EMPLOYMENT TRIBUNALS

Claimant:	**Mrs Michelle Muxworthy**
Respondent:	**Piramal Healthcare UK Limited**
Heard at:	**Newcastle Employment Tribunal (in person)**
On:	**20 – 23 February 2023**
	Deliberations in Chambers: 9 March 2023

Before: **Employment Judge Langridge**

Representation

Claimant:	**Mr G Price, Counsel**
Respondent:	**Mr P Scope, Solicitor**

RESERVED JUDGMENT

1. The claimant was unfairly dismissed by the respondent.
2. The claimant was wrongfully dismissed by the respondent and is entitled to damages in respect of her three month notice entitlement.
3. The deduction of £5,782 from the claimant's final wages on 31 March 2022 was permitted by section 13(1)(a) Employment Rights Act 1996 and was not therefore unlawful.
4. A one day remedy hearing shall be fixed to determine compensation.

REASONS

Introduction

1. The hearing of these claims took place between 20 to 23 February 2023 in person, when judgment was reserved following four days of evidence and submissions from the parties.

2. The claimant's principal claim was for constructive unfair dismissal based on her decision to resign from her employment on 10 March 2022. She also brought a wrongful dismissal claim in respect of her entitlement to contractual notice, and a claim challenging a deduction of relocation expenses from her final wages as being an unlawful deduction under Part II Employment Rights Act 1996. Prior to the hearing the claimant had withdrawn a claim for holiday pay.

3. In summary, the problems that the claimant experienced at work followed the arrival in November 2021 of a new Managing Director at the Morpeth site where she was based. She submitted a grievance on 2 February 2022 following a meeting on 26 January about his setting expectations for her performance. This led immediately to informal discussions with HR about the possibility of resigning. At this time the claimant was unfit to work and remained absent on sick leave until her employment ended. In the meantime, she complained that the arrangements for the grievance hearing were delayed and that adjustments she requested to that process were refused by the respondent. A proposed hearing on 8 March was postponed and the claimant alleged that an email from HR on 9 March was the last straw leading to her resignation the following day.

4. In its Response to the claim the respondent identified "a number of serious concerns regarding the claimant's performance of her role". It set out five examples. These related to a backlog of employee health assessments; a failure to adequately maintain a risk register; spending an excessive an unexplained portion of working time travelling to the respondent's site in Grangemouth and working from home; making an untrue statement to the managing director that a strategy plan was in place and that she would send it to him; and there being an unacceptably poor safety culture at the Morpeth site.

5. The respondent described these as legitimate issues which the Managing Director was entitled to raise with the claimant, noting that he deferred doing so from December until 26 January because of the ill health and then death of the claimant's father. The meeting of 26 January was a constructive discussion with an agreed outcome. The respondent further pleaded that the hearing of the claimant's grievance was arranged for 8 March "once it became apparent that the claimant was not willing to have an initial discussion regarding her grievance or how she wished for this to be dealt with."

6. The respondent disputed that there was any breach of contract and asserted that its genuine concerns were dealt with in a reasonable fashion. It stated that the reason for the claimant's resignation was to avoid being subjected to performance management steps and/or her not being willing to work to the actions and objectives outlined by the Managing Director at the 26 January meeting.

7. As for the deduction of relocation costs, the respondent pleaded that the claimant was reimbursed against receipts for expenditure totalling £23,130.26 against a

ceiling of £30,770. According to the terms of a letter dated 18 November 2019, the respondent said it was entitled to recoup 25% of the expenses paid.

8. The hearing of these claims was listed for four days with the intention that a decision could be delivered during that time, but in the event this was not possible due to lack of time. It was agreed at the outset to treat this as a liability-only hearing, such that any remedy issues, should they arise, would be deferred until another date. Evidence was heard from the claimant herself and from two former colleagues on her behalf, Mr Garry Thompson, former HR Director and Mr Robert Haxton, former Managing Director. On the respondent's behalf evidence was given by Mr Terry Cooke, Managing Director and by Ms Kerry Hardy, HR Director. An agreed bundle comprising around 400 pages was provided and the first morning allocated for pre-reading. The parties also helpfully prepared an agreed list of issues which is summarised below.

9. By agreement, a voice recording from 3 February conversation with Ms Hardy was admitted into evidence from the claimant, on the understanding that I would listen to this during deliberations. The relevance of this, given that a transcript of the conversation existed, was to enable me to assess whether the claimant had been "nervous and stressed" during the call, as she alleged, or "confident and composed" as submitted by the respondent.

<u>Issues and relevant law</u>

10. The parties' agreed list of issues is reproduced in paragraphs 1.1 to 3.2 below.

Constructive unfair dismissal

1.1. Did the respondent commit the following alleged acts/omissions:

(a) During a meeting between the claimant and Terry Cooke on 26 January 2022:

(i) Presenting the claimant with a document entitled "setting expectations" (the Document) in which Mr Cooke stated among other things "*I'm struggling to understand what your day to day activities are and what value you bring to the role. I've seen nothing productive from you in my time in role. To support closing this void I want you to send me a weekly EHS report on a Friday covering the following:*

- *Your personal 'key areas of focus' during the week and output.*
- *EHS Teams 'key areas of focus' during the week and output.*
- *EHS milestone status due in the week:*

  Departmental milestones eg
  EHS/API/Pharm/packaging/engineering etc
  HSE milestones
  Environmental milestones

- *Look ahead to the coming week/month for key deliverables as per the previous point*
- *CAPA close out status."*

(ii) Listing in the Document a number of actions for the claimant which included submission of weekly reports and obtaining prior approval of her work location and movements.

(iii) Stating in the Document: 'Working from home' (WFH) – "*I don't expect you to be taking ad hoc days at short notice. If you want to work from home one day per week as a fixed day, you can put this in as a formal request which I can review/approve*".

(b) On 26 January 2022 and 2 February 2022, Mr Cooke requiring the claimant to acknowledge receipt of the Document.

(c) During a call between the claimant and Kerry Hardy on 3 February 2022, asking the claimant if she was resigning.

(d) During a meeting between the claimant and Ms Hardy on 4 February 2022:

(i) Refusing to temporarily change the claimant's reporting line to limit interaction with Mr Cooke.

(ii) Again asking the claimant if she was resigning and outlining an exit strategy for her.

(e) Not confirming arrangements for a grievance hearing until 25 February 2022.

(f) Not granting the claimant's request to hear the grievance remotely.

(g) By email from Ms Hardy on 9 March 2022:

(i) Refusing the claimant's request to consider the grievance in writing only, given her ongoing absence due to stress; and

(ii) Arranging a revised grievance hearing for 18 April 2022, some two months after the claimant lodged the grievance, following the claimant being too ill to attend the grievance hearing arranged for 8 March 2022.

The claimant says that the email from Ms Hardy dated 9 March 2022 was the final straw.

1.2. If so, did the above acts/omissions amount to a breach of the claimant's employment contract? Namely, a breach of the implied term of mutual trust and confidence?

1.3. Was the breach sufficiently serious that it constituted a repudiatory breach, entitling the claimant to treat the employment contract as terminated with immediate effect?

1.4. If so, did the claimant resign in response to the alleged breach?

1.5. If so, did the claimant affirm the fundamental breach of her contract by virtue of any delay or conduct prior to her resignation?

