EMPLOYMENT TRIBUNALS (SCOTLAND)

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Case No: 4111710/2021

Hearing held in Dundee on 10 to 13 October 2022 & 8 November 2022 (In Chambers)

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Employment Judge R Mackay
Tribunal Member C Jackson
Tribunal Member J McCaig

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KW	**Claimant** **Represented by** **Ms Bowman, Solicitor**
KN	**First Respondent** **Represented by** **Ms Wood, Solicitor**
and	
CG	**Second Respondent** **Represented by** **Ms Wood, Solicitor**

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JUDGMENT AND ORDER OF THE EMPLOYMENT TRIBUNAL

The unanimous judgment of the Employment Tribunal is as follows:

1. The claimant was employed jointly by the first and second respondents at the time of her dismissal and at the material times prior thereto.

2. The claimant succeeds in her claim for constructive unfair dismissal under s94 of the Employment Rights Act 1996 (**"ERA"**). The respondents shall pay to the claimant a basic award of **TWO THOUSAND, EIGHT HUNDRED AND THIRTY ONE POUNDS AND FIFTY FOUR PENCE (£2,831.54)** and loss of statutory rights of **THREE HUNDRED AND FIFTY POUNDS (£350).**

3. The claimant's claim of automatically unfair dismissal under s103A ERA does not succeed and is dismissed.

4. The claimant's claim for breach of Regulation 12(1) of the Working Time Regulations 1998 (**"WTR"**) succeeds. No compensation is awarded in respect of the breach.

5. The claimant's claim for a failure to be provided with a statement of employment particulars succeeds and the respondents shall pay to the claimant compensation of **FIVE HUNDRED AND ONE POUNDS AND TWENTY FOUR PENCE (£501.24)**.

The Employment Tribunal orders that the names of the claimant, the first and second respondents and other parties connected to these proceedings (as outlined below) shall be anonymised in accordance with rule 50 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013.

REASONS

Introduction & Anonymity

1. The claimant was employed as a support worker in the care of two severely disabled sisters (referred to as service users). In the latter years of her employment, she was also a medical student. She was one of a number of support workers who cared for the sisters in their own home. As set out in

the *Findings in Fact* section which follows, the tribunal heard evidence about the nature of the sisters' medical conditions and their care and treatment. It also heard allegations of wrongdoing against the claimant which were held to be ill-founded. This was considered particularly relevant given her status as a medical student. Allegations of wrongdoing were also made against other parties who were not witnesses to the proceedings.

2. It was a matter of agreement between the solicitors for the claimant and the respondents that anonymity orders should be granted in respect of the claimant and the service users. The Tribunal agreed to that given the highly private sensitive information it heard relating to the service users and the very serious allegations made against the claimant which it considered ill-founded. The tribunal considered it appropriate to extend the anonymity order to cover all parties, witnesses and others referred to in evidence. Were the order not to be extended, there is a material risk of the indirect identification of the service users, the claimant and others connected to the case. The Tribunal was also anxious to protect those against whom allegations were made who were not witnesses and thus not able to able to defend themselves.

3. The claimant shall, accordingly, be referred to as KW. The first respondent shall be referred to as KN and the second respondent shall be referred to as CG. The service users shall be referred to as service user LM and service user SM respectively. The first respondent is a family friend and former support worker for the service users and is legal guardian for service user LM. The second respondent CG is a sister of the service users and is the legal guardian of service user SM.

4. Other parties relevant to the proceedings shall be referred to by their initials and/or role as follows: support worker witness IS; support worker witness YL; team leader TF; mother of the service users LS; brother of the service users TM; and the service users' social worker MD.

Background

5. This case was originally brought against two additional respondents. A number of case management preliminary hearings took place. At one of these on 9 May 2022, it was accepted by counsel on behalf of all respondents that the first respondent, KN, and the second respondent, CG, had responsibility as the employers of the claimant. Claims against the remaining two respondents were at that point dismissed.

6. At the commencement of this hearing, the respondents' solicitor sought to withdraw that concession and stated that the second respondent, CG, was the sole employer. The tribunal agreed to proceed against both respondents and to make a determination having heard the evidence.

7. The claimant gave evidence on her own behalf. For the respondents, evidence was heard from the first and second respondents themselves, as well as two colleagues of the claimant, support worker witness IS, and support worker witness YL.

8. Parties prepared a joint bundle of documents running to over 300 pages, most of which were referred to in evidence.

9. The claims brought by the claimant are as follows:

    (1) Constructive unfair dismissal in terms of section 94 ERA.

    (2) Automatically unfair dismissal in terms of section 103 ERA.

    (3) A failure to provide rest breaks in accordance with regulation 12(1) WTR.

    (4) A failure to provide written particulars of employment in terms of section 1 ERA.

10. The respondents defended each of the claims and denied that the claimant had made a qualifying protected disclosure for the purposes of her automatically unfair dismissal claim.

Observations on the Evidence

11. The tribunal found the claimant to be a very credible and reliable witness. She responded to questions in a clear, measured and consistent way. She made appropriate concessions and did not seek to exaggerate or embellish her evidence.

