



EMPLOYMENT TRIBUNALS

Claimant: Ms S McNuff

Respondent: Parliamentary and Health Service Ombudsman

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

Under the provisions of Rule 69, the reserved judgment sent to the parties on 3rd May 2022, is corrected as set out in block type at paragraph 14.

Employment Judge Anderson
Date 1st July 2022

SENT TO THE PARTIES ON
4 July 2022

FOR THE TRIBUNAL OFFICE

Important note to parties:

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



EMPLOYMENT TRIBUNALS

Claimant: Ms. S McNuff

Respondent: Parliamentary and Health Service Ombudsman

HELD AT: Manchester **ON:** 5 & 6 April 2022 and in Chambers on 7 & 8 April 2022

BEFORE: Employment Judge Anderson (sitting alone)

REPRESENTATION:

Claimant: In Person

Respondent: Mr. Tahzib of Counsel

RESERVED JUDGMENT

The complaint of unfair dismissal is well founded. The Claimant was constructively unfairly dismissed.

REASONS

Introduction

1. This is the reserved Judgment of the Tribunal claim brought by Ms. Sasha McNuff against her former employer the Parliamentary and Health Service Ombudsman.
2. The Claimant claims by an ET 1 dated 30th July 2021 that she was constructively unfairly dismissed. The Respondent by its ET 3 denies that this was the case.

Procedural matters

3. The Claimant appeared in person. Mr. Tahzib of Counsel represented the Respondent.
4. There were some initial housekeeping matters to deal with. Some additional documents were added to the bundle with the consent of the parties.
5. A more contentious point was that the Claimant wished to adduce evidence from an additional witness (Ms. Hannah Rose) that had not been served in accordance with the orders of the Tribunal. The reason for the timing was said to be that potential witnesses had signed non-disclosure agreements and were reluctant to give evidence without a witness order.
6. In the days running up to this hearing, there had been correspondence between the parties and the Tribunal regarding witness orders. No witness orders had been granted by the Tribunal prior to the hearing.
7. The witness was not present at the Tribunal but was available to attend. The Respondent's position was that it would be prejudiced by the calling of this witness. It would most likely involve the calling of additional evidence.
8. I ~~decided~~ not to allow the witness statement to be relied upon. In my view, allowing the witness statement in would require allowing the Respondent the opportunity to obtain and call rebuttal evidence. That would put the hearing date at risk and also the Claimant at a risk of costs if the additional witness was the cause of the hearing going off. There was a prejudice to the Claimant that she would not be able to call a corroborative witness, but I considered that there had been more than sufficient time for these issues to be ventilated in 2021 rather than in the run up to the hearing.
9. All witnesses supplied witness statements. The Claimant gave evidence first, Ms. Woodward, a Respondent witness then gave evidence due to her

availability. Mr. Pierce, the Claimant's TU rep then gave evidence followed by Mr. Conway. Mr. Conway gave his evidence via CVP, all other witnesses were in person.

10. The Tribunal indicated that due to the preliminary points of discussion and amount of evidence to be heard, the hearing would deal with the question of liability only.
11. Breaks were taken throughout the hearing when appropriate.
12. The parties made oral closing submissions. In addition, the Respondent submitted a skeleton argument as part of their closing submission.

The Issues

13. At the outset, the nature of the case was clarified with all parties. The parties agreed that this was a constructive dismissal case and that the term relied upon was the implied term of trust and confidence.
14. The parties also agreed that this was a 'final straw case' rather than a single incident breach case. The last straw relied upon by the Claimant was identified as being the telephone call between the Claimant and Ms. Woodward on the **26th May 2021**.
15. The Claimant agreed that notwithstanding the fact that the 'other payments' section was ticked on the ET 1, there were no other complaints before the Tribunal. The Claimant specifically confirmed that she was not bringing a claim under the Equality Act 2010.
16. The issues in this case were drawn from the Judgment of the Court of Appeal in Kaur v Leeds Teaching Hospitals NHS Trust [2018] IRLR 833

- (1) What was the most recent act (or omission) on the part of the employer which the employee says caused or triggered his or her resignation?
- (2) Has he or she affirmed the contract since that act?
- (3) If not, was the act (or omission) by itself a repudiatory breach of contract?
- (4) if not, was it nevertheless a part (applying the approach explained in Omilaju) of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a (repudiatory) breach of the Malik term? (If it was, there is no need for any separate consideration of a possible previous affirmation.)
- (5) Did the employee resign in response (or partly in response) to that breach?