1.6. If the Tribunal finds that the claimant was dismissed within the meaning of section 95(1)(c) ERA, what was the reason for dismissal? The respondent says that the reason was capability.

1.7. Did the respondent act fairly in all of the circumstances in dismissing the claimant?

1.8. Was dismissal for this reason within the range of reasonable responses available to a reasonable employer in accordance with equity and the substantial merits of the case, pursuant to section 98(4) ERA?

Wrongful dismissal/breach of contract

2.1. If the acts/omissions listed above amounted to a repudiatory breach of the claimant's employment contract, entitling her to treat the contract as terminated with immediate effect:

(a) Was the claimant entitled to receive payment in respect of her contractual three month period?

(b) If so, was payment made?

The claimant's position is, but for the acts/omissions listed above, she would not have resigned summarily or may have been able to resign with notice. The respondent's position is that there was no entitlement to notice, as section 95(1)(c) ERA permits the claimant to resign with or without notice and the claimant chose to resign summarily.

2.2. These issues only apply if the claimant's constructive unfair dismissal succeeds and remedy is to be determined, since a damages award is a separate head of remedy to the basic and compensatory awards for constructive unfair dismissal.

Unlawful deductions

3.1 The unlawful deductions claim relates to relocation costs only and it is not disputed that:

(a) Wages due to the claimant on 15 March 2022 (paid on 31 March 2022) were properly payable. There is no complaint by the claimant in respect of the delayed payment.

(b) On 31 March 2022, the respondent made a deduction of £5,782 from the claimant's wages in respect of relocation costs.

3.2 The issues for the Tribunal to determine are therefore, whether:

(a) The deduction made by the respondent on 31 March 2022 was required or authorised by statute or a provision in the claimant's employment contract (section 13(1)(a) ERA); and/or

(b) The claimant gave prior express consent (orally or in writing) to the deduction (section 13(1)(b) ERA).

The claimant's position is that no contractually binding consent was given to the respondent in respect of the deduction made on 31 March 2022 in respect of relocation costs, whether verbally or in writing.

The respondent's position is that agreement was reached orally and that this agreement is recorded in a written agreement.

11. Dealing first with the unfair dismissal claim, section 95(1)(c) Employment Rights Act 1996 (ERA) provides that an employee is dismissed by her employer if she resigns (with or without notice) in circumstances in which she is entitled to resign without notice by reason of the employer's conduct. The employee has the burden of proof and must persuade the Tribunal that she was entitled to resign by reason of the employer's conduct, and did resign for that reason. It is not enough for the claimant to show that the respondent's conduct was unreasonable. The conduct

would have to be a fundamental breach of the contract going to the root of the relationship.

12. This case turned not on breaches of express terms of the contract, but rather a breach of the implied duty of trust and confidence. The claimant relied on a series of events between around November 2021 and March 2022, and alleged that the cumulative series of decisions and actions on the respondent part amounted to a breach of the implied duty.

13. A breach of the implied duty of trust and confidence can arise if the employer, without reasonable and proper cause, conducts itself in a manner calculated or likely to destroy the relationship of trust and confidence in the employment relationship. The Tribunal should look at the employer's reasons for its actions and consider its conduct taken as a whole. A breach of the implied duty will be regarded as a repudiatory breach going to the root of the employment relationship: Morrow v Safeway Stores [2002] IRLR 9.

14. While it is necessary to examine the respondent's conduct leading up to the claimant's resignation, it is also appropriate for the Tribunal to consider the claimant's conduct. The test to be applied when considering the claimant's reaction to the conduct is an objective one; in other words, the question is whether it was reasonable for the claimant to regard the respondent's actions as a fundamental breach of her contract.

15. If the claimant persuades the Tribunal that she was dismissed, it is then for the respondent to show the reason or principal reason for dismissal. The respondent relies on capability as the underlying reason in this case.

16. The next stage would be to consider whether that dismissal was fair or unfair in all the circumstances of the case, pursuant to section 98(4) ERA. In keeping with the guidance in Iceland Frozen Foods and other authorities, it was not for the Tribunal to substitute its own view of the case but rather to consider whether the dismissal fell within or outside a range of reasonable responses.

17. The Tribunal took into account the key authorities relating to constructive unfair dismissal cases, including the decision of the Court of Appeal in London Borough of Waltham Forest v Omilaju [2005] IRLR 35, which helpfully summarises the key authorities of Western Excavating v Sharp [1978] 1 QBD 761, Malik v BCCI [1998] AC 20 and Woods v WM Car Services [1981] ICR 666. I have also considered the guidance provided by the Court of Appeal in the case of Buckland v Bournemouth University. This provided that the question of whether the employer has committed a fundamental breach of the contract is not to be judged by a range of reasonable responses test. The test is objective: a breach occurs when the proscribed conduct takes place.

18. Where a last straw is relied on, the act in question does not have to be of the same character as the earlier acts in the series, provided that "when taken in conjunction with the earlier acts on which the employee relies, it amounts to a breach of the implied term of trust and confidence. It must contribute something to that breach, although what it adds may be relatively insignificant." – Omilaju.

19. No issues arose in this case about whether the claimant had affirmed her contract, nor was it suggested that she had any other reason for resigning.

20. The wrongful dismissal claim related to the claimant's entitlement to notice pay, and required the Tribunal to determine whether on the balance of probabilities the respondent was in breach of its contractual duty to pay the claimant her notice entitlement of three months.

21. The unlawful deductions claim is a purely statutory one which turns on the wording of section 13 ERA:

> *(1) An employer shall not make a deduction from wages of a worker employed by him unless—*
>
> *(a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or*
> *(b) the worker has previously signified in writing his agreement or consent to the making of the deduction.*
>
> *(2) In this section "relevant provision", in relation to a worker's contract, means a provision of the contract comprised—*
>
> *(a) in one or more written terms of the contract of which the employer has given the worker a copy on an occasion prior to the employer making the deduction in question, or*
> *(b) in one or more terms of the contract (whether express or implied and, if express, whether oral or in writing) the existence and effect, or combined effect, of which in relation to the worker the employer has notified to the worker in writing on such an occasion.*
>
> *(3) Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion.*

Submissions for the claimant

22. For the claimant, Mr Price referred the Tribunal to the key authorities referred to above, and also the decision in Bethnal Green and Shoreditch Education Trust v Jeanne Dippenaar UKEAT/0114/15/JOJ. This held that subjecting an employee to an unjustified capability process, on an inadequate basis, is easily capable of being a repudiatory breach of contract. Furthermore, following Billington v Michael Hunter [2003] UKEAT/0578/03, an invitation to resign without reasonable and proper cause can constitute behaving in a manner calculated and likely to destroy or seriously damage the employment relationship.

23. Mr Price emphasised the claimant's seniority and success in her professional career, which had been unblemished. He compared the respondent's pleaded case with the evidence presented to the Tribunal. In the Grounds of Resistance, the respondent alleged that the 26 January meeting was fixed partly to deal with alleged "excessive or unexplained travel to Grangemouth or working from home",

yet there were in fact no such concerns. Furthermore, the respondent's assertion that the claimant had “knowingly misled” Mr Cooke about the existence of the strategy document was not supported by its own evidence. There were other inconsistencies in the way the respondent presented its case and its evidence about why the 26 January meeting was held. In any event, there was no (reliable) evidence supporting Mr Cooke’s criticisms of the claimant's performance.

