He replied within ab 25 minutes (page 328) to; attach the consent form with a request that it be returned as scon as possible; advise that a copy would be sent in the post: note that she had not answered his question on change of address so changes would be made then; said that the respondent needed advice on a safe return in light of her position on dizzy spells; note that it had been her GP who had suggested the involvement of occupational health and the requirement to act on it to ensure her safety at work and confirm that she would be paid for the work allocated and thus would not lose out financially. Pages 346 and 347 were a letter to the claimant dated 6 January. It appears it was emailed and posted to her with a form (pages 348 and 349). The letter is headed *"Consent to refer to Occupational Health for medical assessment and medical report."* It made reference to both the Access to Medical Reports Act 1988 and the Data Protection Act 2018. It sought the completion and return of the form no later than Friday 8 January. The form was a blank pro forma which required the claimant io indicate answers to a series of questions. The form did not ask for the name and address of the claimant's GP.

34. On Thursday 7 January the claimant replied (page 327). In it she: said she would complete and return the form as requested; suggested that her annual leave was 28 days per annum and thus retained 11 days (not 7); and queried why the rota showed her as being on holiday which she had not requested. Mr Campbell replied that day (page 327): asked for the form by 3pm that day: referred to an email sent from Ms McLaren which explained the holiday-position and queried whether the claimant had replied to it; and explained that her rota changed to permit payment of a double shift that week, the holiday on the rota being *"just an admin requirement"* which did not impact her allocation, wasn't a holiday and she would be paid for it. The claimant replied within 15 minutes (page 326). in it she; sought a hard copy of the form as she did not have a printer and reiterated her position of entitlement to 11 days with her explanation for it.

35. On Friday 8 January Mr Campbell replied (page 326). In it he, advised that a copy of the form had been sent that day; sought advice as to when it was received, approved, signed and returned (by hand or post); and reiterated that the respondent's position on holidays was as it had been. On Monday 11 January (12.23) Mr Campbell emailed the claimant (page 325) to say that: he had not received a response to his email of 8 January; the documentation (sent to her) had been signed for at 11.00 on 8 January and asked her to confirm that it had been sent back. About 3 minutes later the claimant replied (page 325) to say she had signed and sent it on Friday (8) and he may get it that day or the next.

36. It is likely that Mr Campbell received the form on (or by) Tuesday 12 January (see page 662).

37. There was no communication between the parties after 11 January until Tuesday 19 January when Mr Campbell emailed the claimant (page 324) asking for her GP's details. Just over two hours later she replied with the details of a practice in Marchmont (page 324). Later that afternoon (4.45pm) Mr Campbell replied (page 323) to say that the respondent had been in touch with the GP practice as per her details and had been advised that she had transferred her records from them on 13. He went on to say *"I must advise you that if we are unable to obtain the information required to facilitate a return to work, then we may be forced to make a decision on the future of your employment based on the information that we currently have."* The claimant had provided the details of the GP who had treated her following the car accident. She did so because they were the treating practice who had knowledge of the injury, symptoms and prescribed medication. The next day, 20 January the claimant replied (page 322). In it she said, "*I have changed the GP but the one who may provide you with all information regarding to the accident should be Marchmont Medical Practice"* and named the GP. She continued, *"The current one I have never been to so they do not have any information"* and provided its name. Later that day she confirmed (page 322)

that she had changed to the named practice but reiterated that her previous GP had all of the information regarding her accident and all of her sick lines.

38. The following Monday 25 January Mr Campbell wrote to the claimant (page 352). It advised that the respondent had identified alternative office admin duties which required a return from medical suspension from the following Monday, 1 February. It noted that her contract provided for her to work three mornings (Tuesday, Friday and Sunday) and two afternoons (Tuesday and Wednesday) and proposed that she fulfil the admin duties on the same basis. The same day, the respondent (Mr Campbell) wrote (page 353) to her "new" GP. He referred to telephone conversations and emails with the practice. He enclosed the claimant's consent form. He sought:

    1. *"A GP summary of her whole health record - usually available in a condensed form and electronically produced.*
    2. *Any tests arranged by GP or hospital from 01 June 2020 onwards - to date. Hospital xways/specialists letters about her car accident*
    3. *Specific contacts from 01 June 2020 with her GP practice onwards - to date.*
    4. *Any drugs medicines, medicaments or other items prescribed by her GP practice form 01 June 2020 onwards - to dated*

39. Mr Campbell believed that it was normal practice to seek information over the periods specified on the basis that 6 months was *"norrnaF* or *"routine".* The copy letter produced is headed, *"AVENUE HEADED PAPER Private and* Conf/cfent/a/ *(SENT BY EMAIL AND* F/RST *CLA, 3NED FOR POST)."* The letter did not ask for an opinion about the potential impact on the claimant's ability to drive of any prescribed medication.

40. On Tuesday *2* Februar 2pm) the claimant emailed Ms McLaren (page 427). She asked for confirmation as to what time she should be at the office and noted its opening hours. Ms McLaren replied within about 90 minutes (page 426). She noted her normal start time of 7am while working a 6 hour shift in the community. She suggested working 8am until 2pm if that was the claimant's preference. She also noted her *"late shift'* start time of 4pm and

thus her finish time would be 10pm. The claimant replied at 14.06 copying Mr Campbell and Ms Davidson, the respondent's managing director (page 425). She: expressed her confusion contrasting the office hours with her working hours; noted that she had not been trained in the role; and said she felt unnecessarily exposed when working with three others contrasting Government advice to work from home when possible. Ms Davidson replied 10 minutes later **(page 425).** In it she; said office hours are insignificant, she need only fulfil her own hours; explained that the role was merely photocopying and filing so training was not required: hoped other staff would show her how to use equipment; set out that Government guidelines were being followed; and asked that she wear a mask at all times when leaving her desk. Later that afternoon (16.08, page **436)** Mr Campbell emailed the claimant. After explaining about breaktimes and noting that she could finish early he asked for her preference (7-1 or 8-2) for morning hours.

41. Also on 2 February, Ms McLaren wrote to the claimant about her holidays (pages 433 and 434). Under reference to 7 days carried over from 2020 and to Regulation 15 of the Working Time Regulations 1998, the respondent required her to take holidays as follows, which she took:-

    1. Tuesday 16 February 2021 — Early shift and Late Shift = 2 days
    2. Wednesday 17 February 2021 - Late Shift = 1 day
    3. Friday 19 February 2021 - Early shift = 1 day
    4. Sunday 21 February 2021 = Early shift = 1 day
    5. Tuesday 23 February 2021 = early shift and Late shift = 2 days

42. On Friday 5 February Mr Campbell sought advice from the claimant on his email from Tuesday 2, noting that he had not had a reply **(page** 435). On Monday 8, the claimant replied (page 435) to say that she had *"already spoken to Shona* [Reynolds, office manager] *regarding to office time."* Mr Campbell was of the view that the claimants reply was *"petty"* and *"muddied the waters"* The claimant agreed to start in the office at 7am on days when she worked there on early shift.