12. In contrast, the tribunal had considerable difficulty with aspects of the evidence led on behalf of the respondents. The evidence of both respondents and support worker witness YL, was considered unreliable in a number of respects. Aspects of their evidence appeared rehearsed. There was an unwillingness to accept obvious points which they considered not to favour the respondents' case. Their answers were at times hesitant and evasive. Multiple serious allegations were made against the claimant without foundation and were presented in an increasingly extravagant and implausible manner. The witnesses often relied on what can best be described as gossip and speculation. There were also inconsistencies across the three witnesses. An exception is the evidence of support worker witness IS, whose evidence was measured and consistent. It was clear that she was attempting to be as fair and neutral as possible in her account and did not engage in unwarranted accusations.

13. Where conflicts of evidence emerged, the tribunal tended to favour the account of the claimant. Details of material conflicts and how the tribunal resolved them, are set out in the *Findings in Fact* section which follows.

Findings In Fact

14. As noted in paragraph 1 above, the claimant was employed as a support worker to care for service user LM and service user SM. She started in January 2011. She resigned with effect from 30 May 2021.

15. The service users have severe mental and physical disabilities. They are unable to mobilise independently and are non-verbal. They are fed by means of a gastric tube.

16. The service users are cared for in their own home. Public funding is allocated for this purpose. Although the precise numbers varied over time, approximately eight or nine support workers were engaged at any one time. A team leader was also employed. At material times, this was team leader TF.

17. The claimant, like the other support workers, worked 24 hour shifts starting at 8.00am. As noted above, in the latter years of her employment she was also studying medicine. Prior to that, she had undertaken a science degree. She typically worked at weekends to accommodate her study schedule. On average, she worked around one shift a week although this fluctuated from time to time.

18. A typical day would involve a staff handover, attending to the personal needs of the service users and interacting with them at various points during the day. On occasion, the service users would spend time in their own rooms watching television. They were fed three or four times a day by means of a pump attached to a gastric tube, each feed taking approximately one hour.

19. Once the service users had been settled into their sleeping positions for the night, support workers would themselves sleep on the premises.

20. On any shift, two support workers were scheduled to be on duty.

21. The claimant, like other support workers, was not provided with designated rest breaks during the day. They would generally have their own meals whilst the service users were being fed. If the support workers were not in the same room as the service users, they would carry baby monitors to ensure that they were alerted to any issues. On occasion, the feeding tubes would become blocked such that an alarm would sound. The support workers would be expected immediately to attend to the relevant service user to correct such issues.

22. The tribunal heard differing accounts as to how often alarms would sound, such that staff meals would be interrupted. Whilst not uncommon, the tribunal

was satisfied that on any shift it was highly probable that a support worker would be in a position to have a break of at least 20 minutes, albeit that no break was ever formally designated so as to ensure no interruptions.

23. Although there were differing accounts as to whether the claimant was free to leave the workplace, the tribunal was satisfied considering the evidence as a whole, that she required to be available 24 hours a day. Any departure from the workplace was typically for activities such as shopping for the service users.

24. The claimant did not at any time during the course of her employment raise any concerns or complaints about how rest breaks were scheduled.

25. The claimant was not provided with a contract of employment or statement of employment particulars at the commencement of her employment. She was provided with a draft contract of employment at some point in 2019. The draft was issued by the brother of the service users, TM. The tribunal accepted the evidence of the respondents that he was not intended to be the employer but that he assisted his sister (the second respondent CG) given his greater expertise in administrative matters.

26. The claimant challenged the draft in a number of respects. It did not include the correct rates of pay, pay dates or the claimant's start of employment. It did not contain the claimant's own name and the claimant questioned TM being designated as the employer.

27. The claimant refused to sign the contract, and it was left with TM to address the points raised. He did not do so and the matter was never subsequently revisited.

28. As noted at paragraph 3 above, both service users have legal guardians. At the time of the claimant's dismissal, the first respondent, KN, was guardian for service user LM, and the second respondent CG was the guardian for service user SM.

29. Prior to 2020, the mother of the service users, LS, had been guardian of service user SM. She performed most of the day-to-day functions of managing and interacting with the staff. She stepped down as a guardian following concerns raised about her attending the premises under the influence of alcohol. Although the second respondent, CG, suggested that the concerns had been raised by the claimant alone, the tribunal was satisfied that several members of staff raised concerns – not least the team leader TF. The concerns were elevated to the service users' social worker.

30. The claimant and others met with the second respondent, CG, to discuss the concerns. This led to CG taking over as legal guardian of service user SM. It was also agreed that the first respondent KN, as guardian for the other service user would take a more active role. Prior to that time, despite having been guardian for many years, she had little or no involvement with the staff.

31. By email of 12 November 2020, the first and second respondents communicated with the whole staff team. In the course of the email, staff were told that if they had any future concerns they should email the first respondent and the second respondent in the first instance given that "*…as guardians they are the employers of the team*".

32. In their evidence, the first and second respondents and support worker witness YL, refused to accept the clear meaning of those words and sought to persuade the employment tribunal that only CG was an employer and that the claimant was aware of this. The tribunal had no hesitation in rejecting that evidence. The claimant's position was that she understood the position to be that both respondents were employers. That is consistent with the position of support worker witness, IS, who described the situation whereby the guardians stepped into the shoes of the service users as employers given their lack of capacity to perform that function themselves.

33. Whilst the claimant knew the second respondent CG, as the sister of the service users, she had never met the first respondent, KN. She did not meet her at any point prior to the termination of her employment.