24. In the context of the claimant's unblemished record, and the very short time she and Mr Cooke had worked together, the claimant was entitled to consider her position undermined, and the trust in the relationship destroyed or seriously damaged.

25. Mr Price criticised the respondent's handling of the claimant's grievance, beginning with Ms Hardy’s emphasis on discussing a proposal for the claimant to leave rather than taking steps to maintain the employment relationship. This initial response to the grievance was compounded by the decision not to accommodate the claimant's requests to modify the process. The 9 March email, in which the claimant was told her sick pay may be affected if she did not answer Ms Hardy’s calls, was capable of amounting to a final straw.

26. Although the respondent argued that the claimant affirmed her contract, that was incorrect. The first repudiatory breach was the 26 January meeting, and the claimant submitted her grievance within 7 days. That remained unresolved until the claimant's resignation, and during the interim period she was absent from work on sick leave. In any case, the 9 March email revived the earlier repudiatory act.

27. As for the reason for dismissal, the respondent pleaded that the claimant resigned “in order to avoid being subject to performance management and/or because she was not willing to work to the actions and objectives outlined by Mr Cooke on 26 January 2022”. These reasons are not necessarily consistent with the stated “capability” reason. Mr Price reminded the Tribunal that in her oral evidence Ms Hardy had presented the claimant's reason as being retaliation in response to the respondent's treatment of her sister, a new point raised during the hearing.

28. On the deductions claim, Mr Price submitted that the claimant did not agree to the letter of 18 November 2019, and so it was not a ‘relevant provision’ of her contract. Alternatively, any such term is not enforceable as it is insufficiently clearly expressed.

<u>Submissions for the respondent</u>

29. Mr Scope’s written submissions identified the key legal issues, and relied heavily on the assertion that the claimant's evidence was not credible. He put forward several examples, pointing out differences between the claimant's evidence about the strategy document and that of the respondent's witnesses, both of whom said the claimant had told them it was in place. Another difference in the evidence of the parties was that the claimant positioned her case as one where Ms Hardy tried to force her out with an exit package, yet the 3 February conversation made clear that it was the claimant herself who was seeking an exit package, as she could not see another way forward.

30. Mr Scope submitted that an implied term cannot override an express term of the contract, which he said was relevant to the issues about working from home and the sick pay rules.

31. Crucial to the respondent's case was that it had reasonable cause for its conduct throughout. Mr Cooke was tasked with turning around the Morpeth site and the respondent was merely trying to operate its business in a safe and successful manner.

32. Mr Scope referred to the facts of the case as supporting the respondent's view that there were serious issues at the Morpeth site, including safety concerns for which the claimant was partly responsible for handling. He referred to the issues which were discussed at the 26 January meeting, pointing out that Mr Cooke had not criticised the claimant that day, but rather set his expectations. He pointed out that in her oral evidence the claimant had accepted that in some of the ten items in Mr Cooke's document, there was nothing wrong with what was stated. For example, the statement that safety culture on the site needed to be improved, and his reference to her job description needing to be reviewed.

33. On the key passage in Mr Cooke's document, about not seeing any value in the claimant's role, Mr Scope submitted that Mr Cooke had been clear in his evidence that "adding value" was a term he used regularly with the senior leadership team.

34. Overall, none of the issues raised by Mr Cooke amounted to a breach of contract, either singly or cumulatively.

35. The respondent further submitted that the claimant had already decided to resign by the time of her grievance on 2 February or at the latest by the conversation with Ms Hardy on the following day. Accordingly, the claimant affirmed her contract after any alleged breach, by continuing to be employed for a further month and engaging with the respondent in relation to the grievance and exit negotiations. The 9 March email was innocuous and did not entitle her to resign. Further, the claimant resigned not in response to any alleged breach but because she wanted to avoid being performance managed and/or was unwilling to work to Mr Cooke's actions and objectives. He introduced a new argument, based on Ms Hardy's oral evidence, that the claimant had already decided in November 2020 and January 2021 that she would resign because of how her sister had been treated.

Findings of fact

36. On 6 January 2020 the claimant took up her position with the respondent as UK Head of Environment, Health and Safety (EHS). Her main work location was the company's premises at Morpeth, though her role required her to take responsibility for both that site and the respondent's site in Grangemouth. The respondent allocated 25% of the claimant's time and salary to the Grangemouth site. The claimant was a senior member of the site leadership team and reported to the then Managing Director, Robert Haxton. Her starting salary was £102,500.

37. In advance of taking up her position the claimant discussed with the respondent the terms on which it would assist her with a relocation allowance to help with the costs of relocating her family home to Northumberland. By a letter from Mr Garry Thompson, the then UK HR Director, dated 18 November 2019 the agreed terms were set out. The intention was that the claimant could submit

receipts for expenses incurred up to an estimated ceiling of £35,770. The letter stated:

> "*Given the costs entailed we would look to reclaim the relocation payment should you leave our employment within a 30 month period as follows:*
>
> *Period of employment 24 to 30 months Amount repayable 25%"*

38. The claimant received that letter but put it to one side without signing it and without reverting to the respondent to query the terms set out. During her employment the claimant submitted receipts and was reimbursed in respect of a total of £23,130.26.

39. The other terms of the claimant's employment were set out in an engagement letter dated 10 October 2019, setting out the offer subject to references and other pre-employment checks. Relevant extracts from the contract terms are as follows:

    Over- and under-payments

    Under the provisions of the Employment Rights Act 1996, the company can and will recover all overpayments of remuneration made to staff from the date of commencement of the overpayment. …

    Sickness absence

    If you are absent from work because of sickness or injury you are required to notify the company on the first morning of that absence or as soon as is reasonably practicable. If the absence exceeds the period of time statutorily covered by the self-certificate (five working days), then you must submit to the company the certificate or advice of a registered medical practitioner immediately, and thereafter at regular intervals so long as the absence continues.

    Whilst the company has no obligation to pay full or part salary during sickness absence, it may do so at its discretion and will give sympathetic consideration to each individual case on its merits. However, Statutory Sick Pay (SSP) will be paid to all eligible employees in accordance with current legislation.

    Policies and HR guidelines

    None of the guidelines referred to in this offer letter or any of the company's policies form part of this agreement and the company may amend these at any time. You are required to comply with these and you should read these in their entirety to ensure you have a full understanding of the content.

    Notice of termination

    Subject to the terms that apply during the probationary period referred to within the probationary employment and you are required to give the company the same period of notice [sic]. The company may pay salary in lieu of notice.

    The period of notice required after the probationary period is three months, according to the contract details form.

40. During the claimant's employment the respondent operated a Grievance Procedure, of which the following are relevant extracts:

    6.1 Principles

    - All grievances raised, which are specific and reasonable, will be treated seriously and in confidence.

- It will be endeavoured to discuss and resolve problems at the earliest stage possible in the procedure.
- Timings are given throughout the procedure as a general guide, however, hearings should be arranged to suit the working patterns and other commitments of both parties, and it is important the issue is given full and thorough attention; factors which may force the guide times to be extended.
- No decision will be made until the matter has been fully and fairly investigated.

6.4 Formal Process

Where issues cannot be resolved informally, the grievance procedure provides a mechanism for them to be dealt with fairly, timely and in a consistent manner.

Consultation with HR, from either party is permitted at any time, in their advisory capacity.

6.4.1 Hearing

Grievances should be given, in writing, to HR stipulating the specific reasons for the grievance.