17. If the Claimant was dismissed, the Tribunal must go on to consider whether there was a potentially fair reason for the dismissal and if one was established, whether the dismissal was fair for the purposes of s.98(4) Employment Rights Act 1996.
18. In terms of the 'course of conduct', the Respondent identified the following points from the ET 1 and the parties were prepared to proceed on this basis:
- a. That in June 2019, the Claimant's job role changed without consultation and without an updated job description, role evaluation, change in her pay and without written confirmation of her new duties.
 - b. An unreasonable workload
 - c. Lack of support
 - d. Bullying and aggressive behaviour from the HR Management team
 - e. Inconsistent treatment after raising her grievance.
19. The Tribunal made the point, which was agreed by the parties that only events prior to the resignation were capable of forming part of the alleged breach. Events post resignation were not relevant unless it was relevant to the fact-finding exercise, e.g., someone in the subsequent grievance making an admission that they used certain words pre-resignation. This meant that point (e) above fell away.

Findings of fact

20. I made the following finds of fact on the balance of probabilities.
21. First dealing with the issue of credibility. I considered the Claimant to be an honest witness who sought to tell me the truth. Her perception was sometimes influenced by the strength of her feeling regarding this case and there was a risk of exaggeration as a result. However, on occasion, the Claimant was prepared to make appropriate concessions when matters were explained or put more neutrally. The central points made by the Claimant in evidence were credible.
22. In terms of Ms. Woodward, I considered that she made an attempt to answer some of the questions asked. I did not consider her to be a dishonest witness. However, there were problems and gaps in her evidence as will be evident in the findings of fact below. I consider that she was understated in her descriptions of problems within the Respondent's HR team.
23. The evidence of Mr. Pierce was straightforward and where relevant of assistance to the Tribunal.
24. Finally, the evidence of Mr. Conway focused on the post resignation period and therefore he was not a direct witness of pre-resignation events. In so far as his evidence could be relevant, for example the recording of a fact that is alleged to have occurred pre-resignation as part of the post resignation grievance process, I found that I could not rely upon his evidence. It was apparent that he was not across

the detail of the case. Indeed, in one respect in its closing submissions (the point regarding whether the Claimant had raised the Julie comment previously) the Respondent asked me not to place reliance on his evidence, notwithstanding that he had been called as a witness on behalf of the Respondent.

25. The Claimant commenced employment with the Respondent on the 17th November 2017. She was initially employed as an Interim Resourcing Manager. The Claimant's contract records her gross pay as being £40,000 per annum at this point. In September 2018, the Claimant reduced her hours to 32 and her pro rata salary was £35,555.56 per annum. In March 2019 this increased to £36,266.67.
26. The ET 3 describes the Respondent as an institution established by Parliament to provide an independent complaints handling service for complaints that have not been resolved by the NHS in England and UK government departments. The Respondent's powers are set out in the Parliamentary Commissioner Act 1967 and the Health Service Commissioners Act 1993.
27. At page 88 of the bundle is a letter stating, "I am pleased to confirm that with effect from 04/09/2019 your fixed term-position of HR Shared Service Manager has been made permanent." This appears to be the first document in which the Claimant's job title is changed.
28. In her witness statement, Ms. Woodward describes the Claimant's job role as gradually changing from recruitment to other aspects of HR. Ms. Woodward describes this by way of background, though of course these events occur prior to Ms. Woodward starting in February 2020.
29. In this new role, the Claimant did not have an up-to-date job description that reflected her role or line management responsibilities.
30. There was no organisational chart or organogram in the bundle. However, it is apparent that there were a number of changes in leadership. Sandra Skelly is described as going off sick and David McKnight and Jeanette Woodward being brought in as Senior HR Business Partners on fixed term contracts. Mr. McKnight would subsequently leave in November 2020. The level above that was also described as 'interim' at one point in the evidence.
31. According to Ms. Woodward's witness statement, Nicola Shewring was recruited in October 2020 to assist with the modernisation project. Because this project was ultimately 'paused', Ms Shewring assisted with general HR responsibilities. Given the subsequent complaints and strength of feeling from staff on this point, I find that this was not sufficient to alleviate the workload problems.
32. On 30th October 2020 a document was produced by Jane Touil who was a 'guardian'. The Respondent had in place a process called 'Freedom to Speak up' The procedure starts at page 253 of the bundle and the policy starts at page 255.