43. On Friday 19 February Mr Campbell emailed to NHS Lothian to chase for information on the claimant (page 437). It noted that it was having an effect on a key worker (the claimant) safely returning to work.

44. On Friday 26 February Mr Campbell and the claimant exchanged emails (pages 442 and 443) Having explained why he could not be in the office on Sunday 28 February, Mr Campbell asked if the claimant was happy to move her hours i.e. move the Sunday shift to another morning when she was not scheduled to work in the following week. He asked her to let him know because there was a need to support the office admin *"with Suzie* [Zsuzsanna Molnar] *being on annual leave from Monday",* being 1 March. In her reply the claimant explained that she did not have availability beyond what was on the rota as she and her husband alternated shifts to share the care of their two children.

45. On Thursday 11 March (2.16pm) Mr Campbell emailed the claimant (page 459). Its heading was *"Occupational Health review -■ Appointment'* . He said We *have received the files back and now would like to proceed to an occupational health review to assist you back to work!'* The reference to files is to the records/files received from the GP practice. It is not clear when the respondent received a report from the claimant's GP. It was not produced at this hearing.

46. Mr Campbell said that an appointment had been arranged at 11am the next day (12th) at a pharmacy in Glasgow. The email advised that she could bring a friend or colleague for support. It asked if she could confirm her attendance and if she wished to be accompanied. The claimant replied that day (18.10) (page 458). In it she said she would like to take her husband but dye to short notice she had not arranged childcare. She asked if she was allowed to take her children with her, which faffing asked to reschedule for Tuesday (16) when her children were to be at School/nursery.

47. Mr Campbell replied the next morning Thursday 12 March (08.43) (page 458). In it he referred to a conversation with the claimant that morning. He

noted her reasons for not being able to attend because of short notice, not knowing the road and that it was raining. It referred io her reply. He said he would revert when rescheduling was possible. Very shortly thereafter (08.46) **(page 461)** Mr Campbell emailed Dr Andrew McCall, the clinic manager. In it he reporte ' he had spoken to the claimant that day. He said. “She *can’t go today as its too "short-notice”. She also advised she doesn’t know the road and its raining with the usual attitude.'* He asked if the appointment could be rescheduled for mid-morning on Tuesday (16) when the claimant’s children were due to be in education. He continued, *"I know the specificity of this request might be difficult to accommodate but I do feel it's the best way to get things moving given how obstructive she’s been at every opportunity, if you could let me know by 2pm today as I’d like to get the letter out to her today via recorded post and also via email.”* **In the course of the** day **on** 12 March the claimant felt unwell. By agreement with Ms Reynolds and Ms McLaren she left work early.

48. By **email at 16.56 on** Friday **12** March **(pages 476 and 468 to 469)** Mr Campbell sent to the claimant a letter notifying of an occupational appointment for Tuesday 16 March at 3pm at the same pharmacy in Glasgow. The email asked for confirmation as soon as possible. The letter asked for a response “asap” and by Sunday 14 March 12pm. The claimant had been advised by Shona Reynolds that the office was to be closed on Sunday (see page **665).**

49. On Monday 15 March Mr Campbell and the claimant exchanged 11 emails between 10.11 and **16.38 (pages 470 to 475).** At 10.11, Mr Campbell asked if the ciaimant had been available and fit to work the previous day or had she been off sick? Her reply, 5 minutes later, advised that she was fit but had been told by Shona [Reynolds] her manager that she was not required to go to the office as no-one was there. 4 minutes later Mr Campbell reminded the claimant that he had sent her an appointment letter for the occupational health review, saying that he just wanted to check that she had been available to work on the Sunday. At 10.55 he emailed again. He said that the

letter had a deadline so that the respondent could plan accordingly. He then said, *"Can I ask why you haven't met this* [deadline] *during working hours and also ask you to respond to the letter asap."* The claimant replied about 15 minutes later (11.11), copying it to Ms McLaren. In it she said, "*I have been bombarded with several emails this morning from Paul and Jane when I am off. I will be at the office tomorrow so if you have any questions please call me tomorrow and we can discuss"* Mr Campbell replied at 11.58. He said that he felt it fair and reasonable to expect a response to "an *important appointment email by 12pm on Sunday when you have been paid from Jam that morningJ* He continued, *"This session (2nd attempt) has been arranged for the day you have requested and failure to confirm your attendance at this time is concerning. We have tried to arrange this to support your return to work and we'd ask you to confirm this so that we can move forward in a planned manner."* At 13.14 the claimant replied to say that she had just received the appointment letter that day. She confirmed that she could attend it. The claimant's reply continued, *"Could you arrange the transfer please so I can go to Glasgow to attend the appointment."* Mr Campbell did not know what the claimant meant. He saw this as pretty vague on her part. Mr Campbell took this as a sign of the claimant trying to frustrate the process. That being so, he emailed at 3.07pm. He said, *"Can you explain what you mean by transfer? The journey has been screen shot below for you. The distance is 47 miles and this works out at 55 minutes in the car and we would also pay for mileage costs. If you are advising that you can't drive I need to know why? In terms of arranging transfers I'm not sure what could be done other than take you through myself Fatima, let me know as per above and I can plan accordingly." The* claimant replied at 15.35. She explained that she did not have her car between 1.30 and 3.30, and then, *"If could arrange a transfer to go would be great. Thank you"* At 4.17pm Mr Campbell replied. He suggested that the claimant took at the bus and train timetables and plan a journey from there. He said that her last email was the first that he was aware of a car issue. He remin >r that it was her responsibility to get to the appointment. He said the respondent was happy to be flexible with office hours to assist her with attending. He offered for the respondent to purchase

the tickets for her that evening or the next day. The claimant replied at 16.38. After referring to the vious attempted appointment and repeating reasons for not attending she then said. *'Today I received a letter that / have to go tomorrow to attend an appointment to Glasgow without asking me what time suits me as it a long journey. The appointment is at 3pm and I don't have car to go there. Besides that, I have received 6 emails in my day off. I am trying to concentrate to study as I have 3 assessment this week but due to all stress I have been trough this morning I can't focus. I will be tomorrow at the office so we can discuss everything."* My Campbell's opinion was that this lengthy exchange was evidence of communication with the claimant which was not great. He was detecting a lack of trust at this stage.

50. The claimant and Mr Campbell had a conversation in the office the next day, Tuesday 16 March. He stressed the need for the appointment to take place. He was concerned that there was a real risk of it not taking place within a timescale that suited everyone. At 12.35 that day he emailed her (page **494).** He confirmed the date and time (24 March at 11.00) of the third attempt at the appointment. He continued, *"In order to agree to this I've agreed that you will be paid for both shifts on Tuesday but not required in the office. This is to be used to catch up on college work because of the appointment the next day. We will also pay mileage and travel expenses. I'll issue a formal letter with a list of pre-requisites such as ID and addresses as well as the chaperone option which I'd encourage you to arrange."* The claimant did not ask to be paid both shifts.