At this stage the grievance would normally be heard by a member of HR and an appropriate level of manager; for which a mutually convenient date will be arranged (usually within five working days) and an invite letter sent to the individual along with any documents and/or information intended to be used or referred to during the hearing.

The format of a hearing would normally be as follows:

- Individual to explain the nature of their complaint/reason for the hearing.
- Relevant questions being asked of the individual for clarification.
- Other employees or witnesses who, it is felt, could help to ensure that the full facts of the matter are known may be asked to attend at this stage and spoken to either in front of all attendees or just with HR and the hearing manager, whichever is most appropriate.
- Agree as to whether further investigation is required or if this has been exhausted if a decision can now be made.

6.5 Time Limits

To encourage speedy resolution of the complaints recommended timescales are included within the procedure. The dates, times and location of the meeting must be appropriate to the working patterns and other commitments of both parties.

These limits may be extended with the agreement of both parties where it is felt additional time could result in an agreement being reached. If a manager extends the time limits, then an explanation of the delay should be given to the employee with an indication of the reason and probable timescale.

41. Two months into her employment the claimant began working from home during the pandemic, initially under arrangements whereby members of the leadership team were paired with colleagues. Once the restrictions were relaxed, some managers including the claimant continued to work from home on occasion. At no time was the claimant involved in any discussion or given any express instruction

about that arrangement not continuing, or it being required to be formalised in any way.

42. When the claimant took up her position there was no risk assessment available relating to the requirement for employees to be subjected to regular health surveillance questionnaires. In around April 2020 the claimant commissioned an external provider, Viridis, to prepare such a risk assessment.

43. The claimant had also joined the respondent at a time when an incident in 2019 was reported by the respondent to the Health and Safety Executive (HSE) due to a potential exposure of risk to employees. This led to a formal notice from the HSE which remained in place throughout the claimant's employment.

44. The responsibility for employees attending health surveillance appointments lay at the time when the claimant joined the respondent in the HR department, previously managed by Mr Thompson and later by Ms Kerry Hardy when she joined the respondent as his successor. When the claimant became aware of a backlog with the health surveillance referrals, she took steps to set up a structured approach, which was discussed with the site leadership team on a monthly basis so that the issues could be addressed. In her role the claimant had an overarching responsibility to supply support and governance on environment, health and safety issues, and to make her expertise available to managers, though they also directly held responsibility for ensuring that EHS matters were dealt with. The respondent had had some difficulty in employees not attending health surveillance appointments, or not being released by line managers to do so, and this had contributed to the backlog. The claimant took the view, which was shared by the senior leadership team, that responsibility for EHS matters started at the top of the organisation, which should lead by example.

45. The claimant had two direct reports, an EHS manager at Morpeth (Stewart Fullarton) and another at Grangemouth, who left. Although she arranged for interim cover in Grangemouth, at times this was not available and the claimant had to provide that cover herself.

46. In January 2021 the claimant prepared a three month activity plan for the EHS function, covering the period between February and April that year. This included some lead measures such as reviewing risk assessments, carrying out audits and inspections, safety walkdowns in the premises and hygiene monitoring. The document included a summary of actions from previous meetings. This was updated on 19 January 2021. Responsibility for the nine key actions identified lay to a large extent with the entire leadership team, but four of the nine were marked as overdue. For example, only the engineering department had completed the feedback to teams on the culture survey results, and only that department had developed three improvement projects per area based on site culture survey results.

47. Within a few weeks Ms Hardy joined the respondent as the new HR director and Mr Thompson left in March 2021.

48. In March 2021 an incident had taken place at the premises of the respondent's parent company in India, which led to a pause being implemented on the respondent's strategy for safety culture pending a global solution being explored. Nevertheless, informal steps like walk-arounds and behavioural conversations continued.

49. In around March or April 2021 the claimant's year end review was carried out by Robert Haxton, the then Managing Director. The claimant was assessed as meeting expectations. In accordance with the respondent's practice, the claimant received a letter dated 28 May from the Chief Executive Officer of the global company and the Vice President of Human Resources, confirming her performance rating for the year 2020-2021. By around early to mid-2021 Mr Haxton was aware of the backlog of employee surveillance assessments and took the decision to shift responsibility from the HR team to EHS where he felt it better fitted. In his view, employees bore responsibility for attending the appointments, and their line managers were accountable for ensuring that this happened. Mr Haxton was aware that the cause of the backlog was creating some friction between the claimant and Ms Hardy because the claimant was unhappy to be accepting responsibility for the legacy she was inheriting. He did not, however, find it difficult to persuade her that she was accountable for tackling the backlog in the future. Mr Haxton had conversations with both the claimant and Ms Hardy, who continued to work together on a professional basis.

50. In around July or August 2021 the claimant had some involvement along with other colleagues with a personal injury claim that had been brought against the respondent. This was something of which Mr Haxton was aware. Due to some historical problems the insurer advised the respondent to accept liability in this one case, due to a lack of evidence supporting what the respondent had done.

51. On 12 August a summary was prepared by a member of the HR team, Diane Wilkinson, showing the backlog of the health surveillance checks. She emailed this to Ms Hardy. Ms Wilkinson estimated that the backlog went back around two years and presented data showing that around 200 employees had 698 different assessments outstanding. The number and type of assessments was fixed partly by reference to the risk areas affecting the job groups. Once the claimant's department took over responsibility for the health surveillance assessments, the claimant brought Viridis on board to evaluate and help manage the risks through a health risk assessment. Mr Haxton and Ms Hardy were both aware of this, and certain actions were targeted to reflect the risk areas in a proportionate way. For example, the health risk assessment was done so as to map back issues to workers in similarly exposed groups. Another step taken by the claimant in the summer of 2021 was to prepare an Occupational Health and Wellbeing Policy setting out roles and responsibilities, including specific responsibilities of managers, which she sent to the HR team.

52. At around the same time, August 2021, the claimant was tasked with restructuring her department and presented a restructure option to the Chief Operating Officer, John Fowler. She did not, however, feel that she was well supported by the HR department on this, whose specific input was needed.

53. In September 2021 the claimant's mid-year review was carried out by Mr Haxton and as before she met the respondent's expectations. Mr Haxton noted that the claimant had had:

> "a tremendous six months in working with the team to address HSE concerns and get the site to a position of compliance … the ongoing raising standards of EHS is apparent across the site."

54. He noted that there had been a "big improvement" and that there were "definite signs of cultural transformation." The review was calibrated in accordance with the

respondent's internal procedures, which meant Mr Haxton met with Ms Hardy and agreed the rating for the claimant's review as with other individuals.

55. Mr Haxton then left his role as Managing Director in later that month, and in early November he was replaced by Terry Cooke, who then became the claimant's line manager.

56. One of the first encounters between the claimant and Mr Cooke was a discussion on 8 November about the fact that he was letting her sister go from her position in the company. The claimant was unhappy about this, not merely because it was her sister but also because she felt that the loss of her skills was not a good decision for the business. She was, however, able to separate her personal feelings and continue working in a professional manner.

57. On 9 November the claimant emailed Mr Fullarton, the Morpeth EHS manager, asking for confirmation as to whether some information she had prepared for a meeting with Mr Cooke was still correct. She then attended her first formal one-to-one meeting with Mr Cooke to discuss EHS strategy and status. The claimant said she had made a start on a gap analysis and strategic plan, and although the former was done she was awaiting discussion with Mr Cooke before completing it by adding dates and identifying resources. The claimant did not indicate to Mr Cooke that the strategic plan was in place, but agreed to progress this.

