



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4101290/2023

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Held in Stornoway Sheriff Court on 15 and 16 June 2023

Employment Judge B Campbell

10 **Ms Natasha Cross**

**Claimant
Represented by:
Mr M Macleod -
Citizens Advice
Bureau**

15 **Third Sector Hebrides**

**Respondent
Represented by:
Mr F Silver -
Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

20 The judgment of the tribunal is that the claimant was not constructively unfairly dismissed and her claim is therefore dismissed.

REASONS

Background

25 1. This claim arises out of the claimant's employment with the respondent which ended with her resignation. The respondent is a registered charity which provides administrative support services to other charities and support directly to members of the community. The claimant was employed as a Finance and Administration Manager.

30 2. The claimant commenced early conciliation with ACAS on 9 January 2023 and was issued with an Early Conciliation Certificate on 11 January 2023. The claim was presented on 30 January 2023.

3. The claimant alleges that she was constructively unfairly dismissed, so that her resignation should be treated as equivalent to dismissal.

4. The hearing of the claim took place over two days. The claimant herself gave evidence followed by, for the respondent, Ms Tina Macleod and Mr Fred Silver. Ms Macleod is the Chief Officer of the respondent, which operates under a board. Mr Silver is the Chair of the Board.
- 5 5. Pursuant to case management directions issued at an earlier hearing, the claimant had provided a schedule of loss and the respondent had combined the parties' documents into a joint bundle. References to numbers in square brackets below are references to documents within the bundle.
6. The hearing was to decide remedy if appropriate as well as questions of liability.
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7. Each witness, including the claimant, was found to be generally credible and reliable in giving their evidence. There were some disputes in the evidence, primarily in relation to exchanges between the claimant and Ms Macleod during three meetings. Those are dealt with in the findings of fact below.

15 **Issues**

The tribunal had to decide the following legal issues:

1. Did the respondent materially breach the claimant's contract of employment, whether by breaching one or more express terms, or by breaching the implied term of mutual trust and confidence?
- 20 2. If so, did the breach occur by way of a single event or a sequence of events?
3. When did the breach occur, and if it was as a sequence,
- a. when was the last event in the sequence?
- b. Was it a breach in itself or a 'last straw' with lesser effect?
4. Did the claimant resign in response to the breach?
- 25 5. Did she do so promptly so as not to waive the breach?
6. If the claimant was constructively dismissed, was her dismissal fair, i.e.:

- a. Was it for a potentially fair reason under section 98(2) of the Employment Rights Act 1996; and
 - b. Did the respondent act reasonably according to section 98(4) of that Act in treating its reason as sufficient to justify dismissing the claimant?
- 5 7. If the claimant was constructively unfairly dismissed, what compensation should she be awarded?

Applicable law

1. By virtue of Part X of the Employment Rights Act 1996 ('ERA'), an employee is entitled not to be unfairly dismissed from their employment. The right is subject to certain qualifications based on matters such as length of continuous service and the reason alleged for the dismissal.
10
2. An employee may terminate the contract but claim that they did so because their employer's conduct justified the decision. This may be treated in law as a dismissal under section 95(1)(c) ERA, commonly referred to as constructive dismissal. The onus is on the employee to show that their resignation amounted to dismissal in that way. The employer's conduct prompting the resignation must be sufficiently serious so that it constitutes a material, or 'repudiatory', breach of the contract. The breach may take place or be anticipatory, i.e. threatened. It may be way of a single act or event, or a chain of events ending with a 'last straw'. The employee must resign in response to the breach, and not delay unduly in doing so or they may be deemed to have waived or 'affirmed' the breach.
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3. Unless the reason for dismissal is one which will render termination automatically unfair, the employer has an onus to show that it fell within at least one permitted category contained in section 98(1) and (2) ERA.
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4. Whether a dismissal is direct or constructive, a tribunal must consider whether the employer acted reasonably in relying on that reason to dismiss the individual. That must be judged by the requirements set out in section 98(4) ERA, taking in the particular circumstances which existed, such as the

employer's size and administrative resources, as well as equity and the substantial merits of the case. The onus of proof is neutral in that exercise.