51. On Tuesday 23 March Ms Davidson wrote to the claimant (page **509).** Amongst other things, the letter said, *"It has become clear that there is insufficient work for you in that department, partially because the office is not always open during your scheduled shift pattern, and it appears that your presence has become somewhat disruptive as a result. Moving forward, we have taken the decision to place you back on medical suspension from 24th March 2021 until such time that the Occupational Health report confirms that you are fit to return to full duties. Once we have received this report, we will*

aeange a *rQlwn to work meeting at which the process and timetable uf your return to work will be discussed."* By that time, Zsuzsanna Molnar had returned from holiday. There was therefore less need for the claimant to be in the office. Mr Campbell's opinion was that reference in the letter to her being disruptive was based on feedback from Ms Molnar, Ms Carr, Ms Reynolds and from Claire-Louise Gill, a team leader. His understanding was that they thought she was difficult and challenging. He believed that as a result there was an unwanted edge in the office. The claimant understood the reference to mean that there was not enough work in the office and the disruption was cause by the fact that her contracted hours did not match the normal office opening hours. The claimant thus returned to medical suspension on Wednesday 24 March.

52. On 24 March the claimant attended a wellbeing medical consultation. A report from it was produced (pages 518 to 522). She saw the first version of it on or about Monday 29 March (see page 526). She wanted time to review it. She asked the OH provider for time to take legal advice on it. She sought advice from the Citizens' Advice Bureau about how relevant was all of the information in it. She wished some corrections to it. An updated report was sent to her on Wednesday 31 March.

53. Meantime, on 29 March the claimant raised a grievance with Ms McLaren (pages 528 and 529). Her letter referred to her terms of employment and to the ACAS code of Practice: Disciplinary and Grievance Procedures 2015. She recorded her understanding that; she would be invited to a meeting to discuss the issues in great detail; and her right to be accompanied at it. Her letter said that her grievance was about five circumstances. They were:-

1. Annual leave payment
   ting me differently comparing with my colleagues
3. Less annual leave
4. Given annual leave without my consent
5. Raising an issue with a client which' was ignored

54. On 30 March Ms McLaren replied **(page 527).** Given annual leave due to Ms McLaren and the claimant, she proposed three dates for a meeting in week commencing Monday 19 April.

55. **On** Tuesday 6 April **Dr** McCall emailed **Mr** Campbell **(pages 525 and 526).** After setting out the background of the claimant's attendance for assessment and preparation of the report he said that she had been give one further day after 31 March and continued, *"Unfortunately, she appears to have refused her consent to allow release of this updated medical report to you. After taking legal advice and reviewing our regulatory advice, we cannot provide you with her medical report. I apologise for this situation, beyond our control."* By that time. Mr McCall had given the claimant until 5 April to discuss the report with her lawyer (see page 653).

56. On Thursday 8 April the claimant gave permission to the occupational health provider to release the report to the respondent.

57. The claimant was on annual leave for the week beginning Monday 12 April (see page 530). By letter dated 14 April, Mr Campbell invited the claimant to a meeting to take place on Monday 19 April at 11am (page 547). The bundle copy was headed *"NOTIFICATION OF POTENTIAL DISMISSAL. (SOSRp* The letter began, 7 *am writing to advise you that, unfortunately, Avenue care Services (Edinburgh) is considering terminating your employment due to a Breakdown in working relationship. For this reason, there are difficulties for ACS in continuing to employ you in your current position of social care officer. However, before a decision is taken by Avenue care Services, you are invited to attend a meeting on Monday 19th April at Avenue Care Services Edinburgh office at 11am where the proposal to terminate your employment will be discussed further."* The letter was drafted by the respondent's HR provider. Mr Campbell filled in some of its details. He understood SOSR to mean *"some other significant reason."* Mr Campbell decided to convene the meeting taking account of a number of matters. They included; the relationship with the claimant: her reluctance to get to the KPIs; the situation with her change of address; her reluctance to attend the occupational health

assessment; her relationship with office colleagues; the respondent's man hours spent in dealing with the claimant; and her unwillingness to release the OH report. Mr Campbell's purpose in convening the meeting was to formalise the next steps and to had the claimant his decision. Prior to the meeting, nothing was "set *in stone*". In his experience, the situation was unprecedented. He intended to consider matters at the meeting with an open mind.

58. The meeting with Mr Campbell took place on Tuesday 20 April. Notes were taken and were produced (pages 548 to 553). They show that they were taken by Shona Reynolds, service manager. They appear to be a verbatim record of the discussion in that they attribute a full transcription to both Mr Campbell and the claimant of what they said opposite their initials. Mr Campbell saw the notes soon after its conclusion. His view was that they were an accurate reflection of what had been said. They were a fair and accurate record of the meeting. The note records that Mr Campbell; referred to two occasions prior to 5 January when the claimant had said she was ready to return only then to say she was unfit and was consulting her GP; queried why she had moved house without notifying the respondent; noted that she had changed GP, again without notifying then provided details for the prior GP; noted that she had declined the offer of physiotherapy and well-being support; noted a delay caused by the need to send a paper copy consent form when (despite an email version being sought) she then advised she had no printer to print it; alleged that she had not answered an email about shift patterns and breaks: alleged that over a two week period she had not performed to the minimum requirement of 80%; referred to several frustrations arising from delays in replying to emails; asked what had been the issue in travelling to the (first) occupational health assessment noting some of the reasons she had given him at the time (it was raining and she did not know the road): noted that she had been asked not to put her holidays on the office calendar; alleged that she would not give access to the OH report; repeated a complaint related to that refusal suggesting that there was no difference between it and the GP's report; referred to complaints from office

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staff; challenged her reference to ACAS of an issue prior to allowing the respondent the opportunity to investigate it; referred to the fact that Tramadoi has significant impact for people when they are 'driving; asked if she had made DVLA aware of her dizzy spells; noted his feeling that there was a clear breakdown in trust and working relationship and an unwillingness to move on and be integrated into a well performing service. On some issues, the note records *"no answer"'* from the claimant. She raised a number of issues including: that staff complained about the office staying open to accommodate her working hours; other care staff were treated differently from her in relation to performance and percentage scoring: her feeling that an email from Ms Davidson while addressed to all staff was directed at her; the fact that the office is never open for copying until 10 o'clock, the time of the end of one of her shifts; her allegation that a complaint about a named service user (for an illegal practice/use of an offensive comment) had been ignored. When invited to add anything towards then end of the meeting, the claimant repeated that she loved her job and disputed that there had been a breakdown of trust. The meeting adjourned at 10.41 and resumed at 10.45. albeit the note does not record when the meeting began. On resuming, Mr Campbell advised that; there would be no decision that day; he needed to w check emails: the last update he had had from OH was to say that she was not releasing the report, which issue he said he would check, repeating his reference to there being no difference between the GP report and the OH report. The claimant said that; on 8 April she had said that she was fine (for the OH report to be released); and repeated that she was unsure if she had seen the GP report. The end of the note included Mr Campbell's shock that the OH report was approved. His impression was that the issues raised by the claimant were attempts to deflect from the issues he was raising.