34. The first respondent KN, wrote emails to the staff team 2 and 17 February 2021. She expressed a desire to speak to each of the members of staff and stated that she believed "*supervision*" with each member of the team would be helpful to her and the team. The tribunal was satisfied that these emails demonstrated a clear intention on her part to become more actively involved in the supervision and management of the team. Whilst the mother of the service users, LS, had traditionally performed this function, the transition to her daughter, CG (who worked full time and had a family of her own) meant that KN was required to perform a more active role. The tribunal was satisfied, on the basis of the evidence (and as previously conceded by counsel for the respondents) that from November 2020 the first and second respondents were jointly employers of the claimant.

The COVID Pandemic

35. The COVID pandemic had a significant impact on the care of the service users. It was a matter of agreement that their medical conditions were such that were they to contract the virus, their lives would be endangered. Protocols were put in place to minimise risk. The service users were no longer able to leave the house. Staff were required to wear PPE.

36. A risk assessment was prepared in March 2020. There was evidence on behalf of the respondents that it was regularly updated. The claimant disputed this. The second respondent CG gave evidence that she regularly updated the risk assessment as well as a range of other policies and sent hard copies to the staff along with shopping. None of the documentation was produced before the tribunal and there was significant divergence amongst the respondents' witnesses about the issue. The tribunal preferred the evidence of the claimant. Only one risk assessment was contained in the bundle. There was nothing to suggest that the differing guidance or legal requirements as they changed during the course of the pandemic led to a revised risk assessment. The risk assessment produced did not make

reference to the position of allowing visitors at the home – an issue which was to become a significant feature of this case.

37. At the outset of the pandemic, staff raised concerns about the availability of PPE. These concerns were raised with TM, the service users' brother, principally through the team leader, TF. The issue was ultimately resolved.

38. Following the placing of the country into a national lockdown on 5 January 2021, the claimant raised concerns about visits to the service users' home which she said contravened the "stay at home" guidance in place at that time.

39. On 10 January 2021, the service users' mother, LS, visited the home indoors with her partner. The claimant was on shift. Recommended social distancing, mask wearing, and hand hygiene measures were not observed.

40. It was accepted that the service users' grandmother regularly visited the home.

41. By email of 2 March 2021, the claimant wrote to the first respondent, KN. Despite the intention set out in KN's emails on 2 and 17 February, the two had not met or spoken. She asked the first respondent to outline her role and responsibilities in terms of the service users.

42. The claimant went on to raise concerns about family members visiting the home on numerous occasions. She outlined her view that this was not appropriate given the lockdown in place. She went on to say that visitors had not been following government advice regarding non-essential travel, social distancing, hand hygiene and the wearing of masks. She described what she saw as increased risk to the service users and staff. She referred to a clear conflict of interest but that it was something that she needed to be addressed. The claimant gave evidence that the conflict of interest she referred to was the fact that the visitors were family members and for that reason felt conflicted in approaching the second respondent, CG, herself a family member.

43. On 4 March 2021, the service users' grandmother visited the home indoors. It is clear from a group chat among staff that others were concerned about her doing so and "*spreading bus germs*".

44. On 5 March 2021, the claimant sent a chaser email to the first respondent, attaching her email of 2 March 2021. She did not receive a response.

45. On 7 March 2021, the second respondent, CG, visited the home. On 8 March 2021, the first respondent, KN, visited the home. Both were indoors. The claimant was not present on either day.

46. The claimant escalated her concerns to the service users' social worker, MD, by email of 8 March 2021. She reiterated her concerns about family visits and non-compliance with government guidance. She highlighted the three separate visits since her concerns had been raised.

47. The service users' social worker, MD, replied by email of 9 March 2021. He wrote: "*I see that [KN] as got the email now – can you call her to discuss this matter and let me know the response? I think a call will sort this out. I agree that we all have to be very careful re guidelines for both [service users] health and for staff. Thanks again.*"

48. No such call ultimately took place. The claimant did not have a phone number for the first respondent, KN. The tribunal was, in any event, satisfied that KN was aware of the emails on that date if not earlier and considered it incumbent on her to initiate the process rather than leaving it to the claimant.

49. On 14 March 2021, the claimant was working. She received a message from the service users' grandparents to suggest that they would be visiting that day. She responded to the effect that they were not anticipating a visit given the lockdown rules. The grandparents responded to say that they would visit in the garden. The visit ultimately took place outdoors. The claimant sensed that the grandparents were unhappy about being excluded from the home itself.

50. The second respondent, CG, gave evidence that she became aware of the family visits shortly thereafter. She gave evidence that she instructed family members not to attend further. Her evidence was that she instructed the team leader, TF, to inform staff that this had taken place. The claimant stated that was not informed. The first and second respondents sought to persuade the tribunal that the claimant had been informed, but their evidence was based on assumption rather than any direct knowledge. The tribunal accepted the claimant's position. As noted below, she subsequently sent further chasing emails, including to the team leader TF. Had she been informed, it would be expected that TF would reply to that effect. She did not do so.

51. The claimant emailed the first respondent, KN, and the team leader, TF, on 26 March 2021. In the email she stated: "*I would really appreciate it if you could respond to the issues and concerns I raised in my previous email (dated 02/03/21) as these are still relevant to me as a cause of concern. I believe the issue of visiting has also caused upset amongst the family which could have potentially been prevented had this been discussed sooner. I am very anxious about the situation and it's impacting on me whilst I am not at work so I'd appreciate it if we could start a dialogue and discuss the relevant health & safety aspects of the [service users]' home as a workplace.*"

52. She attached her previous emails for reference. She received no response; nor did she receive any reassurance that steps had been taken to address the concerns.