Findings of fact

The tribunal made the following findings of fact based on the evidence before it and
5 as relevant to the issues to be determined:

1. The respondent is a registered charity and based in Stornoway. The claimant was employed by it between the dates of 27 May 2019 and 17 November 2022. Latterly she acted as a Finance and Administration Manager. Her role changed at certain times and this is dealt with below.
- 10 2. The claimant was initially engaged as a Finance Officer. She carried out work for the respondent. Over time she carried out work also for other charities (and one company) which were either subsidiaries of the respondent or separate but who had an arrangement with the respondent to receive finance and other back-office support from it.
- 15 3. It is in the nature of the respondent's operations that there is frequently a need to restructure its various teams, or change the nature or composition of individuals' roles. This is largely because the respondent depends on funding for discrete projects which will tend to have a beginning and end date. The nature of the activities the respondent can undertake is heavily influenced by
20 which funding it is able to secure from time to time. Additionally, the number of other bodies which it serves can change over time, and each may have its own levels of demand for support in particular areas. Ms Macleod as Chief Officer regularly reviews individuals' roles with a view to matching the focus of the respondent's activities with the staff available.
- 25 4. The respondent has a governing board of trustees. At a board meeting on 8 July 2021 it was discussed and minuted that an Administrator had left and that the amount of work required in her role had diminished with the closure of one particular charity which the respondent served, named Staran, and the cessation of the respondent's tenure as chair of another organisation. A
30 proposal was put forward to combine the Administrator role with the claimant's

5 role, so that she would take on the residual responsibilities of the Administrator such as maintaining HR records, purchasing, and liaising with utilities suppliers. Both roles were part-time and the new role would be a full-time one involving 35 hours per week [2a]. The proposal was approved by the board.

5. A job specification was prepared for the new role [3a] and the claimant agreed to perform it. She was issued with a new written statement of terms and conditions of employment which both she and Ms Macleod signed on 17 August 2021 [3b]. She began the new role on 1 September 2021.
- 10 6. The respondent began providing support to two new charities, first Volunteering Hebrides in September 2021 and later Western Islands Foyer around January or February 2022. The claimant noticed that this created more work for her as there was an increase in the number of financial transactions she had to oversee. This was particularly so for Volunteering Hebrides. She also believed that Western Islands Foyer needed extensive input from her as
15 its internal processes were not optimally organised.
7. The claimant estimated that her workload increased by around 10% in September 2021 with the introduction of Volunteering Hebrides, and that her volume of work steadily increased through 2022 to reach the point where it
20 was about a third more. She found herself working beyond her normal working hours of 9am to 5pm, Monday to Friday and also found it more difficult to take holidays. She did not see that anyone could directly cover for her.
8. The claimant reported to Ms Macleod, the Chief Officer. The two had regular discussions on an informal and ad hoc basis. The claimant discussed her
25 increasing workload. Ms Macleod took the view that the claimant needed to improve her skills in certain areas, principally through training and relying more on the expertise of the respondent's external accountants. If she did that her workload would be manageable.
9. Ms Macleod had undertaken a role equivalent to the claimant's earlier in her
30 period of service with the respondent, between 2007 and 2014. She then became a Business Development Manager although she retained a small

number of finance responsibilities. Her evidence was that the demands of the role were greater at that time as the respondent as an organisation was busier and undertaking more financial activity.

- 5 10. The claimant's evidence was that Ms Macleod had acknowledged the increase in her workload and the two had discussed the option of recruiting an assistant to work with the claimant. Ms Macleod had no such recollection and said in her evidence that this was not a particularly workable option.
- 10 11. A receptionist was recruited in the early part of 2022 but they had no administrative or finance skills. Ms Macleod said that it was never the intention for her to cover any of the claimant's workload. The claimant said she spent time trying to upskill the receptionist to the point where they could cover some of her work, but that stage was not reached. The receptionist left in around July 2022 after some six months in the position.
- 15 12. At various times in 2022 the claimant continued to suffer from migraines. She also is affected by dyslexia and needed time to process information or work out how to deal with particular tasks. She made Ms Macleod aware of her dyslexia but not its particular effects. She did not ask for any particular measures to be implemented to help her work.
- 20 13. Ms Macleod maintained a document in table format which she used to record the matters discussed in her meetings with the claimant [1a]. She did likewise for other employees she directly line managed.
- 25 14. The document was entitled 'CEO Monthly Report Comments/Follow-ups 2022'. For each month of that year there were columns to record comments in relation to 'Achievements', 'Challenges Experienced', 'Planned Work', 'New Ideas', 'PD/Training', 'Office H&S' (i.e. Health and Safety) and 'Env/Eco'.
15. For the month of February 2022 Ms Macleod recorded under 'Achievements', *'Low productivity. Review meeting 24th Feb. Prioritising and providing support and focus.'*
- 30 16. For the month of March 2022 Ms Mcleod again recorded under 'Achievements', *'Low productivity. Lots of reminders needed'*. Under 'Planned