59. Shortly after the end of the meeting on 20 April (at 11:06) Mr Campbell McCall (page 525). In it he said, *"Just had Fatima in for a meeting, during which she's advised she gave permission for Avenue to access the report on the 8th April? I've adjourned the meeting and I'm just about to go into another session with a carer so will call you at half-past but*

can you check your comm's with her and confirm the above please?"

Dr McCall **replied at 1.29pm** that day (pa ind 525). In **it he said,**

""Although she had written this 8 April, as she had wavered about it. I wanted to make double sure with her regarding her consent. I have contacted her several times to try and make this happen. It is rather ragged, however, consent then withdrawing it can be problematic, hence me wanting to double check with her. The importance of this resolution around the issue of agreed consent, then removing it, is beneficial to yourselves, her and ourselves as the provider of the report. We shall get it resolved quickly I hope." 20 minutes later Dr McCall emailed again to Mr Campbell (page 524). In this email he said, *7 have now managed to speak with Fatima and reassure ourselves that she fully consents to the release of this updated medical report. She confirms she sought and received legal advice on the subject and that our report is a fair and accurate description of her medical status. I apologise for the delay in getting this report to you"* Mr Campbell then sought HR and legal advice. He was a little shocked to have got to this stage. Having noted that the claimant had had no issues with the report, he felt almost like he had been put in *''checkmate'.* Mr Campbell received a copy of the report a day or so after 20 April. Mr Campbell believed that in the time that the claimant had been performing administration duties in the office; there was some tension; she had been *"difficult';* she had been playing on her mobile phone; she had complained about her working hours and the office duties she was being asked to perform. His impression was that it was not popular with her that she had to do

60. The next day, Wednesday 21 April, a grievance meeting took place. It was one of the three days proposed by Ms McLaren. Notes were taken at it and were produced **(pages 532 to** 539). They were taken by Kirsty Swankie - Trainee Operations Manager. Ms McLaren saw the notes at or about the time of the meeting. Her view was that they were an accurate reflection of what had been said. They were a fair and accurate record of the meeting. The notes record that the meeting began at 16.42 and ended at 18.00. Five points were discussed. They were:-

1. **Annual Leave Payment; by which she meant that her last annual leave payment was incorrect. Ms McLaren agreed to "get** *structure to* **and explain it**
2. **Treating me differently** comparing **to my col e**agues; and i**referenced** two **occasions. The first** related **to the email from Ms Davidson (discussed with Mr** Campbell **and noted at** paragraph **52 above. The second related to a** cornplaint **from the daughter of** a **service user to** the **effect that the** claimant had **not noticed** medication at **a visit**
3. **Less Annual Leave;** was a **further reference to** her belief **that she was entitled to** 28 days leave as opposed **to** 24 which was **the respondent's position**
4. **Given Annual Leave without my consent; referred to the letter (now at pages 433 and 434) the complaint being that she was given holiday dates without her consent**
5. **Raising an issue** with a client **which was ignored: referred to the** cc ,nplaint about a nai med service **oww To an** illegal prac **ice**'use of an offensive comment) had been ignored which she had also raised with **Mr Campbell.**

61. The note records that the claimant, when asked, had nothing else that she wished to **discuss. The meeting concluded with Ms McLaren agreeing to look** into **a number of matters before reverting to the claimant, and a reminder of** the **right** of **appeal within seven** days. The **claimant maintained** that her **main** grievar ce was that she w« ted to go b ick to work. Sh< maintains . issue **was not noted in the** minutes. **She maintained that the minutes were** to inaccurate **because her main** theme **of complaint is not** recorded in **them.**

62. Ms McLaren issued to the claimant an undated letter with her determinations on each **of the five grievance** points. **The fifth was partially** upheld. The **others** were not. **Ms McLaren believed** that **she sent it about two** weeks **after their** meeting. The letter **was** therefore issued on **or about** 5 **May.**

63. **A** day or **so** after 20 April, Mr Campbell received a copy of Dr McCall's report (pages **518 to 522). The** fact that **Mr Campbell received it** when he **did made**

no difference to his sense of frustration about the claimant's conduct to that point in time.

64. Following the meeting on 20 April the claimant and Mr Campbell agreed to meet on 5 May. Notes were taken at it and were produced (page 558). They were taken by Suzie Molnar. They record that the meeting began at 10.07am. The purpose of the meeting was to formally hand over the decision Mr Campbell had arrived at, being to dismiss the claimant and pay her in lieu of notice of four weeks. Mr Campbell's view was that they were an accurate reflection of what had been said. The note records an exchange in which the claimant sought and was given the information that her contract ended that day and she would be paid four weeks' notice. It records the claimant saying, *"I accept the decision."* The claimant disputed saying so. Mr Campbell was of the view that there were avoidable frustrations at every turn. He was of the view that there were no grounds to repair the relationship which in his view had broken down irretrievably. He considered alternatives to dismissal. He discounted a return to working in the office because of the issues there. He discounted a return to her job role because of; his belief that her RTM average was below 80% in the entirety of her working time within that regime; her reluctance to work *"doubles"* (with a colleague) and his concern about a quick return to work without OH input, which he saw as risky.

65. By tetter dated 4 May Mr Campbell wrote to the claimant (pages 554 and 555). It referred to the meeting on 20 April and advised of the decision to end the contract *"on the ground of some other substantial reason of a kind such as to justify your dismissal."* It recorded the respondent's feeling that the working relationship had broken down irretrievably and there was a complete loss of trust in her ability to continue to work for it. It noted her entitlement to four weeks' notice and an undertaking to pay it. It set out how an appeal should be made. The letter said that the meeting had highlighted two main bulleted ongoing issues, the first of which included six sub-bullets.

66. The first bullet referred to the claimant's *"repeated frustration of the prom to facilitate a return to work folk ■.* her accident in November 2020. The issues said to be part of that repeated frustration were:-

1. Chan ging GP practice the day after providing consent for an report and not advising of it. leading to a delay in obtaining a report.
2. Frustrating attempts to obtain the Occupational Health report to assess medical capability to return to contracted role on a full-time basis, including refusing to attend a consultation in Glasgow despite being on medical suspension and being advised your travel expenses would be covered.
3. Refusing to attend the Occupational Health assessment unless provided with two shifts off the day before, despite policies indicating the requirement to undergo such an assessment and advising of unwillingness to travel to the assessment because it was raining and didn't know the road.
4. Refusing consent for the OH report to be disclosed. "We *appreciate that you changed these instructions, however further delay was caused when you were aware you were out of the office on full pay."*
5. Repeatedly being uncooperative with efforts to enable a return to work despite best efforts to accommodate all of her requests demonstrating a complete lack of respect for the respondent and those attempting to assist her.
6. In the meeting on 20 April 2021, attempting to deflect attention from the breakdown in relationship by making allegations that other staff were complaining about management and that other members of staff had been treated differently with regards to real-time monitoring, but refusing to provide any information, further eroding trust. Failing to report such circumstances under SSSC guidelines, which she was required to do.

67. The second bullet referred to the claimant being disruptive to other workers. It insistence on full training for the office admin role; her reference to complaints from staff but being unable to provide names; and the

claimant's unpleasant mood and lack of productivity being stressful for office staff.