58. On 12 November Ms Wilkinson in the HR department emailed a copy of the claimant's employment contract to Ms Hardy at the latter's request. The covering email did not provide any context as to why that request was made.

59. There was a conflict in the oral evidence about this, as Ms Hardy said the claimant had requested a copy of her contract and this led her to be concerned that she might be checking her notice obligations with an intention to leave. The claimant disputed this and alleged that it was the respondent which was considering the possibility her employment terminating. Having evaluated the evidence, I accept that the claimant had not requested her contract and that Ms Hardy took it upon herself to obtain this.

60. In December the EHS apprentice had left her position and was not replaced. This created some difficulty because she had been the sole resource for booking the health surveillance appointments with Occupational Health.

61. No further one-to-one meetings took place between the claimant and Mr Cooke until 26 January 2022.

62. In the interim period the claimant's father was very ill and this led her to take some personal leave from 13 December. Her father passed away on 19 December and the claimant had some time off until returning to work on 5 January 2022 after a period which included a week's bereavement leave as well as annual leave.

63. On 10 January the claimant attended a routine site leadership team meeting at which she felt Mr Cooke behaved aggressively towards her. He had been concerned about the need to close down parts of the site in December although the claimant had not been aware of that as it happened during her absence. At around 7pm that day Mr Cooke emailed the claimant asking her to provide the site EHS strategy document and the gap analysis for the Morpeth site. The following morning the claimant replied saying that she had the gap analysis but wanted to review it with Mr Fullarton to ensure it was up to date since it was last reviewed in November. She said she had started work on the strategy document in late

November after their one to one meeting, but had not made much progress with it. She asked when he would need to see a draft. She pointed out that in the absence of a corporate strategy document she had nothing against which to align other than current site situation and regulatory or aspirational objectives. Mr Cooke's reply later that evening asked the claimant to send through the gap analysis from November and provide the update once it was reviewed. He asked for a timeline for the strategy document some time in February, and said he appreciated that this was not a good month for her.

64. The next day the claimant replied with the draft gap analysis pointing out that she and Mr Fullarton had started to review this but that their work would depend on resource availability. The claimant provided the document not as an attachment but by pasting the spreadsheet into the body of the email. Mr Cooke was unhappy about this and requested it to be provided as an attachment, stating:

    "I would have expected this to have been a live document, from what I can see this has just been generated considering there is only one site date and no completion dates in any of the 27 line items?"

65. The reason that the document was not populated with dates was that the claimant felt unable to do this without sitting down with Mr Cooke to discuss the allocation of resources and the likely timescales. She had previously discussed these priorities with Mr Haxton but not Mr Cooke.

66. In around the middle of January the claimant decided to work from home on three days adjacent to her father's funeral, which took place on 17 January. In accordance with the established practice during her time with the respondent, she made the PA to the site leadership team aware of this. At no time had Mr Cooke made the claimant that she did not have the autonomy to decide to work from home on an occasional or ad hoc basis.

67. On 26 January the claimant attended a meeting with Mr Cooke, which she expected to be in the format of a usual one-to-one meeting following a model agenda which Mr Cooke had created for this purpose. Contrary to her expectations, the meeting did not take this form but rather Mr Cooke gave her a pre-prepared document headed "Setting expectations 26 January 2022". Mr Cooke's notes covered 10 items which he had summarised in advance of the meeting. His note was annotated briefly after the meeting to reflect what he believed to be the agreed outcome.

68. In advance of this meeting Mr Cooke had taken no steps to review the claimant's performance reviews or her personal file, nor did he speak to the claimant or Mr Fullarton, nor Jim McClean, the Managing Director at the Grangemouth site, in order to establish the accuracy of the information underpinning his document.

69. The first item in the document related to Mr Fullarton, whose leadership skills were put in question by Mr Cooke. He decided that he would speak to Mr Fullarton personally to discuss his development needs, rather than leave that to the claimant as his line manager. He instructed the claimant to keep the matter confidential pending that discussion.

70. The second item was stated to be that "the safety culture is poor at Morpeth". Mr Cooke referred to an issue in one section which had been a concern since around 2014. He observed some incidents on the site in December 2021 which had led to three areas being shut down. In his note he said that he appreciated Operations had a part to play in these issues. The note did not identify any specific

expectation or action needed from the claimant, though clearly he took the view that she had some accountability for the safety culture as a whole.

71. The third item also related to Mr Fullarton and his development plan, which the claimant had been keen to support. It was agreed that the review would be conducted at the end of July 2022.

72. The fourth item referred to Mr Cooke's request to see the site strategy and gap analysis documents. He pointed out that the former document was not available and the latter was incomplete as it was not populated with dates. He said, "Considering your position and time in post I would have expected to have seen both these documents as live documents." He asked the claimant to provide them both in an acceptable format for presentation to the site leadership team and the Executive. He recorded an agreement that the gap analysis was the priority and it was to be provided by 11 February, with the site strategy following by 31 March.

73. In the fifth paragraph of his document Mr Cooke stated the following:

> "I'm struggling to understand what your day to day activities are and what value you bring to the role. I've seen nothing productive from you in my time in role. To support closing this void I want you to send me a weekly EHS report on a Friday […]"

74. The details which Mr Cooke required encompassed key areas of focus in respect of the claimant personally and the EHS teams, including EHS milestone status reports for each week, as well as looking ahead to the coming week or month for key deliverables. His expectation was that the reports would be initiated from 4 February.

75. The sixth area identified by Mr Cooke was working from home. He stated, "I don't expect you to be taking ad hoc days at short notice. If you want to work from home one day per week as a fixed day, you can put this in as a formal request which I can review/approve." No outcome was noted.

76. The seventh item similarly challenged the way in which the claimant managed her time, telling her that her holidays must be approved through him as her manager and saying that he expected "an element of courtesy when requesting time off site", as he did not expect the claimant simply to make the PA to the SLT aware. Mr Cooke did not identify any particular occasions when the claimant had taken holiday without approval.

77. The eighth item was the need for the claimant to obtain advance approval from Mr Cooke to attend the Grangemouth site, as a minimum in the week prior to any visit, so that he could approve it. To enable him to do this he required the claimant to set out the justification for the trip, its duration and the expected benefit or output.

78. The ninth item on Mr Cooke's list stated that:

> "I am aware that you are an active director in your own consultancy business which you have not declared to me. I'd like to understand how active you are with respect to this role outside Piramal?"

79. The claimant pointed out that she was not active in her husband's consultancy business, and there was no conflict of interest. In fact, the claimant had declared her notional interest in the business when joining the respondent.

80. The tenth and final item raised was that Mr Cooke wanted to know if the claimant had signed off her job description. He felt there was little difference between hers

and Mr Fullarton's, with considerable overlap. It was agreed that the claimant's job description needed to be updated to align with a similar role in the US.

81. Mr Cooke had expected to initiate this discussion with the claimant in December but had deferred it until January due to her father's illness and her subsequent bereavement.

82. Mr Cooke did not prepare any similar document in relation to any other member of the leadership team nor have any comparable discussion with anyone else. The only other instance was an informal discussion with a manager whose commitment was lacking, and following a constructive discussion that issue was resolved.