53. On 7 April 2021, the claimant sent a further email to the team leader, TF, alone. In the email, she referred to the fact that a few days after a family member had visited the service users, the visitor had been required to self-isolate for 10 days. She stated that she was finding it very difficult to manage her anxiety surrounding the risk of COVID. She stated that she was aware that family were still visiting often without following guidance (no hand hygiene and not wearing masks, etc.) She referred to having tried to raise the issue with the first respondent, KN, on a number of occasions without any

response. She stated her belief that the second respondent, CG, was also aware of her concerns but that she hadn't tried to discuss them with her. She was signed off sick for two weeks at that time with a week of annual leave scheduled thereafter.

54. She stated that she would expect to return to work for a shift on 1 May 2021. She concluded by stating "*If you need to discuss anything further then we can arrange it after my annual leave week*".

55. Neither the team leader, TF, nor anyone else responded to that email.

56. The team leader, TF, and the first respondent, KN, exchanged emails on 8 and 12 April 2021 to the effect that they would wait until the claimant returned before discussing with her. In her evidence KN suggested that the claimant has asked not to be contacted during her absence. That is not what the claimant said. The tribunal considered that an email seeking to reassure the claimant would have been entirely appropriate and welcomed by the claimant – particularly in circumstances where she was signed off from work with anxiety caused by the issue.

57. The claimant returned to work on 1 May 2021. No contact was made by anyone on behalf of the respondents to address her concerns.

58. By email of 3 May 2021, addressed to the second respondent, CG, and copied to team leader, TF, the claimant intimated her resignation. She stated that it was not an easy decision but having sent emails raising health & safety issues that were concerning her which had not been addressed, and the impact that that had had on her health, she felt it was the best course of action. She undertook to provide four weeks' notice which would involve her carrying out one final shift on 30 May 2021.

59. An email from the second respondent, CG, to the email address of the first respondent, KN, appears to contain an email intended for the claimant. In it, CG states her understanding that the claimant was to have been contacted by KN on her return from work. It did not address any of the concerns or refer

to the action she said she had undertaken to stop family visits. The claimant's evidence was that she did not receive this email. CG sought to suggest that it was part of a chain and that it had been sent to the claimant. The first respondent, KN, contradicted that evidence and accepted that the email produced was addressed only to her. The tribunal accepted the claimant's evidence.

60. Evidence from the first respondent, KN, as to whether she received the sequence of emails from the claimant was deeply unconvincing. She initially stated that the emails went into her spam account. On being questioned as to whether she had checked her spam folder, she stated that she had not. Her evidence then became that she "assumed" that they had gone into a spam folder.

61. There was nothing to suggest that the emails were of a type that would go into a spam folder. There is clear evidence of other similar being received by her. She had no explanation for the reference from the social worker to her having seen the emails as at 9 March 2021. She gave no meaningful explanation for her failure to deal with the matter when, by her own admission, she had become aware of the issue.

62. Both the first and second respondents were clearly annoyed that the claimant had raised her concerns. They gave increasingly extravagant and unsubstantiated evidence as to the motivation of the claimant in raising her concerns in the matter that she did. They stated that the claimant chose to raise her concerns with the first respondent, KN, on the basis that she somehow knew that her concerns would not be addressed, setting herself up for a claim. The suggestion that the claimant could somehow control the responses or otherwise of KN or CG is absurd and represents one of the most unreliable chapters of the respondents' evidence.

63. Not only did the claimant raise her concerns with the first respondent, KN, she raised them with the team leader, TF, and with the social worker, MD. Her reason for not approaching the second respondent was quite

understandable given the family connection that the second respondent had with the visiting family members.

64. In seeking to cast doubt on the genuineness of the claimant's concerns, the respondents put forward a number of very serious allegations which could be extremely prejudicial to someone seeking to enter the medical profession. The tribunal found it troubling that the allegations were made without any real foundation. The allegations only surfaced after the claimant had resigned.

65. Certain of the allegations were (properly) withdrawn by the respondents' solicitor during the course of the hearing. Those allegations were to the effect that the claimant had herself breached COVID regulations on a number of occasions. Photographs from the claimant's social media pages were produced. She was cross-examined at length on these and in each case gave clear and persuasive answers demonstrating that she had acted in accordance with the appropriate rules and guidance at the relevant times. Although these allegations were withdrawn during the course of the hearing, it was very troubling to the tribunal that they were advanced without proper analysis as to whether they in fact pointed to relevant breaches in the first place.

66. Perhaps even more troublingly, the respondents sought to suggest that the claimant was responsible for a deterioration in the health of one of the service users. It was suggested that she had unduly influenced the team leader TF to mischaracterise seizures suffered by the service user such that her condition deteriorated. No issues were ever raised with the claimant during the course of her employment. Moreover, the most vociferous allegations were made by the first respondent, KN, who by her own admission had never met or spoken to the claimant. The allegation appeared to come from what KN said were discussions between "*folks*" at the home.