68. Mr Campbell was of the view that if the claimant had not *"refused consent for the OH report to be disclosecf* (see page 554, the letter of dismissal) there was a platform from which to move forward.

69. On 5 May the claimant sought by email to Mr Campbell (page 515) a copy of the notes from their meeting of 20 April. It is not clear if he received' it. The bundle copy does not disclose the address to which it was sent.

70. The claimant maintained that she had raised a number of issues and provided an amount of information at the meeting on 20 which were not recorded in the minutes. She said that they were therefore not accurate.

71. By letter dated 10 May addressed to Jane McLaren the claimant appealed against the decision to dismiss her (pages 562 to 564). In it, she set out her grounds of appeal.

72. Between 10 and 12 May the respondent asked Ross Bennet to consider the **appeal (see pages 570 and 571).**

73. Mr Bennet is a self-employed auditor. He does work via a contract for the respondent. He formerly worked for Fife Constabulary. In that role he was involved in a number of investigations. They required him to be independent and thorough.

74. On 18 May the claimant emailed a letter appealing the outcome of her grievance (pages 680 and 681).

75. On Friday 21 May the claimant attended a meeting with Mr Bennet. Notes were taken at it and were produced (pages 606 to 608). They were taken by Maria Marshall. They record that the meeting began at 14.00 and ended at 14.57. They were a fair and accurate record of the meeting. The claimant did not raise in the meeting the fact that she had not seen the notes from the meeting with Mr Campbell. Both before and after the meeting Mr Bennet

sought an amount of information from employees of the respondent. They included Ms McLaren and Mr Campbell.

76. Relative to his consideration of the appeal Mr Bennet sought and got an amount of information from; Shona Reynolds (pages 583 to 585); Zsuzsanna Molnar (pages 586 to 588) and Claire-Louise Gill (pages 58® to 592). Each of them was asked if they found the claimant to have been in any way disruptive to them or others. Ms Gill said *''maintaining confidentiality was difficult as well as music being turned up and played loudly from the radio in the background of phone calls. She was also on her mobile making personal phone calls during the working hours which was distracting!'* The others answered in the negative.

77. By letter dated 11 June 2021 Mr Bennet wrote to answer the claimant's 19 points of appeal (pages 657 to 677). He responded to each point in turn. On some points he provided more than one outcome. He recognised (in his conclusion) that some appeal points were not directly associated with the reasons for dismissal. He nonetheless investigated them and provide outcomes. His conclusions include his findings that; the evidence did not support a conclusion that the respondent acted disproportionately in terminating the contract; her course of conduct was *"not compatible with someone who was embracing the numerous and varied approaches made by* [the respondent] to *help facilitate a return to workff* she appeared by all reasonable accounts to have broken down her engagement with the respondent; and the breakdown of the relationship extended beyond the OH report.

78. On 14 June the claimant again sought by email to Mr Campbell (page 515) a copy of the notes from their meeting of 20 April. The bundle copy shows it is addressed to Pcampbell@avenuecareservices.co.uk. It is not clear if he received it. He had no recollection of seeing either request for the notes.

79. By letter dated 6 July 2021 Mr Bennet wrote to the claimant (pages 699 to 706). In it he recorded that following completion of his -investigations his

conclusion was that neither of her grievance appeal points was upheld. The claimant did not participate in the appeal process after her dismissal.

80. The claimant did not participate in her appeal from her grievance.

81. Since her dismissal the claimant has sought alternative work. Her efforts are limited by her need to find shift work which suits her childcare needs and her studies. She did some NHS Bank work prior to 18 February 2022. From it she has earned (net) £254.58. On about 18 February 2022 she began training in new employment for CURA. Her employment began with them on 24 February. It is a zero hour contract. Thus far (in the period between February and the date of the March hearing) her net pay was £493.27. Her average weekly net pay since then had been £177.90. There was no evidence that the claimant was in receipt of State benefits since her dismissal.

82. In the opinion of Ms McLaren the market for employees who work in the role performed by the claimant for the respondent is buoyant. She reports to a recruitment manager within the respondent's business. She provides updates to him weekly on vacancies. She has links with local authorities in Fife, Perth, Angus and Edinburgh. She has knowledge of the market for vacancies in the care sector in those areas. In her view, there are consistently not enough candidates for vacancies, those vacancies being within local authorities and private companies.

Comment on the evidence

83. Mr Campbell occasionally provided answers to questions which contained more material than was necessary. He appeared keen to provide evidence which suggested fault on the part of the claimant. He gave the impression of someone who had lost patience with her. His reference to *"checkmate"* suggested that he believed that the claimant was trying to outmanoeuvre him. On the question of the claimant's dizziness while absent, he appeared to suggest that he believed that driving caused the claimant's dizziness. This

was at odds with the information provided to him at the time, and his knowledge of the effect of the claimant's medication.

84. The claimant had a tendency to reply with information which was not quite an answer to the question. This was particularly obvious in her cross examination. On certain issues she was initially truculent then made a reluctant concession. For example, it was only on reviewing her written terms that she accepted that she was required to use her own car for work. She also maintained that on 5 January she was fit to return to work despite what was noted by her GP on her sick note (see page 752). Her position on the grievance minutes was not credible. She maintained they were inaccurate in that they did not record her main grievance. That is not a credible position because; it was not an issue raised in her grievance letter; the typed minutes were prepared shortly after the meeting based on notes taken by Kirsty Swankie where there was no basis to suggest that she had reason not to take them accurately; and they were spoken to by Ms McLaren. Neither was her evidence credible on the minutes of the meeting of 20 April.

Submissions

85. For the respondent Mr Allison made an oral submission. He then lodged an outline written submission and copies of the cases referred to by him in it. I do not repeat his submission. I summarise it. He argued that in the context of section 98(1) of ERA 1996 the dismissal was, under reference to paragraph 32 of the respondent's grounds of resistance, for a potentially fair reason being an irretrievable breakdown in the relationship. There was an accumulation of issues. They included both the issues to do with the GP and OH requests. They also included the claimant's own allegations and conduct as to her view of the respondent. He listed 6 examples of allegations and complaints by her. He cited the cases of *Gallacher* v *Abellio Scotrail Ltd* [2020] 2 WLUK 691 and *McFarlane* v *Relate Ann Ltd* [2010] IRLR 196 as examples of cases where as a result of personality clashes or a breakdown of trust and confidence dismissals were fair as SOSR. Using section 98(4) of ERA as a heading he first argued that the *"procedural complaints!"* in this case

were Immaterial because, he said, the claimant's position was that tone was *right and her employer was wrong!'* and in any event were accounted for in the appeal which he described as "one of *the most comprehensive appeal processes the Tribunal will likely have come across. The appeal outcome itself demonstrates clear, careful consideration on each and every complaint or challenge and a cogent response to them."* Second, he argued that the respondent's belief in the reason was genuine. Th ier section 98(4) and under the heading of *"The substantive merits')* he; reminded that it is not for the tribunal to substitute its decision for that of the respondent; argued that even where an employer's conduct contributed to (or aggravated) the reason for dismissal that does not preclude a dismissal being fair (under reference to the cases of *Royal Bank of Scotia* : y *McAdie* [2007] EWCA Civ 806 and *Tubbenden Primary School Governors v Sylvester* [20121 ICR D29); the cumulative weight of events entitled the dismissal under reference to (i) the detail within the tetter of dismissal and (ii) "Most *importantly, tipping the balance, are the conduct and allegations summarised above in respect of the reason for dismissal. When added to the mix. those amply justify the dismissal. It is tolerably clear from* those, *whatever she* says *now,* that *the Claimant herself felt the relationship had broken clown,"* On remedy, any compensatory award should; be limited to the start date of her current employment, 22 February 2022; subject to a 100% *Hotkey* reduction and at least 50% reduction under section 123(6).