83. On the evening of 26 January Mr Cooke emailed the claimant attaching his 'setting expectations' document annotated with the actions and asked her to confirm receipt by return email. The claimant had never before in her working life been provided with such a document and asked to confirm receipt in this formal way. On 1 February Mr Cooke emailed again asking for receipt by return email and the claimant then replied on 2 February to do so. She had been working away, as Mr Cooke was aware, in the Grangemouth site to bring on board the new EHS manager there. Mr Cooke thanked the claimant for the confirmation and said that they could discuss any concerns about the document in their next one-to-one. This was not due to take place until 22 February. The claimant had said in her email, "I have considered the contents therein and have some concerns related to this which I will raise through appropriate channels."

84. By this time the claimant was beginning to feel that her role was not tenable and was becoming convinced that Mr Cooke wanted her to leave. She submitted a formal grievance of harassment and bullying on 2 February, complaining about the way that Mr Cooke had dealt with her, particularly on 26 January. She felt he had been unjustifiably seeking to micromanage her and she found the comments in his document "hurtful, insensitive and undermining." She set out a detailed response to the points in the 'setting expectations' document and also stated:

    "I am now under the impression that Terry Cooke would prefer that I left the company's employment. I feel I have no option but to consider my options in light of the situation that I find myself in where my professional standing is unduly in question. I feel compelled to seek intervention in the form of a grievance."

85. At the conclusion of the grievance the claimant answered the question about what outcome she was looking for by saying:

    "It is difficult for me to see a way forward given the extent to which my role and professional standing, and the trust and confidence placed in the company, has been undermined. I would therefore appreciate intervention and proposals for resolution by the company."

86. The respondent's response to the grievance being submitted came through a phone call from Ms Hardy to the claimant via Teams on the evening of 3 February. Ms Hardy opened the conversation by referring to the need to go through through a formal grievance process, but immediately then said she wanted to understand what would be the best outcome for the claimant, so that she could "plan the way forward".

87. The claimant responded by saying that the tone of Mr Cooke's document undermined her professionalism and autonomy. She felt that any trust in that

relationship had been "completely undermined". She added that the grievance document had set out her position clearly. Ms Hardy acknowledged that. They went on the discuss whether the claimant would be attending the site, so that they might meet in person, and the claimant confirmed that she would, because Mr Cooke had not given her permission to work from home.

88. Ms Hardy referred to the fact that the formal process would follow, with the grievance being heard by her and Mr Leahy, but her main purpose during this call was to explore other less formal options. She referred to the fact that in her grievance the claimant had said she felt the working relationship was "untenable" and that the claimant "would appreciate intervention and proposals for resolution from the company". In reply the claimant recognised that she did not have a lot of options, given that she "didn't think she could work with Mr Cooke going forwards". That prompted Ms Hardy to ask whether the claimant was considering resigning. The claimant replied by saying that would depend on what proposal comes forward from the company. She reiterated that she felt there was no way forward in the working relationship, as Mr Cooke had "decimated any shred of respect there was", and she had "no trust in him".

89. After this, the claimant requested information about the formal grievance process and its timing. Ms Hardy identified two options: a formal hearing with Mr Leahy or exploring an exit strategy. The two agreed to think about the position overnight and speak the next day.

90. The following day the claimant and Ms Hardy met in the office. Although both had produced notes of the Teams meeting on 3 February (the claimant recording this and preparing a transcript), neither prepared any note of the meeting on 4 February. The gist of what was discussed was Ms Hardy following up on a possible exit strategy. The claimant engaged in that discussion but felt pushed in that direction by Ms Hardy's questions. The claimant took the opportunity at this meeting to request a temporary change of reporting line but Ms Hardy did not agree to this. Although the claimant was making Ms Hardy aware that the situation between her and Mr Cooke was becoming untenable, that trust had been undermined and that the position was potentially irretrievable, Ms Hardy made no attempt to help the claimant identify any constructive outcomes, whether through the formal grievance process or in some other way such as mediation.

91. Later that day the claimant left the site early due to the stress and anxiety she was experiencing and did not after that return to work.

92. On 7 February the claimant wrote to Ms Hardy to make her aware of the impact on her health of the current situation and stating that she was "taken aback by your suggestion on Friday that I resign from my employment." She said she did not feel she should be "put in a position by the company to make any proposal regarding an exit strategy as you suggested in our meeting on Friday." She then invited the respondent to consider what such an offer might be as she was open to that as an option.

93. Ms Hardy and the claimant made some attempts to speak on the phone, initiated by Ms Hardy, though they were unsuccessful in doing so.

94. On 25 February Ms Hardy emailed the claimant to say that her grievance would be heard on 8 March. This invitation was forwarded to Mr Cooke and to the Vice President of HR in the parent company. On 28 February Mr Cooke emailed Ms Hardy saying, "You have stated 8 March in the attached, it needs to be 8 April".

He followed this up with an email explaining that he had got his months mixed up. There was no reason for Mr Cooke to be aware of the arrangements for the grievance, unless he were being asked to provide an management statement in response to it, or unless it was anticipated that he might attend the meeting so that Mr Leahy could ask him questions about the issues. However, in his evidence to the Tribunal Mr Cooke denied having any such involvement or expectation being placed upon him.

95. On 4 March the claimant emailed Ms Hardy saying that she did not feel in a position to attend the grievance hearing in person due to the effects on her of the stress and anxiety. She did, however, recognise "a need to move forward and the concerns raised in my grievance remain valid. Therefore given that I am not fit to attend a grievance hearing, I would propose that any questions in relation to the grievance are raised with me in writing. I can then ensure I am able to compose myself and respond fully in writing, making sure that I convey everything that I want to say without being overcome by the effects of my stress and anxiety." She asked Ms Hardy to confirm that this "reasonable procedural adjustment" could be accommodated. In her reply on 9 March Ms Hardy declined to agree the claimant's requests and said that their "preferred approach" was to meet face to face. Due to difficulties with the diaries of herself and Mr Leahy she proposed a date in the week commencing 18 April.

96. Ms Hardy's email concluded with reference to attempts to contact the claimant by phone and email on numerous occasions. She said it was important for the claimant to remain in regular contact with her while on sick leave and said that :

> "As a senior leader of the business it is not acceptable that you liaise with a junior member of my team or only respond to me via email. In line with company policy you are expected to remain in touch and co-operate with us when absent. Should you fail to do so you will be in breach of your contract of employment which will have a detrimental impact on your continued sickness benefit being paid for the duration of your current absence."

97. In fact, neither the claimant's contract nor the respondent's Absence Management Policy imposed any such requirement on the detail of her contact with the company, either as to the frequency or manner. The Policy stated:

> 8.2 Keeping in touch
>
> "The employee must keep their manager informed as to their progress throughout the absence period. Contact should be made on a regular basis, as agreed with their manager.
>
> Employees are also expected to be available for appointments/meetings while they are sick. They are also expected to attend appointments with the OHP at the request of management."

98. That was the only requirement under the Policy as to the manner and frequency of contact, and the claimant was not given any other instruction on this prior to the email of 9 March.

99. For the claimant this email was the final straw and after reflecting on the position overnight, she wrote a resignation letter which was emailed to Ms Hardy on 10 March. The reply later that evening acknowledged the resignation and expressed disappointment that the claimant felt it necessary. Ms Hardy went on

to deal with the formalities and paperwork relating to the termination and the need for the return of company property. She concluded:

> "Please be advised that we remain open to meet with you to consider and hear your grievance. Should you wish to discuss further please do not hesitate to contact me."