67. The service users were cared for in accordance with the guidance of a range of medical professionals including their GP a neurological team. The team leader TF was the only staff member with access to outside medical

professionals. Both respondents sought to suggest that the claimant somehow controlled TF's actions in failing to identify medical issues. The deterioration in the service user's condition, however, was only identified by her neurological team many months after the claimant's employment had ended. To make the allegation that the claimant should take responsibility was wholly baseless and unwarranted.

68. The respondents also led evidence to the effect that the claimant had exposed the service users to risk by doing shifts on COVID wards at a local hospital. The claimant gave evidence that she carried out two shifts on COVID wards and did not carry out any shift for the respondents until a period of 10 days had passed. The tribunal accepted that evidence. No concerns were ever raised with the claimant about her carrying out duties elsewhere during the course of her employment. The evidence to the contrary from the first and second respondents appeared to rely on the evidence of support worker witness YL. She was not, however, able to provide any specification for her allegation. In this context and others, she became increasingly argumentative in her evidence and on several occasions referred to guessing or assuming facts.

69. Following the termination of her employment, the claimant has been engaged as a bank nurse. She does only sporadic shifts and earns approximately a quarter of the remuneration she earned with the respondents.

70. Evidence was led from the respondents to the effect that the claimant had said she wished to leave their employment when she started her fourth year of medical studies. None of the witnesses who gave evidence pointed to any direct conversation with the claimant on that point. The first and second respondents gave the wholly implausible evidence that she had made this clear to others at the start of her employment 10 years earlier. At that time she had not even sat her Higher exams to gain entry to her first degree, far less her subsequent medical degree.

71. The claimant accepted that she might have required to do fewer shifts had she remained in employment and that is consistent with the pattern of work she does as a bank nurse. The tribunal was not satisfied that she had otherwise planned to leave the employment of the respondents at the point she resigned. In her email of 2 March 2021 addressed to the first respondent, KN, she asked about staff being given specific roles within the team. This points to her anticipating a future role at that time.

Relevant Law

72. The four elements of the claim are considered in turn.

Rest Breaks

73. Regulation 12(1) WTR provides that a worker whose working time is more than six hours is entitled to a rest break. In the absence of any collective agreement specifying otherwise, Regulation 12(3) provides that the rest break must be an uninterrupted period of not less than 20 minutes and the worker is entitled to spend it away from his or her workstation if they have one.

74. In **Gallagher v Alpha Catering Services Ltd** 2004 EWCA Civ, Gibson LJ held:

"… *a period of downtime cannot become a rest break only because it can be seen after it is over that it was an uninterrupted period of 20 minutes. The worker is entitled under reg 12(1) to a rest break if his working time exceeds six hours, and he must know at the start of a rest break that it is such. To my mind a rest break is an uninterrupted period of at least 20 minutes which is neither a rest period nor working time and which the worker can use as he pleases.*'

75. **MacCartney v Oversely House Management** 2006 ICR 510 EAT provided that a worker is entitled to an uninterrupted 20-minute rest break period and is entitled to know at the start of that rest break that it would be as such.

76. Regulation 21(1)(c) lists a number of special cases where certain provisions including Regulation 12(1) do not apply. One such special case relates to the reception, treatment or care provided *inter alia* by hospitals or similar establishments and residential institutions.

5 77. The provisions of Regulation 21 are subject to Regulation 24 which provides that compensatory rest must be provided in circumstances where a worker is required to work during what would otherwise have been a rest break.

Constructive Unfair Dismissal

78. Employees with more than two years' continuous employment have the right
10 not to be unfairly dismissed, by virtue of ERA. 'Dismissal' is defined in s95(1) ERA to include what is generally referred to as constructive dismissal. Constructive dismissal occurs where the employee terminates the contract under which he/she is employed (with or without notice) in circumstances in which he/she is entitled to terminate it by reason of the employer's conduct
15 (s95(1)(c) ERA).

79. The test for whether an employee is entitled to terminate his contract of employment is a contractual one. The Tribunal requires to determine whether the employer has acted in a way amounting to a repudiatory breach of the contract or shown an intention not to be bound by an essential term of the
20 contract (***Western Excavating (ECC) Ltd v Sharp*** [1978] ICR 221). For this purpose, the essential terms of any contract of employment include the implied term that the employer will not, without reasonable and proper cause, act in such a way as is calculated or likely to destroy or seriously damage the mutual trust and confidence between the parties (***Malik v Bank of Credit and***
25 ***Commerce international Ltd*** [1998] AC 20).

80. Conduct calculated or likely to destroy mutual trust and confidence may be a single act. Alternatively, there may be a series of acts or omissions culminating in a 'last straw' (***Lewis v Motorworld Garages Ltd*** [1986] ICR 157).

81. As to what can constitute the last straw, the Court of Appeal in ***Omilaju v Waltham Forest London Borough Council*** [2005] IRLR 35 confirmed that the act or omission relied on need not be unreasonable or blameworthy, but it must in some way contribute to the breach of the implied obligation of trust and confidence. Necessarily, for there to be a last straw, there must have been earlier acts or omissions of sufficient significance that the addition of a last straw takes the employer's overall conduct across the threshold. An entirely innocuous act on the part of the employer cannot however be a final straw, even if the employee genuinely, but mistakenly, interprets the act as hurtful and destructive of their trust and confidence in the employer.