86. For the claimant Mr McCormack made an oral submission which I summarise. He took no real issue with the law in that it was not impossible to categorise conduct as SOSR. But in this case it was proper to focus on "*othef,* distinguishing that *"other"* reason from one within section 98(2). Issues raised by the respondent in the period leading to dismissal suggested reasons within 98(2), (for example conduct and absence). There was no other reason. It was either conduct or capability. Even if *"othef,* was the reason *"substantial'* as the Act requires? He reminded of Mr Campbell's answer to a question; if the claimant had not *"refused consent for the OH report to be disclosed"* (see page 554, the tetter of dismissal) there was a

pk >rm from which to move f j This hr ˙ l ted, Mr Mi m ck said, what Camp erstood at t me to be important. So, if *"other'* it was not so substantial as to be a fair dismissal in the context of section 98(4) particularly in light of either what Mr Campbel! knew by 4 May or after Mr Bennet's investigations, with particular focus on the fact lnal by then the respondent knew that the claimant had agreed to the release of the OH report by 8 April. On remedy, he referred to what had been agreed between the parties and her schedule of loss. He argued that neither ***Polkey*** nor section 123(6) justified any reduction.

The law

87. Section 98(1) of the Employment Rights Act 1996 provides that 7n *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"*

88. Section 98(4) of the Act provides *"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.*

89. *"A* ***Polkey*** *deduction" has these particular features. First, the assessment of it is predictive: could the employer fairly have dismissed and, if so, what were the chances that the employer would have done so? The chances may be at the extreme (certainty that it would have dismissed, or certainty it would not) though more usually will fall somewhere on a spectrum between these two*

extremes. This is to recognise the uncertainties. A Tribunal is not called upon to decide the question on balance. It is not answering the question what it would have done if it were the employer: it is assessing the chances of what another person (the actual employer) would have done." And *"the Tribunal has to consider not a hypothetical fair employer but has to assess the actions of the employer who is before the Tribunal, on the assumption that the employer would this time have acted fairly, though it did not do so beforehand" Mil verniing Body of Great Tey Primary School* [2013] ICR 691.

90. Section 123(6) provides that where the Tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding. A Tribunal must identify the conduct which is said to give rise to possible contributory fault. Having identified that conduct, it must ask whether that conduct is blameworthy. The Tribunal must ask if that conduct which it has identified and which it considers blameworthy caused or contributed to the dismissal to any extent. If it did then the Tribunal moves to the next question; by what proportion is it just and equitable, having regard to that finding, to reduce the amount of the compensatory award?

91. Section 122(2) provides that where the Tribunal considers that any conduct of the complainant before the dismissal (or, where the dismissal was with notice before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the Tribunal shall reduce or further reduce that amount accordingly.

92. I took account of the law to which reference was made in submissions and other case law to which I refer below.

Discussion and decision

93. In *Abernethy v Mott Hay and Anderson* [19/4] ICR 323, the following guidance was given by Lord Justice Cairns, *"A reason for the dismissal of an*

employee is a set of facts known to the employer, or it may be of beliefs held by him which cause rum to dismiss the employee.' words were approved by the House of Lords in ***W Devis & Sons Ltd v Atkins*** [19771 AC 931. in ***Beatt v Croydon Health Services NHS Trust*** [20171 |RLR 748 Lord Justice Underhil! observed that Lord Justice Cairns' precise wording was directed to the particular issue before that court, and it may not be perfectly apt in every case. However, he stated that the essential point is that the 'reason' for a dismissal connotes the factor or factors operating on the mind of the decision-maker which caused him or her to take that decision - or, as it is sometimes put, what 'motivates' them to do so. In this case the best evidence of the factors operating in Mr Campbell's mind and which resulted in his decision to dismiss the claimant is within his letter of 4 May 2021 (pages 554 and 555).

94. In the case of *Sylvester* to which the respondent referred, a deputy head (female) teacher had been friendly with a fellow (male) teacher. He was arrested and suspended for having indecent images of children (not at the respondent school). She maintained the friendship, discreetly. Some nine months after it had been indicated to her by the school that there was nothing wrong in her continuing with this, and without more than three days prior warning, she was suspended from post and disciplinary proceedings initiated. On the internal appeal, it was held that her actions had not brought the school into disrepute, nor did they pose a safeguarding risk to children at the school, but nonetheless the head teacher had lost confidence in her such that her continued employment at the School was untenable, and her dismissal was confirmed. The school maintained this was SOSR. The employment tribunal accepted this, but found the dismissal unfair in the circumstances, especially since the employer had not only failed to warn her of the risk to her employment but had appeared to condone her conduct in maintaining a friendship. The school appealed which succeeded in the EAT. For the school it was contended that in a case of dismissal for SOSR for loss of confidence an ET was not entitled to have regard to the causes of that loss but should be restricted merely to the fact of it. That argument was rejected by the EAT. At

paragraph 38 the then President (the Honourable Mr Justice Langstaff) said, "*as a matter of principle if it were to be open to an employer to conclude that he had no confidence in an employee, and if an employment tribunal were as a matter of law precluded from examining how that position came about, it would be open to that employer, at least if he could establish that the reason was genuine, to dismiss for any reason or none in much the same way as he could have done at common law before legislation in 1971 introduced the right not to be unfairly dismissed."* An employment tribunal is therefore entitled to have regard to the causes for the alleged loss of confidence. Section 98(4) of ERA 1996 requires a tribunal to decide whether it was reasonable for an employer to have concluded that the causes relied on could have resulted in that loss of confidence.

95. In this case the respondent set out to show those causes as they were relied on at the time. The causes were the issues contained in the various Hets in the dismissal letter of 4 May (pages 554 and 555). The respondent's case is that the alleged breakdown was irretrievable. The claimant denied that this was the case, both at the time and in her evidence.

96. Looked at in the context of section 98(4) of EA 1996, no reasonable employer at the time of dismissal would have concluded that the specific issues identified in the bullets on page 554 equated with *"repeated frustration"* of the process of returning the claimant to her role. That overarching issue and the specific bullet points noted there clearly indicate Mr Campbell's view that the claimant was responsible for it, and them. In his evidence, he frequently referred to the claimant's conduct prior to 5 April as being a source of frustration for him. He described it as *"avoidable frustrations"* caused by the claimant. His opinion of her culpability is obvious from what the dismissal letter says, including *"your repeated frustration"* and her *"refusals".* A reasonable employer properly considering these specific issues would have concluded that they had no factual basis.