The stated purpose of the policy is to ensure that current and former employees can raise concerns without suffering adverse consequences. I was told that individual's names would be kept anonymous unless the individuals chose to be named.

33. The Claimant along with Jessica Warning and Hannah Rose chose to utilise the process which resulted in Ms. Touil producing the document titled 'Concern about management in HR'.
34. The focus of the complaint is on the management of David McKnight. I have not heard evidence from Mr. McKnight. I consider this to be a credible document, highlighting the contemporaneous concerns of three staff members at that point in time. It follows that these complaints have a basis in fact.
35. The document includes a complaint that "The last 10 months have been extremely difficult under David's management. He seems to have been given free rein to do what he likes. The HR team is now at breaking point and morale is very low. They have been working very hard and the workload has increased due to the pandemic. They feel they cannot take leave as there is no one to pick up the work." They said they did not feel supported or valued.
36. Later on, the complaint makes the point that "They are understaffed, and work is piling up."
37. Mr. McKnight left the Respondent at some point in November 2020. In addition to Mr. McKnight not giving evidence, there is little wider documented or oral evidence about the steps taken in response to this.
38. The Claimant was off sick in November 2020 when Mr. McKnight left. Her fit note (pg. 91) records her absence as 'stress-related problem' and 'stress at work'.
39. The Claimant did not have a return-to-work interview following this period of absence for 'work-related stress'. There was no assessment of her workload or consideration of whether occupational health could assist.
40. Ms. Woodward took over Mr. McKnight's responsibilities at that point, which meant that she became the line manager of the Claimant. It meant that the modernisation project that Ms. Woodward was working on previously had to be paused as she undertook her new duties.
41. Ms. Woodward's evidence was that she spoke to the Claimant on her return from sickness absence but that this was an informal chat without any particular topic being highlighted. Ms. Woodward effectively assumed that in light of Mr. McKnight no longer being employed, the matters relating to the freedom to speak up complaint were resolved.

42. The team then proceeded under the management of Ms. Woodward. I find as a fact that whilst Ms. Woodward had a different management style to that of Mr. McKnight, the HR team continued to have an excessive workload and a lack of support or structure in place. With the modernisation project 'paused' this also meant that much needed updates to the HR systems had not been implemented.
43. The Claimant remained without an accurate job description, fully reflecting the extent of her duties. Ms. Woodward was new to her role. She did not have a good working knowledge of what the Claimant did. She took the view that the Claimant should supply a draft to her, not the other way around.
44. The effect of this divergence over how a job description is produced in effect led to the situation whereby the Claimant continued to work without an accurate job description. In some roles, this would not matter. However, I find that in the Claimant's role this did matter. The Claimant would frequently take on the role of supporting others more senior and more junior than her, projects were being commenced and paused, there was overwork which required firefighting of HR enquiries. The lack of a job description has then had the knock-on effect of prohibiting any sort of assessment of the Claimant's workload but also leading to a lack of clarity over what her job is, what she is supposed to do and a lack of understanding by management of what she actually did do.
45. I further find that the Claimant and her colleagues in their attempts to raise these matters internally were told words to the effect of 'if you don't like it leave'. This is attributed to Julie, who was senior to Ms. Woodward.
46. On 12th May 2021, Jane Touil recorded a further Freedom to Speak complaint. This time six team members supported the complaint. The Claimant was one of those individuals.
47. The complaint records a number of points relating to the management of Ms. Woodward. It is evident that there is a significant perception difference between the six members of staff and Ms. Woodward.
48. The complaint also records the need for more resources and emphasises that staff are overworked.
49. It is also apparent that members of staff remained upset by the treatment from Mr. McKnight and that Ms. Woodward had only taken few (if any) steps to address this.
50. I asked Ms. Woodward what she thought was behind the complaint of six members of staff that was focused on her. The answer given by Ms. Woodward was 'change' in that the staff were opposed to change.