100. That was the full extent of any attempt by Ms Hardy to urge the claimant to reconsider her decision.

101. In the payroll which was processed at the end of March 2022 the respondent made a deduction representing 25% of the relocation costs actually reimbursed, amounting to £5,782.

<u>Conclusions</u>

Constructive unfair dismissal

102. The first question for the Tribunal was whether the respondent committed the acts about which the claimant complained. These largely focussed on the meeting with Mr Cooke on 26 January 2022, and the 'setting expectations' document he presented to her then. The document, which was mostly written by Mr Cooke in advance of the meeting and therefore without the benefit of any input from the claimant, made the extraordinary statement that:

> "*I'm struggling to understand what your day to day activities are and what value you bring to the role. I've seen nothing productive from you in my time in role."*

103. Mr Cooke then raised some specific issues relating to the claimant's role, in order *"to support closing this void".* The claimant was instructed to provide a detailed written report to Mr Cooke every Friday, covering a number of areas for which the EHS department was responsible. He also required the claimant to obtain his prior approval of her work location and movements, with detailed justification to support her plans for the working week. Although the claimant had never been given instructions to change the way she arranged occasional working from home days, she was now required to make a formal request for a fixed flexible working arrangement, rather than use her judgment to manage that time on an ad hoc basis.

104. Other matters set out in that document were more neutral about the claimant's personal performance, for example where they related to her job description or to Mr Fullarton's role. However, they were presented alongside the direct criticisms of the claimant in a document setting Mr Cooke's "expectations" of her.

105. The question about the claimant's other potential interest in a consultancy could easily have been answered by reviewing her personnel file or liaising with HR. Instead, Mr Cooke presented this to the claimant as a challenge, quite unnecessarily.

106. In my judgment, the conduct of the 26 January meeting, and the related document, the overall content, and the tone and manner in which the issues were discussed by Mr Cooke, amounted to serious and unwarranted criticism of the claimant's performance and her role within the business. Mr Cooke had done no research in advance of setting out his opinions in the document, had taken no steps with the claimant or other key individuals to establish some basic facts, but had instead formed a strongly adverse view of the claimant's performance and attitude to the work based on virtually no one-to-one contact with her at work. The fact that Mr Cooke had intended to raise these issues with the claimant in December, but for

her father's ill health, is all the more concerning. At that time, within a few weeks of his joining the company, Mr Cooke had had only a single one-to-one meeting with the claimant.

107. Furthermore, Mr Cooke made it clear through his actions that he held the claimant personally responsible for the numerous and historical safety issues on the Morpeth site as a whole. He took no account of the fact that there were global implications affecting the way forward for the claimant's role, arising from the incident in India, nor the fact that it was a failing in the HR team previously that had created a backlog of employee health assessments. Line managers in other departments also shared some responsibility, as did every manager on the site in order to achieve a better commitment to an improved safety culture. Beyond these wider concerns, Mr Cooke appeared to ignore the claimant's strong track record in a field in which she was clearly highly experienced and highly competent. She had joined the respondent just before the Covid-19 pandemic, with all that that entailed. She had taken steps to outsource and prioritise the safety measures needed, for example identifying a risk-based approach to the backlog of employee health assessments. Yet the respondent (including the HR team) focussed on the numbers without giving the claimant the benefit of a considered explanation for the position.

108. This approach can be seen also in the way Mr Cooke dealt with the gap analysis and strategy document. He was quick to make assumptions about the claimant's progress with these documents, which were works in progress. The claimant needed his input on priorities and the available resources in order to finalise the documents. He knew the claimant had had a very difficult time in December and January, yet made no allowance for this.

109. The respondent's position on the readiness of the strategy document was inconsistent and unreliable. It seemed unable to make up its mind whether the claimant had actually misled Mr Cooke by suggesting she had a finalised strategy plan when it was in fact incomplete. The pleaded case made this unambiguous – and very serious – allegation, yet it was not supported by the respondent's evidence during this hearing.

110. Overall, I found the claimant's evidence clear and compelling and was not satisfied that the evidence from either Mr Cooke or Ms Hardy was reliable. Both gave the impression that they had a personal animus towards the claimant, which was difficult to understand. For example, the respondent pleaded that it had serious concerns about the claimant's performance, and asserted that she resigned to avoid being performance-managed or working to Mr Cooke's expectations. At the same time, in its evidence the respondent sought to play down the 26 January document and meeting, suggesting that these were straightforward matters which did not justify the claimant's strong reaction.

111. A further example of the inconsistencies in the respondent's case is the assertion in the Grounds of Resistance that she had spent "excessive or unexplained travel to Grangemouth or working from home". Not only was this not true, the respondent presented no such evidence at this hearing, and the allegations did not feature in this manner in the setting expectations document.

112. It was also evidence from Ms Hardy's evidence that she had no interest in retaining the claimant in the business during the events of early 2022. It seems inconceivable that she would not have been involved in some discussion with Mr Cooke in advance of the meeting with the claimant. Indeed, it became clear later

that he was involved in communications about the grievance in a way which neither witness was able to explain. The fact that Ms Hardy initiated the request for the claimant's contract on 12 November 2021 suggests that discussions about the claimant were taking place at that time, immediately after Mr Cooke took up his position. Perhaps the respondent was concerned that the claimant might resign, but if so, it was not in the least concerned to try and ensure she stayed in the business.

113. The overall effect of the 26 January meeting and the setting expectations document was such as to undermine the claimant's role and abilities, to let her know that she was not valued, and to impose on her a series of requirements by which she would be micromanaged for the future. For a person of the claimant's seniority to be required to seek permission to fulfil her responsibilities for the Grangemouth site, or to need formal permission to work from home, was unwarranted and demeaning. Mr Cooke's written statement, prepared before giving the claimant the courtesy of a discussion, reinforced his predetermined negative opinion of her:

> *"I'm struggling to understand what your day to day activities are and what value you bring to the role. I've seen nothing productive from you in my time in role".*

114. That he had come to this view in a very short time of working together was extraordinary. The attempt to explain this away by suggesting this was a phrase Mr Cooke used routinely was wholly unconvincing.

115. The handling of the 26 January meeting was compounded by the requirement for the claimant to acknowledge immediate receipt of the document that day, and again on 2 February, at a time when the claimant was known to be working away in Grangemouth while she focussed on embedding a new EHS manager there. The claimant was again being treated as junior employee whose every move needed to make her accountable to her line manager.

116. The handling of the claimant's grievance added to her sense of being unvalued. The purpose of Ms Hardy's call to her on 3 February was to ask whether the claimant planned to resign, and if so, to ascertain whether an exit package might be negotiated. Ms Hardy steered the claimant repeatedly towards this route. Although she acknowledged the option of a formal grievance hearing, she had no words of reassurance to offer the claimant with a view to identifying a way forward beyond the impasse. Although it is understandable that Ms Hardy might want to discuss the claimant's desired outcome, she had already stated this in her grievance document. The claimant used strong language to express how difficult she felt it would be to continue working with Mr Cooke, but she nevertheless made it clear that she would:

> *"appreciate intervention and proposals for resolution by the company."*

117. No such intervention or proposal was offered by the respondent, except to encourage discussions about an exit strategy. It seems that the possibility of a 'clear the air' discussion or a workplace mediation were not in the respondent's contemplation.