97. 0 the issue of the timing of providing her GP details and the allegation that this led to a delay in obtaining the GP report, a reasonable employer would

have; noted that it first sought confirmation of the claimant's GP t is on 19 January; anc while she supplied her previous GP ail lat day sne did so because he was *"the one who may provide you with all information regarding to the accident* **(page** 322), she nonetheless supplied her current GP's details the next day. A reasonable employer would have concluded that (i) there was no delay by the claimant in providing the details of both GPs and (ii) her motive in providing her former GP's details was consistent with someone who was trying to facilitate the process, not frustrate it. Mr Bennet's conclusion does not assist, in his view *"The key point here is the fact that the details of the GP provided were incorrect as of 13th January. The reason the details were incorrect were due to actions by yourself."* There was on his own findings no basis for him to conclude that the claimant had provided any GP details by 13 January. Neither the letter of 6 January, the form with it nor the covering email asked for those details. Separately, he does not deal with the claimant's rationale for providing the former GP details even thought this is a part of this ground of appeal.

98. On the issue of refusing to attend the first OH consultation (12 March), no reasonable employer could have concluded that she refused at all. Mr Bennet partially upholds the appeal on this point. But neither Mr Campbell nor Mr Bennet had any basis on which to conclude that the claimant refused On the contrary in her initial reply she said she would like to take her husband but due to short notice she had not arranged childcare. She asked if she was allowed to take her children with her, which failing asked to reschedule for Tuesday (16) when her children were to be at School/nursery (page **458).** On any reasonable view, that is not a refusal. Nor on any view is it evidence of frustration of the respondent's attempts to obtain an OH report.

99. On the issue of refusing to attend the OH assessment (on 24 March) unless she was given two shifts off the day before, no reasonable employer could have concluded that she adopted that position. That had been Mr Campbell's conclusion. In his appeal outcome letter (page 666) Mr Bennet refers to the email from Mr Campbell of 16 March **(page** 494) and refers to what he

recorded as Mr (position being, *duo to the previc - to have an Occupational Health Assessment undertaken not being taken up by yourself and the . - r time he di j matter with you. He states you advised him that if you could have the Tuesday shifts off to study but paid you would attend an appointment on the Wednesday morning. Yog would nc 'r be off on rhe Wednesday mornings and working in the afternoon. Due to the pressing need to get the Occupational Health referral done he agreed to your request. You also did not have to attend the office to work after your appointment on 24th March."* He concludes **on this** point on **page** 667, "*I am content this was an agreement to mutual benefit following discussion whereby you would have the time off you were wanting to study and the Occupational Health appointment could be attended.'* No reasonable employer could have concluded that in those circumstances this was any *"refusal/unless"* situation. **No reasonable** employer, **certainly** by the time **of** the appeal, could have concluded that the claimant refused at ali. Indeed, Mr Bennet's conclusion is that there was an agreement to mutual benefit. His conclusion makes no reference to any refusal (initial or otherwise) by the claimant

100. On the **issue of** refusing Mr **Bennet** concluded (page 667) that "On *8th April 2021 you emailed Adam Occupational Health to say you were happy for them to release the report to Avenue Care Services "* and **(page 669)** on the question of general delay, *"I do not take delays after 8th April into account in this assessment for the reasons already provided."* Mr Campbell's tetter says (on **page** 554) *''further delay was caused when you were aware you were out of the office on full pay:* Mr Bennet's conclusion (on page 669) is that *"The period of delay therefore is before 8th April."* His focus is not on Mr Campbell's rationale. He ought to have confined his consideration to the allegation of further delay (that is delay after 8 April) and Mr Campbell's basis for concluding whether the claimant was at fault for it. Any reasonable employer would have concluded by the end of the appeal that there was no basis to support Mr Campbell's conclusion on this bulleted issue.

101. The final bullet cn page 554 (the dismissal letter) is an unspecific general allegation. It is no more than a summary of the preceding four complaints.

102. The fifth bullet under the heading of *'repeated frustration of the process to facilitate a return to work'* (on page 555) refers to attempts in the meeting of 20 April by the claimant to deflect attention from the alleged breakdown by making unspecific counter-allegations coupled with an unwillingness to provide any detail. A reasonable employer looking at this allegation would have concluded that even if there was any merit in it, it was not an example of an attempt to frustrate the return to work process and that on its own it does not justify a conclusion that the relationship has broken down irretrievably.

103. The second main bullet refers to the claimant's alleged behaviour when carrying out office duties. No reasonable employer could have concluded that the claimant *"insisted on full training for the office administrators position"* because there was no evidence that she had done so. The evidence available to the respondent was that on 2 February the exchanges between the claimant and Ms Davidson (page 425) were (i) the claimant saying *Regarding to administrative role, I haven't been trained to do so"* and (ii) Ms Davidson replying *"Regarding the administrative role you are merely photocopying and filing so you therefore do not require to be trained in this post , however I would hope the staff have shown you how to use any equipment that is required:'* There was no evidence available to the respondent that thereafter the claimant *"insisted''* on any training. Nor could any reasonable employer have concluded that she was disruptive by being the cause of an unpleasant mood or by her lack of productivity. Even by the end of the appeal, the evidence to support such a view was scant. Any reasonable employer would have concluded that there was no evidence of a lack of productivity on the part of the claimant. Ms Davidson had told her that her role was *"merely photocopying and filing'.* There was no evidence available to the respondent that her productivity in either task was lacking. Further and separately, any reasonable employer would have concluded that this role was temporary pending the ciaimant's return to her contracted role.

The claimant's performance in that temporary role could not reasonably have led to th© conclusion that the respondent's trust in her ability to continue working in her job had been lost when that role was to provide personal care and support to people in their own homes.

104. Separately, given the fact that the basis of the respondent's concern about an irretrievable breakdown of trust in the working relationship was a series of complaints about the claimant's conduct, a reasonable employer would have ensured that the decision-maker was impartial. On 12 March Mr Campbell said to Dr McCall (page 461) *"She can't go today as its too "short-notice". She also advised she doesn't know the road and its raining with the usual attitude."* The quotation marks around *"short notice"* suggest his scepticism about the lack of notice being genuine or accurate. His scepticism about the claimant's willingness to attend is more obvious from the use of the expression *"the usual attitude"* which in its context can only suggest that it was a negative one. Mr Campbell goes on to explain that his wish to agree the date and time of the second appointment was because he felt *"it's the best way to get things moving given how obstructive she's been at every opportunity:'* This was a clear indication that by 12 March Mr Campbell's view was that the claimant had by that date been obstructive to steps to have her return to work *"at every opportunity"* . Given his view at that time it was not reasonable or fair for him to determine the issues on 20 April which focussed on examples (including the attempts to fix an OH appointment) of her *"repeated frustration of the process to facilitate a return to work J'* In short, at the meeting on 20 April Mr Campbell was deciding on issues about which he had already formed a view. In its submission the respondent argued that the appeal was a *"top to tail review, rather than just an appeal!'* Mr Bennet's conclusion (page 677) was that he had investigated all the matters contained within the appeal tetter and by association all matters raised at the appeal hearing. His tetter sets out his conclusions on all 19 appeal points. However, Mr Bennet did not consider himself, of new, the bulleted grounds on which Mr Campbell relied in his conclusion that the relationship had irretrievably broken down. The appeal was not a reconsideration of those grounds. It did

net reconsider whether Mr Campbel! i a reasonable basis on which io conclude that those issues were well-founded or that they justified the conclusion that the relationship had broken down irretrievably.