51. Ms. Woodward accepted that the internal systems of the Respondent were outdated and needed to move to digital systems. That was the modernisation project that had been 'paused' by her moving when Mr. McKnight left.
52. I was unable to accept 'change' or being opposed to it as the motivation behind this complaint. The project had been paused and the HR team were in effect firefighting to deal with enquires and undertake their normal duties. I find that the Claimant and her team were under enormous pressure that went beyond the norm.
53. Ms. Woodward's oral evidence was that she had spoken with the Chief Operating Officer with regards to the need for more resource. There was also an autoreply placed on the HR email indicating that staff were busy and that a response would be delayed. Evidence of this was not disclosed by the Respondent as part of its disclosure, it was not part of its pleaded defence nor was it contained within Ms. Woodward's witness statement. I find that these events did occur. They are consistent with the Claimant's evidence.
54. I find that I cannot rely upon paragraphs 15 & 16 of Ms. Woodward's witness statement and the suggestion that the Claimant had never complained regarding issues of support or workload with her. I find that the Claimant and other staff did raise these issues during their meetings with her, which ultimately led to the second Freedom to Speak complaint.
55. I find that the contents of the Second Freedom to Speak report were accurate. That is to say the contents had a basis in fact. It is telling that six members of staff were prepared to support this document. I find that it is a significant step to make a complaint of this nature and it would not have been undertaken lightly.
56. The Claimant was off work due to sickness in April and May 2021. Her fit notes record a number of different points, including on one note 'stress' and on other notes irritable bowel problems (IBS) and lower back problems. The Claimant attributes her IBS to stress. The Claimant supplied no specific medical evidence on the point. At the same time, there doesn't appear to be any formal engagement by the Respondent with the reasons for the Claimant's absence.
57. The Claimant raised a grievance dated 21st May 2021. That grievance made a number of points relating to job descriptions, salary and the impact on her. It specifically raised points relating to unreasonable workload and lack of support.
58. In her grievance the Claimant identified the fact that she had been providing support to interim or new managers above her as well as managing her own team. In oral evidence, Ms. Woodward accepted that the Claimant was providing her with support. I find that the Claimant's grievance on this point describes the situation accurately. I also find the Claimant's complaint regarding workload to be true.
59. Whilst the Claimant was off sick, two members of HR staff who report to the Claimant telephoned her re workload. These individuals sounded like they were crying.