118. During their follow up conversation on 4 February, Ms Hardy refused to make a temporary change to the claimant's reporting line to limit her interaction with Mr Cooke pending resolution of the grievance. As before, she remained focussed on whether the claimant was planning to resign.

119. Following this, the respondent unreasonably delayed making arrangements for a grievance hearing until 25 February, and then refused the claimant's request to hear it remotely. This was for no good reason, other than it was not the respondent's preference, yet the claimant's request was a perfectly reasonable one in circumstances where she had submitted a fit note for stress. The claimant had felt unable to attend a proposed meeting on 8 March in person, but did not wish to delay the process during her ongoing sickness absence.

120. The final straw for the claimant was Ms Hardy's email dated 9 March, which dealt with a number of issues. Firstly, the claimant's request to consider the grievance in writing only was refused, again without good reason. Ms Hardy offered a revised date for grievance hearing on 18 April, two months after the grievance was submitted. The claimant was then berated, in a manner more suited to a junior member of staff, for not complying with the respondent's sickness reporting rules, and for putting at risk her entitlement to sick pay as a result. In fact, the requirement on the claimant was to keep her line manager informed throughout the absence. The claimant had submitted a fit note certifying her absence and its duration. Anything further would need to be agreed, and this did not happen.

121. The claimant was entitled to treat this as the final straw, compounding the events of 26 January and afterwards. The respondent's actions throughout this period amounted cumulatively to a breach of the implied term of trust and confidence. Despite the claimant's obvious distress at the way she had been treated, at no time did the respondent take any steps to mitigate that, or seek a more constructive way forward. Instead, it allowed a valuable senior manager to leave, in such a way as suggests it was not concerned to retain her.

122. Having found that the respondent did treat the claimant in the manner alleged, the breach of the implied duty was a repudiatory one, entitling her to treat the employment contract as terminated with immediate effect, on her resignation. As a result, the claimant could consider herself released from all future obligations under the contract.

123. The claimant did not affirm the contract by virtue of continuing to remain employed for a short time. She was away from the workplace on sick leave for most of that period and had every right to stay and await an outcome on her grievance. She did not waive the breach of 26 January, but even if she did, the 9 March email did further serious damage in undermining both respect and trust in the relationship.

124. I therefore find that the claimant was dismissed within the meaning of section 95(1)(c) ERA, given the circumstances of her resignation. The next question was to determine the reason for dismissal. The respondent relied on the claimant's capability as a potentially fair reason under section 98 of the Act.

125. On this point, I again find that the respondent's position is somewhat contradictory. In submissions Mr Scope said that the claimant was not criticised by Mr Cooke at the 26 January meeting, because he had merely been setting expectations. He also asserted that she resigned because she wanted to avoid being performance managed and/or was unwilling to work to Mr Cooke's actions and objectives. The pleaded case put the position more robustly. In paragraph 5 of its Grounds of Resistance, the respondent pleaded that by late 2021, it "reasonably held a number of serious concerns regarding the claimant's performance of her role". It relied on five specific examples: the employee health assessments; the risk register; the "excessive and unexplained" time away from the Morpeth site; misleading the respondent about the strategy plan; and the "unacceptably poor

"safety culture, which had culminated in section closures during the claimant's absence from the site.

126. The respondent relied on the fact that, if there was a dismissal in this case then the underlying reason was capability. However, that contradicts its evidence and submissions which sought to present the issues very differently.

127. For all these reasons, I conclude that the respondent breached the implied duty of trust and confidence by carrying out an unwarranted and hostile process of criticising the claimant's performance without reasonable and proper cause. There was no evidence at the time, or before me, of capability issues to support that as a potentially fair reason for dismissal. Even if there were a potentially fair reason, I would have no hesitation in concluding that the claimant's dismissal was unfair under section 98(4) of the Act.

Wrongful dismissal

128. Having decided that the respondent committed a repudiatory breach of the claimant's employment contract, the question for the wrongful dismissal claim was a simple one, namely whether the claimant was entitled to receive payment in respect of her contractual three month period. The was no dispute in this case that no such payment was made. The claimant resigned summarily, as she was entitled to do both under common law principles of contract law and as envisaged by section 95(1)(c) of the Act.

129. The claimant's position is, but for the respondent's conduct, she would not have resigned summarily or may have been able to resign with notice. The respondent's position – that there was no entitlement to notice, as section 95(1)(c) ERA permitted the claimant to resign with or without notice – does not address the question from a contractual stance but only by reference to the statutory protection given to prospective constructive unfair dismissal claimants.

130. Accordingly, the claimant is entitled to damages arising from the respondent's breach of contract, amounting to three months' wages.

Deductions

131. The unlawful deductions claim relates only to relocation costs. The claimant was entitled to the wages "properly payable" by the respondent on the termination of her employment. When that final payment was made on 31 March 2022, the respondent made a deduction of £5,782 in respect of relocation costs.

132. Under the ERA that deduction would be unlawful unless authorised in accordance with the statutory rules. Here, the relevant provisions are:

    132.1. Section 13(1)(a) – it was authorised by a relevant provision in the claimant's employment contract;

    132.2. Section 13(1)(b) – The claimant gave prior express consent (orally or in writing) to the deduction.

133. 'Relevant provision' means a provision of the contract comprised:

    133.1. in one or more written terms, which the employer has provided prior to the deduction in question being made; or

    133.2. in one or more terms of the contract (express or implied and, if express, whether oral or in writing), where their existence and effect have been notified to the claimant in writing on that occasion.

134. The claimant's position was that no contractually binding consent was given to the respondent in respect of the deduction, either verbally or in writing. The respondent's position was that an agreement was reached orally and recorded in a written agreement.

135. Applying the above principles, I had to consider whether there was a 'relevant provision' of the claimant's contract entitling the respondent to deduct the relocation expenses from her final wages. The only written evidence of any agreement to allow deductions was the letter of 18 November 2019 setting out the arrangements for the relocation funds to be advanced and the respondent's expectations of recouping a proportion of the expenses actually advanced, depending on how long the claimant remained employed. The claimant received that letter but neither signed nor replied to it. She did not raise any objection to its contents at any time during her employment, but disputed at this hearing that it constituted a contractual term that was binding on her.

136. The letter states in terms that it follows a verbal discussion and agreement on the subject of relocation costs and their recoupment. Its author, Mr Thompson, gave evidence for the claimant at this hearing but he did not challenge the information contained in that letter. On balance I am satisfied that an oral agreement was reached, and its terms are evidenced in that letter. Accordingly, the claimant did agree that the respondent could recoup 25% of the relocation costs actually paid to her. There was a relevant contractual provision for the purposes of section 13(1)(a).

137. In any event, I would have been satisfied that such a term was implied into the employment contract as a result of the claimant's conduct following receipt of the November 2019 letter. She understood the purpose and effect of the letter, continued to work for the respondent following its receipt, without protest, and received numerous payments from the respondent against receipts she submitted for these expenses.

138. Accordingly, I conclude that the deduction made on 31 March 2022 was not unlawful. Subject to any further evidence or argument raised at the remedy hearing, it is open to the claimant to seek to recover the deduction of £5,782 as part of her remedy hearing.

SE Langridge

Employment Judge Langridge

23 May 2023

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