105. The claimant was unfairly dismissed.

Remedy

106. The agreed basic award (subject to any deduction) was £1200.00

107. The parties agreed (in their statement of facts) that; the claimant's gross pay per week was £300; her net weekly pay was £274.86; she was contracted to work up to 30 hours per week: the sum representing loss of statutory rights would be £500.00 and sums now confirmed as being £254.58 and £493.27 should be deducted from any award for financial losses. As noted above, on 6 April the parties notified the tribunal that the claimant's average weekly wage to be offset against any future loss is £177.90. The claimant produced a schedule of loss as at 2 March 2022. The respondent's counter-schedule (pages 748 and 749) accepted that the claimant lost £5.33 per week for pension loss. Neither of them took account of the fact that the claimant had been paid in lieu of four weeks' notice.

108. The respondent argued that any loss of earnings was limited to 42 weeks to the date of the start of the claimant's most recent employment. It argued this on three grounds. First, the new employment is permanent (not temporary), irrespective of whether or not it is a zero hours contract. Permanent employment will usually break the chain of causation. Second the evidence of Jane McLaren was of a buoyant market and demand for carers. It was *"inexplicable"* that the Claimant had not, earlier, secured another job. Third, it is just and equitable, having regard to the whole circumstances. The principal argument is of a failure to mitigate loss. On this question I took account of principles contained in *Cooper Contracting Limited Lindsey* UKEAT/0184/15/JOJ now reported at [2016] ICR D3 being:-

1. The burden of proof is on the wrongdoer; a claimant does not have to prove that he has mitigated loss

2. What has to be proved is that the claimant acted unreasonably; he does not have to show that what he did was reasonable
3. There is a difference between acting reasonably and not acting unreasonably
4. What is reasonable or unreasonable is a matter of fact
5. It is to be determined, taking into account the views and wishes of the claimant as one of the circumstances, though it is the Tribunal's assessment of reasonableness and not the claimant's that counts
6. The test may be summarised by saying that it is for the wrongdoer to show that the claimant acted unreasonably in failing to mitigate.

109. In my view the limited evidence of Ms McLaren is not sufficient to discharge the burden on the respondent. It has not shown that the claimant acted unreasonably. It is not for the claimant to show that she has mitigated her loss. Her situation was influenced by the need to care for her children. Her shifts with the respondent were arranged "opposite" those of her husband to allow them to share care. I accept that that is difficult to replicate where they are not employed by the same employer.

110. On the issue of a *Polkey* reduction to the compensatory award I took account of what had been said in *Software 2000 Ltd* v *Andrews* [2007] I' 5 *"If the employer seeks to contend that the employee would or might have ceased to be employed in any event had fair procedures been followed, or alternatively would not have continued in employment indefinitely, it is for him to adduce any relevant evidence on which he wishes to rely. However, the tribunal must have regard to all the evidence when making that assessment, including any evidence from the employee himself'.* The evidence of the claimant at the time and before the tribunal was that she did not regard the relationship as broken. Her actions at the time suggested that she was not unwilling to return to her contracted role. Nor was she unwilling to participate in the process to do that. In that process she was hesitant and at times reluctant. She had reservations about the purpose and content of medical reports. The respondent argued that given the *"multiplicity of irresolvable*

grievances, the nega.. - w she had of her employer and management, and the - uency with ch she had butted heads wit the company in a short soace of time, it was inevitable he ■ ot er issue wt d s qi k!y. I do not agree. Even if another issue had arisen quickly, the respondent could not dismissed the claimant based on the state of affairs at that time. In my view there is no basis to reduce the compensatory award under *Polkey*

111. On the question of contributory conduct, the conduct which is said by the respondent to give rise to possible contributory fault is not particularly clear. Its submission was that *"the Claimant's own conduct materially contributed to her dismissal. The allegations and conduct clearly tipped the balance. Mr Campbell's position on that was initially confused but was clarified. Moreover, it was clear - given we are looking at the process as a whole - that those factors were very significant to Mr Benet's assessment."* That is broad enough to encompass the claimant's alleged conduct which sat behind the bullet points set out in the dismissal letter. In turn that included making allegations that other staff were complaining about management and that other members of staff had been treated differently with regards to real-time monitoring but refusing to provide any further information. That was in my view blameworthy conduct on her part, even in the context of the meeting with Mr Campbell on 20 April where she had had no notice of the detailed issues which resulted in her dismissal. That conduct contributed to the respondent's decision to dismiss her. The tribunal's discretion is limited to considering what is just and equitable having regard to the extent to which the employee's contributory conduct contributed to the dismissal *(British Gas Trading Ltd v Price* EAT 0326/15). I had regard to the decision of the Court of Appeal in *Hollier v Plysu Ltd* [1983] IRLR 260. The EAT in that case had divided the cases under the statutory provisions into four general categories. But they do not limit a tribunal's discretion. The refusal to provide further information after making allegations that other staff complained about management and had been treated differently about RMT was not a significant factor in the respondent's reason to dismiss the claimant. Its focus

(both in the material it relied on at the time and in its evidence in this hearing) was very much on its belief that she had frustrated its attempts to have her return to work. The claimant's blameworthy conduct was marginal to that overall rationale. In my view, a just and equitable proportion by which to reduce the amount of the compensatory award is 10%.

112. In the 42 weeks between her effective date of termination and the start of her current employment her loss of net pay was £11,544.12. That loss is reduced by four weeks' net pay of £1099.44 (4 x £274.86) and £254.58 from NHS earnings. The net loss in that period is therefore £10,190.10. In the two week period between 24 February and 10 March the net loss is £56.45 (2 x £274.86 - £493.27). In the 18 weeks after 10 March the net loss of pay is 74.86 - £177.90 = £96.96 x 18). Pension loss in the whole 62 week period is £330.46. Loss of statutory rights is agreed at £500. This gives a total loss for earnings and benefits of £12,822.29. Applying a 10% reduction for contributory fault results in the compensatory award reducing to £11,540.06. The judgement reflects this award.

113. On the basic award, I had regard to the decision of the EAT in *RSPCA* r *Cruden* [1986] ICR 205. There it was held that only in exceptional cases should a tribunal differentiate in the exercise of its discretion under the statutory provisions governing a basic and a compensatory award. This was not an exceptional case. The basic award is therefore reduced by 10% to £1,080. The judgement also reflects this.

Employment Judge: R Bradley
Date of Judgment: 03 May 2022
Entered in register: 04 May 2022
and copied to parties