60. The Claimant called Ms. Woodward on the 26th May explaining that staff were in tears. Ms. Woodward covers this conversation at para 24 of her witness statement. It contains the following “I explained to Sasha that I had been closely accompanying the Shared Service Team and everyone had been coping OK.” This is consistent with the Claimant’s evidence which says, “Janette denied all knowledge of issues and concerns within the team.” The two statements are different but are reconcilable.
61. I find at this point in time, the Claimant was of the view that there was a long- term problem within the Respondent HR department and that the management was not willing to resolve it. I consider that the Claimant had a basis for this based on her own experience and what she was being told by other staff. For Ms. Woodward to indicate that everything seemed ok in response was the last straw that prompted the Claimant’s resignation the next day. Nothing in that phone call would have left the Claimant with any confidence that things would be improving on her return from sick leave.
62. The Claimant had a further phone call with Ms. Woodward on the 27th May 2021 in which she informed Ms. Woodward that she would be sending an email with her resignation shortly thereafter.
63. The Claimant resigned by email dated 27th May 2021, giving notice to the 30th June 2021. I find that in resigning, the Claimant was resigning in response to a wide range of events that had occurred over a period going as far back as the management of Mr. McKnight. I find that it would be artificial to say that the Claimant did not have in mind the previous conduct of David McKnight when resigning from her employment.
64. I make no findings in respect of the voluntary exit scheme or any wider allegation of post resignation inconsistent treatment. It was agreed with the parties that this was solely a point post-resignation and was not in any way relevant to the resignation.

The law

65. Section 95(1)(C) of the Employment Rights Act 1996 states that an employee who is dismissed where the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer’s conduct.
66. Reference to the ‘Malik term’ is a reference to Malik v BCCI [1997] IRLR 462 and the existence of the implied term of trust and confidence that is contained within every contract of employment and is a necessary ingredient of its existence.

67. In order for the implied term to be breached, the employer must act without reasonable and proper cause in a manner calculated or likely to destroy or

seriously damage the relationship of trust and confidence that exists between employer and employee.

68. In Woods v WM Car Services (Peterborough) Ltd [1981] ICR 666 the EAT held “The Tribunal’s function is to look at the employer’s conduct as a whole and determine whether it is such that its effect, judged reasonably and sensibly, is such that the employee cannot be expected to put up with it.”

69. The bar for constructive dismissal is a high one. Mere unreasonable conduct is not sufficient. The classic case is that of Western Excavating (ECC) Ltd v Sharp [1978] ICR 221 in which Lord Denning MR stated:

“If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer’s conduct. He is constructively dismissed.”

70. In Kaur v Leeds Teaching Hospitals NHS Trust [2018] IRLR 833 Underhill LJ set out the approach Tribunals must take to last straw cases at para 55. I have drafted the above list of issues based on these questions. This includes the requirement for the Claimant resign (at least in part) in response to the breach.

71. Underhill LJ held that the correct interpretation of London Borough of Waltham Forest v Omilaju [2005] IRLR 35 was that affirmation was capable of occurring between the final straw and the resignation. i.e., “An employee who is the victim of a continuing cumulative breach is entitled to rely on the totality of the employers acts notwithstanding prior affirmation; provided the later act forms part of the series (as explained in Omilaju), it does not land in an empty scale.” (para 51)

72. In considering claims of constructive dismissal, this focus is on the conduct of the employer and not the employees’ reaction to it: Tolson v Governing Body of Mixenden Community School [2003] IRLR 842. In Tolson the EAT held that from that proposition it followed an alleged failure by an employee to follow or not follow a grievance procedure was not relevant.

73. I consider Tolson to be a statement of the law concerning constructive dismissal. I do not consider it to be a statement that inhibits my fact-finding process in any way.