82. In order for there to be a constructive dismissal, not only must there be a breach by the employer of an essential term such as the trust and confidence obligation; it is also necessary that the employee resigns in response to the employer's conduct (although that need not be the sole reason – see ***Nottinghamshire County Council v Meikle*** [2004] IRLR 703). The right to treat the contract as repudiated must also not have been lost by the employee affirming the contract prior to resigning.

83. The Court of Appeal ***in Kaur v Leeds Teaching Hospital NHS Trust*** [2018] EWCA Civ 978 set out guidance on the questions it will normally be sufficient for Tribunals to ask in order to decide whether an employee has been constructively dismissed, namely:

    a. 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?

    b. Has he or she affirmed the contract since that act?

    c. If not, was that act (or omission) by itself a repudiatory breach of contract?

    d. 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?

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

84. If an employee establishes that they have been constructively dismissed, the Tribunal must determine whether the dismissal was fair or unfair, applying the provisions of s98 ERA.

Automatically Unfair Dismissal

85. Section 103A ERA provides that an employee is automatically unfairly dismissed if the sole or principal reason for the dismissal was making a qualifying protected disclosure.

86. A disclosure is a protected disclosure if it meets the definition set out in s43A ERA read with ss43B-H. Relevant passages are as follows:

43B Disclosures qualifying for protection

(1) In this Part a 'qualifying disclosure' means any disclosure of information which, in the reasonable belief of the worker making the disclosure, [is made in the public interest and] tends to show one or more of the following

(a) that a criminal offence has been committed, is being committed or is likely to be committed,

(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,

(c) that a miscarriage of justice has occurred, is occurring or is likely to occur,

(d) that the health or safety of any individual has been, is being or is likely to be endangered,

(e) that the environment has been, is being or is likely to be damaged,

(f) that information tending to show any matter falling within any one of the preceding paragraphs has been or is likely to be deliberately concealed.

43C Disclosure to employer or other responsible person

5 *(1) A qualifying disclosure is made in accordance with this section if the worker makes the disclosure;*

a) to his employer, or

b) […].

(2) A worker who, in accordance with a procedure whose use by him is
10 *authorised by his employer, makes a qualifying disclosure to a person other than his employer, is to be treated for the purposes of this Part as making the qualifying disclosure to his employer*

87. In summary, there are five requirements which must be met for there to be a qualifying disclosure:

15 a. there must be sufficient disclosure of information

b. it must relate to specific types of matter set out in statute

c. there must be a reasonable belief that the information tends to show the relevant failing

d. it must be in the public interest and that belief must be reasonable

20 e. it must be made to the employer or otherwise in the correct way.

88. Guidance on the interplay between constructive dismissal and automatic unfairness for making a protected disclosure is given by the EAT in ***Salisbury NHS Foundation Trust v Wyeth*** UKEAT/0061/15 is summarised at paragraphs 29 to 31:

25 *29. Returning to the case-law on protected disclosures, it has been further recognised that there can be a distinction between the protected disclosure and the way in which the Respondent responds to it, see per Carnwath LJ,*

sitting in the EAT in Price v Surrey County Council and Governing Body of Wood Street School [2011] UKEAT/0450/10/SM:

"This approach in our view reflects a misconception of the statutory scheme. It is about the protection of "whistle-blowers". The purpose is to ensure that employees do not suffer simply because they have had the courage to speak up about problems affecting their workplace. Thus it is the "making" of the protected disclosure which is the focus of attention, and which must be the principal reason for the dismissal, or for the other detrimental action or inaction. In this case, by contrast, Mrs Price's forced resignation came about, not because of the making of her complaint as such, but because of the inadequacy in one important respect of the authorities' response to it."

30. Where an ET has to identify whether a protected disclosure was the reason or principal reason in constructive dismissal case, it will be important to ensure that the correct focus is maintained. As was held in Berriman v Delabole State Ltd [1985] ICR 546 CA:

"… It is the employers' reasons for their conduct not the employee's reaction to that conduct which is important. …" (page 551B)

31. In such a case, the ET will have identified the fundamental breaches of contract that caused the employee to resign in circumstances in which she was entitled to claim to have been constructively dismissed. Where no reason capable of being fair for section 98 purposes has been established by the employer, that constructive dismissal will be unfair. Where, however, the reason remains in issue because there is a dispute as to whether it was such as to render the dismissal automatically unfair, the ET then has to ask what was the reason why the Respondent behaved in the way that gave rise to the fundamental breaches of contract? The Claimant's perception, although

relevant to the issue why she left her employment (her acceptance of the repudiatory breach), does not answer that question.

Written Statement of Particulars of Employment

89. Section 1 ERA requires an employer to provide a worker with a written statement of particulars of employment containing information specified within that section.

90. Where an employment tribunal makes a finding in favour of a claimant in one of a number of specified claims, an award of two or four weeks' pay must be made to compensate for any failure.

Submissions

91. Parties' solicitors helpfully provided written submissions after the conclusion of the hearing. The tribunal considered both documents in detail. Key aspects of the submissions as they relate to the four elements of claim are contained in the *Decision* section which follows.

Decision

Rest Breaks

92. The claimant's solicitor invited the tribunal to find that there had a breach of the obligation to provide rest breaks in accordance with regulation 12(1). She cited the authorities referred to at paragraphs 74 and 75 above in support of the proposition that a rest break must be uninterrupted and defined in advance and before it is taken.