74. The burden of proof is on the Claimant to prove the necessary facts to establish the constructive dismissal.

Conclusions

75. I begin my conclusions with some general observations.
76. I accept that there is some criticism to be made of the Claimant in the way in which she articulates her case. At times, she is too broad in her assertions, or her documents don't cover the point in the way that it should be covered. Those points are relevant to my findings of fact above and I have taken these criticisms on board.
77. The Respondent relies heavily in its defence on the absence of a grievance or other complaint by the Claimant. It seeks to draw a distinction between a grievance and a Freedom to Speak up Complaint. I do not accept there is a significant distinction. For my fact-finding purposes, the key point is that these documents are a record of complaints. i.e., that these points were being asserted at that point in time. The Claimant can pray in aid these documents to assist her in discharging her burden of proof. It is open to the Respondent to call evidence to gainsay that.
78. Furthermore, I consider that the Respondent goes too far in its defence to effectively suggest that the Claimant is raising these points now for the first time. I find that she had raised points, but the Respondent has failed to record them. Whilst there has been a large bundle of documents placed before me, the record keeping of the Claimant's superiors has been woeful. This is a public sector employer with a significant workforce. Furthermore, the Managers being criticised are senior HR practitioners. The importance of basic record keeping by a manager is not a novel concept.
79. Whether there were weekly meetings, 1-1 meetings, conversations regarding serious work matters, the Claimant's ill-health, none of these matters were recorded in any way, be it in the form of a note or a management diary. No explanation was put forward for this other than a reference to the fact that individuals were working remotely. I don't consider the fact that the parties may have been working remotely to be a mitigating factor as to why notes were not taken.
80. I make clear that simply failing to keep records does not in and of itself amount to a breach of the implied term. Rather, it is relevant to the fact finding and the general approach of the Respondent to how it dealt with HR issues.
81. There were clearly matters being raised by the HR team with Ms. Woodward and Julie. The Freedom to Speak complaints don't occur in a vacuum. The fact that the Respondent doesn't keep adequate records isn't a reason that these conversations did not happen. Because I find that these conversations are taking place, the Respondent's reliance on a lack of documentation as a criticism of the consistency of the Claimant's case is difficult to sustain.

82. This point is then extended in respect of the actions of Mr. Conway. This is post resignation and therefore Mr. Conway's failings are not part of the breach but is relevant to the consistency of the Claimant's account. In her grievance meeting, the Claimant complains of Julie stating, 'if you don't like it leave'. This is evidenced at page 197B in the minutes of Mr. Pierce. Mr. Conway is not taking minutes at the time and does not have a note taker. This comment does not feature in the after the event notes of Mr. Conway. I have found that Mr. Pierce's notes are the more reliable. The relevance to the case is that the Respondent's complaints of the Claimant raising points in her evidence and not previously are again impacted by its own staff or contractors not keeping proper records. The point is, issues have been raised at various stages for credibility purposes, it's just that the Respondent appears to have difficulty in recording them.
83. I don't consider that the text messages in the bundle take the case much further beyond the fact that they are evidence of two busy work colleagues attempting to contact each other.
84. I now move on to the specific matters raised in respect of the job description point, I accept that it is normally the responsibility of the employer to provide a job description. Ms. Woodward's approach was lackadaisical and also evidences her lack of knowledge of the role that she found herself in. I consider that these points are relevant to the issues regarding lack of support that are dealt with below. The way in which is relevant is as follows: a) Ms. Woodward did not have sufficient knowledge of the Claimant's specific role, which affects her credibility regarding her understanding of workload within the team b) Ms. Woodward managerial style was not proactive in its nature.
85. The next point is one of unreasonable workload. I find that the Claimant was subjected to an unreasonable workload.
86. In respect of the workload, support and bullying points, I pause at this stage to note that the Respondent has not called Mr. McKnight. It is a matter for the Respondent which witnesses it calls. In the absence of Mr. McKnight, the Respondent has not called any wider evidence other than Ms. Woodward (who was only indirectly involved in that period) or other relevant documentary evidence. In effect, I am left with very little to suggest that the contents of the October complaint are anything other than a true and accurate reflection of the position and I so find.
87. Other than the fact that Mr. McKnight no longer worked for the Respondent, the details of which are unknown, the Respondent doesn't appear to have taken any steps in response to the first complaint. Crucially, this complaint did include points relating to workload.

88. The Respondent did not have in place any meaningful process by which workload was assessed or reviewed. The Respondent relies upon the weekly meetings, but has kept no record of such meetings, even tangential or indirect evidence.
89. Turning to lack of support, I find that there was a lack of support for the Claimant over a sustained period. The Claimant was told and at the very least made to feel that if she did not like it, she could always leave.
90. There are common features in respect of the Respondent's conduct towards the Claimant. At its core there was a failure by management to appropriately manage the HR team. which was itself firefighting due to a lack of resource, antiquated systems and the fact of the ongoing pandemic. There appears to be little proactive management and indeed only limited responsive management cumulating in what appears to be a general lack of care towards the Claimant.
91. The final manifestation of the workload/support points was the telephone call on the 26th of May 2021. It is clear that there was no sign that the problems within the team were going to be addressed or were going to improve.
92. Finally, in respect of bullying and aggressive behaviour, much of the case was taken up with the occasions that the Claimant used the specific phrase 'bullying' and the other occasions when she did not use that phrase. As with other aspects of this case, I consider that it is formulaic to focus too rigidly on labels rather than looking at the substance of what is being said. I consider that the overwork/lack of support points are more than sufficient in this case as labels which accurately reflect the evidence that I have heard, covering the entire period of events the Claimant's relies upon from the actions of Mr. McKnight in 2020 onwards.
93. Looking at these matters cumulatively, this goes beyond unreasonable behaviour. It represents a failure to deal with systemic problems and other management failures. Cumulatively, these are sufficiently serious to indicate that the Respondent was acting without reasonable and proper cause in a manner calculated or likely to breach the implied term of trust and confidence. Much of this case falls within the 'likely' rather than 'calculated' aspect of the test, but if employees are left without adequate support with this level of workload for a sustained period, then it will breach the implied term.
94. Therefore, to summarise and answer the five questions posed by Underhill LJ in Kaur:

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

The response of Ms. Woodward to the Claimant in the telephone call between the Claimant and Ms. Woodward on the 26th of May 2021 was the last straw The

phone call on the 27th May 2021 was to inform Ms. Woodward of the Claimant's resignation.

(2) Has he or she affirmed the contract since that act?

No. The Claimant resigned on notice the following day.

(3) If not, was the act (or omission) by itself a repudiatory breach of contract?

No. The parties are agreed that this is not a single act case.

(4) if not, was it nevertheless a part (applying the approach explained in Omilaju) of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a (repudiatory) breach of the Malik term? (If it was, there is no need for any separate consideration of a possible previous affirmation.)

Yes. The Claimant has established on the facts the existence of an excessive workload and a lack of support that amount cumulatively to a breach of the implied term. Further, whatever, label is put on it, she has also established management conduct, including the management of Mr. McKnight that is part of a course of conduct that is a breach of the implied term.

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

Yes. The conduct of the Respondent was the reason for the resignation of the Claimant. That conduct included all of the treatment that the Claimant had received including that of Mr. McKnight.

95. There was no potentially fair reason for the dismissal. The Respondent makes a bare denial of unfair dismissal at para 45 of the ET 3 but no actual reason has been advanced, and, on these facts, it is difficult to see how one could be.

96. It follows that the Claimant was constructively unfairly dismissed, and she is entitled to a remedy.

97. Looking at the Schedule of loss on pages 50-51 of the bundle, the Claimant claims a basic award and a compensatory award. The Claimant obtained new employment promptly but claims the salary difference.

98. It is open to the parties to reach a settlement and avoid a remedy hearing. All issues in respect of remedy remain open. The Claimant should understand that it does not automatically follow from the fact that she has succeeded in her claim that she will be awarded the sums in her Schedule of Loss.

99. I make the following additional directions in respect of remedy:

- a. Within 14 days of receipt of this Judgment, the Claimant is to send to the Respondent an updated schedule of loss setting out a) the basic award claimed and b) the compensatory award claimed. In respect of the compensatory award, the Claimant is to set out how any sums claimed

have been calculated and supply to the Respondent any supporting evidence for those calculations that is not already in the bundle.

- b. The Respondent may submit a counter schedule in response to the schedule if so advised. It is not required to do so, but a counter-schedule may assist the Tribunal. Any counter schedule should be served on the Claimant at least seven days prior to the hearing.
- c. This matter will be listed for a remedy hearing in person. Time estimate half a day.

Employment Judge Anderson
11th April 2022

Judgment sent to the parties on
3 May 2022

For the Tribunal