93. On behalf of the respondents, it was submitted that the special case exception in regulation 21(1)(c) applied such that there was no breach. The respondents' solicitor also pointed to the opportunities available to the claimant to take breaks during various points during the day, not least when the service users were being fed.

94. The tribunal first considered whether the respondents' solicitor was correct in her assertion that the claimant was exempt from the requirements of regulation 12(1).

95. It is clear from the terms of regulation 21 that the exemption for special cases applies where the worker is unable to take time off during a designated rest break. In those circumstances, the obligation to provide compensatory rest arises.

96. In accordance with the facts found by the tribunal, no designated rest breaks were specified. Instead, it was left to the claimant and her colleagues to take breaks at such times as was appropriate having regard to the needs of the service users. No evidence was led on behalf of the respondents that compensatory rest was ever applied or even considered in respect of the claimant or others. The factual matrix does not, therefore support the application of the exemption.

97. Whilst the claimant was, during the course of a shift, able to take breaks, at the start of any break, she was not in a position to know whether she would be interrupted or not. It was accepted that on occasion breaks would be interrupted by the need to attend to the service users.

98. Although in practice, the nature of the work meant that the claimant would routinely have an uninterrupted 20 minute rest break, the nature of the role was such that she could not be certain at the start that it would be such.

99. In accordance with the approach in ***Gallagher*** and ***MacCartney***, therefore, the tribunal found the respondents to be in breach.

Remedy

100. The claimant sought compensation for the breach equivalent to the rate of pay for a 20 minute break across the whole of her employment as well as a figure for discomfort and distress.

101. The tribunal considered whether any compensation should be awarded for the breach. It was mindful of the fact that compensation is not designed to punish the employer but to make reparations to the worker. It considered ***Miles v Linkage Community Trust Limited*** UKEAT/0618/07 where the EAT held that the tribunal had not erred when it decided to make an award of no compensation, despite finding a breach of the regulations.

102. The claimant's case is similar to ***Miles*** in that she suffered no loss as a result of the breach. Moreover, there was no suggestion that she suffered distress. She never challenged or expressed concerns about the arrangements during the course of her employment. The breach was, in essence, a technical one with the respondents' failure being to designate a break for each employee which would be uninterrupted. The tribunal was satisfied that the service users were able to accommodate the workloads between themselves to ensure adequate rest breaks.

103. For those reasons, no award is made.

Constructive Unfair Dismissal

104. The claimant's solicitor structured her submissions on the basis that the tribunal would consider first whether the claim was an automatically unfair dismissal and, in the alternative, whether it was an ordinary unfair dismissal. The tribunal considered it appropriate to address the tests in a different order and accordingly looked first whether ordinary constructive unfair dismissal was established, as envisaged at paragraph 31 of ***Salisbury NHS Foundation Trust*** (referred to at paragraph 88 above).

105. The claimant's solicitor submitted that there had been a material breach of contract in having an unsafe environment due to non-compliance with COVID restrictions, and by the failures to deal with the various emails of complaint submitted by the claimant on this. She submitted there are other elements of the ***Western Excavating*** test were established.

106. On behalf of the respondents, their solicitor submitted that the relevant tests were not met and that the reason for the claimant's resignation was due to her plan to resign in any event to focus on her studies.

107. The tribunal was satisfied having regard to the sequence of emails sent by the claimant that the reason for her resignation was the creation of the unsafe environment due to breaches of COVID restrictions, and the respondents' repeated failures to address her complaints.

108. The tribunal accepted the claimant's submission that the failure to deal with the complaint in itself amounted to a breach of the implied term of trust and confidence (***British Aircraft Corporation v Austin*** [1978] IRLR 332).

109. In terms of the claimant's motivation, the tribunal had no hesitation in finding that the reasons she advanced for her resignation were genuine. It is clear from the correspondence she sent that the underlying issue and the respondents' failure to deal with it was causing her distress.

110. Considering the elements of ***Kaur*** therefore, the tribunal found that the most recent omission on the part of the employer which caused the claimant's resignation was their failure to deal with the claimant's complaint on her return to work.

111. There is no question that she affirmed the contract since that act, having resigned two days later in circumstances where no effort was made to contact her about her concerns.

112. The tribunal was satisfied that the omission of the respondents in failing to deal with her concerns was itself a repudiatory breach of contract. Even if that were not the case, the repeated failures taken with the creation of the unsafe environment taken would, cumulatively, have amounted to a repudiatory breach. The risks to which the claimant and the service users were exposed were a clear breach of health & safety requirements as they applied in COVID management at that time.

113. Finally, the tribunal was satisfied that the claimant resigned in response to the breach. It is clear from the sequence of emails sent by her that she was becoming increasingly distressed by the respondents' failure to address her concerns. They were in effect being ignored despite having been raised with three separate individuals and made known to a fourth. Whilst she anticipated a reduction in her time commitment going into the fourth year of her studies, for the reasons outlined at paragraphs 70 and 71 above, the tribunal was satisfied that it was otherwise her intention to remain in employment with the respondents.

114. The tribunal then considered whether the constructive dismissal was fair or unfair. Whilst the respondents sought to argue that the dismissal was fair for conduct having regard to the alleged misconduct of the claimant, none of those issues was even raised prior to the claimant's resignation. The tribunal considered that those submissions were potentially relevant in the context of remedy but in no way represented any meaningful suggestion that the dismissal was fair. The tribunal concluded, accordingly, that the dismissal was unfair.

Remedy

115. Having been unfairly dismissed, the claimant is entitled to a basic award. It was agreed that this amounts to £2,831.54. The tribunal considered it appropriate also to make an award for loss of statutory rights at the sum claimed, £350.

116. The tribunal considered whether to make an award for past or future loss of earnings. It concluded in the circumstances that no such award should be made.

117. Following the termination of her employment, the claimant was engaged as a bank nurse on a zero hours' contract. As set out above, she has chosen to work a number of shifts which results in significantly less remuneration than the remuneration for the work she did with the respondents. The respondents

produced substantial evidence of care posts which could have been undertaken by the claimant following the termination of her employment. It was clear to the tribunal that work shortages in that sector would have meant that the claimant could have taken on additional work had she wished to do so. Her failure to do so amounts to a failure to mitigate her losses and for that reason the award for unfair dismissal is limited to the basic award and loss of statutory rights.

118. The tribunal addressed the respondents' submission that the awards should be reduced on the basis that the claimant would have been dismissed in any event due to her conduct in dealing with the service user whose health deteriorated.

119. For the reasons outlined at paragraphs 66 and 67 above, the tribunal was satisfied that there was no basis whatsoever on which to suggest that the claimant would have been fairly dismissed in any event. No reductions to the awards will, therefore, be applied.

Automatically Unfair Dismissal

120. Having determined that the claimant was unfairly dismissed in the ordinary sense, it is somewhat academic, at least in relation to compensation, to consider the question of automatic unfairness. For completeness, however, the tribunal did so.

121. It first considered whether the claimant had made a qualifying protected disclosure and was satisfied that she had.

122. Considering the five key elements of the test referred to at paragraph 87 above, the tribunal was satisfied that there was a sufficient disclosure of information. The claimant made specific allegations relating to breaches of health & safety regulations which she said put service users and staff at risk. She gave more than sufficient context for this to amount to a disclosure of information rather than a mere allegation. The tribunal was satisfied that the

emails of 2 March, 26 March and 7 April 2021 all amounted to qualifying protected disclosures in this regard.

123. The tribunal was also satisfied that the information disclosed fell within the requirements of section 43B(1) ERA. The information set out failures to comply with legal obligations as they related to COVID requirements. It is also covered by the provision relating to the health & safety of an individual being likely to be endangered. That was clearly the case in circumstances where highly vulnerable individuals were being visited by third parties who had in some instances failed to take other preventative measures such as social distancing, hand hygiene and mask wearing.

124. As outlined at paragraph 108 above, the tribunal had no hesitation in holding that the claimant's belief was reasonable. The respondents' alternative narrative of some form of plan to raise issues in a way which she knew would be ignored was wholly without foundation and deeply implausible.

125. In considering the public interest of the disclosure, this again was satisfied in the opinion of the tribunal. This is a case involving extremely vulnerable individuals who require 24 hour care in a publicly funded setting. It is clearly in the public interest if any failure to comply with appropriate standards is alleged. It is clear from the evidence of the claimant and her contemporaneous emails that she found the non-compliance by the respondents to be deeply concerning as it related to the health & safety of the service users and the staff to the extent that she also raised it with the social worker.

126. Much of the respondents' evidence and the submissions made on their behalf as a means of defending this claim focussed on whether the disclosure had been made in the correct way. In essence, the position was that disclosure had not been made to the "employer". In light of the tribunal's decision as to the identity of the employers, this submission is ill founded. The position is reinforced by the terms of the email sent to staff instructing them to raise concerns with the first or second respondents as *"employers*" (paragraph 31

above). The tribunal is, accordingly, satisfied that this final element of the statutory test is met.

127. The tribunal went on to consider whether the making of the protected disclosure was the sole or principal reason for the dismissal.

5 128. The employment tribunal looked at the breaches of contract which caused the employee to resign. The first of these was the creation of the unsafe environment itself. The disclosure cannot be the reason for that breach given that the breach gave rise to the disclosure.

129. The subsequent breaches as they related to the respondents' failures to deal
10 with the concerns required the tribunal to consider why the respondents behaved in the way they did in failing to do so. It concluded that the respondents' failures were more to do with a more general inadequacy or unwillingness on their part to address the issue head on or to engage in a meaningful dialogue with the claimant. This was in part due to their
15 annoyance that she had raised the issue.

130. Considering the breaches together, therefore, the tribunal concluded that the reason for the forced resignation was not the making of the protected disclosure.

Written Statement of Particulars

20 131. Having found in favour of the claimant in at least one of her complaints, the tribunal considered whether there had been compliance with section 1 ERA. Whilst an attempt had been made to provide the claimant with a contract which satisfied many of the requirements of section 1, it was deficient in a number of material respects as set out at paragraph 26 above.

25 *Remedy*

132. The tribunal was mindful of the small scale of the respondents' workplace and its attempts to achieve some compliance. For that reason, it determined that

an award at the lower level (two weeks' pay) should be made. This amounts to £501.24.

Employing parties

133. For the reasons concluding at paragraph 34 above, the tribunal was satisfied that the claimant was employed jointly by the first and second respondent at the time of the termination of her employment and at the material times in the period prior thereto. They are accordingly jointly and severally liable for the awards made.

Employment Judge: **R MacKay**

Date of Judgment: **9th December 2022**

Date issued to parties: **20th December 2022**