Work' she noted *'A lot of planned work incomplete, carried over from last month'. Under 'New Ideas' she noted 'NC comment – hopes to be better organised'.*

17. May and June 2022 were recorded as *'Busy month'* under 'Achievements'.
5 For May Ms Macleod added *'Review meetings 11th May and 24th May. Addressing workload and offering support.'*
18. In July 2022 under 'Achievements' Ms Macleod recorded *'Setting up Xero with Accountants. Review meeting 20th July with NC and accountancy firm.'* This was a reference to the fact that the respondent had switched to a new provider
10 of accounting software in an attempt to make the claimant's role easier, and the respondent's external accountants were to provide after-sales support and training on how it would be used. Under 'Planned Work' she noted *'Little planned work'*.
19. In August 2022 the claimant was absent from work. When undertaking an eye
15 test on or around 9 August she was advised to attend hospital immediately, and when she did it was confirmed to her that she had a build-up of fluid behind her eyes. She was operated on and remained in hospital for a number of days before being discharged. She returned to work on 16 August 2022. An 'Absence/Return to Work' form was completed with the details of the
20 absence [6a]. Later in August 2022 the claimant took a week of prearranged annual leave.
20. In her table, Ms Macleod recorded for August 2022 under 'Achievements' that it had been a *'busy month, despite illness.'* and *'CEO able to step in to complete finance tasks where required'* - a reference to Ms Macleod herself.
25 She also added *'Errors in software set-up, not utilising accountants which would make life easier as agreement in place with them.'* This was a reference to an agreement that had been reached with the external accountants under which they would provide support and answer the queries of the claimant in relation to the newly installed 'Xero' software.
- 30 21. In September 2022 the claimant contracted Covid-19. She was absent from work between 19 and 30 September 2022 as a result. For most of that time

she was too unwell to carry out her duties, but at certain times felt slightly better and attempted to cover some aspects of her work such as responding to emails. She also oversaw the monthly payroll for three of the charities the respondent was supporting, as she felt that nobody else in the office had the knowledge to do so. Again an Absence/Return to Work form was completed to document the absence [6b]. The claimant returned to work on 1 October 2022.

22. In her Monthly Report document Ms Macleod recorded in September 2022 under 'Achievements' for the claimant *that 'Natasha off with Covid for the first time. Supported by staff group and CEO, in regular contact. No return to work form received by CEO. Mentioned working overtime but was not asked to do so, was encouraged to take as much time off as needed and not to attend the work trip as it would be too labour intensive following covid. CEO able to step in and complete finance tasks when required.'*
23. The claimant denied omitting to complete an Absence/Return to Work form. She said it was completed by her online and available to view on the respondent's system. This is accepted to be true although Ms Macleod may have been expecting to see a paper copy. There was no fault on either side.
24. The claimant disagreed with the suggestion in Ms Macleod's comments that she had been given any support she needed. She referred to the fact that in the last few days of September Ms Macleod was on an organised trip (named a 'befriending trip') involving members of the respondent's staff and people from the local community. When on the trip she would not have been able to cover for the claimant. This is accepted to be correct but only applied to two or three working days in that month. The claimant recalled the trip being planned for two weeks and Ms Macleod's time away from the office being extended when a person on the trip became ill and had to be kept in hospital for a few extra days. Ms Macleod stayed back until he was able to return home. She believed this added around a further week, so that Ms Macleod was away from the office for around three weeks from mid- to late-September until the second week in October 2022. Ms Macleod's evidence was that the trip was shorter. It was planned to take four days and she had to remain for a

further six days, taking her way from the office for ten days in total. It is accepted that Ms Macleod would have been more likely to remember the correct details as she had been on the trip. Her assessment of the time away from the office is therefore preferred.

5 25. The claimant accepted that she had been encouraged by Ms Macleod to take whatever time she needed to recover. She felt however that she could not do that if Ms Macleod was away from the office on the befriending trip.

26. The respondent maintains a Staff Handbook which contains a number of policies and procedures [6c]. It was most recently revised in July 2015. It was
10 part of the claimant's objectives from October 2021 onwards to review the handbook and where necessary update it, but the other more immediate demands of her role prevented her from doing so.

27. By early October 2022 Ms Macleod had reached the view that the claimant was not fully coping in her role. There had been evidence of that from the
15 beginning of the year in the form of the claimant taking longer to complete tasks than expected. The accounting software upgrade and some additional training were intended to help the claimant but she was taking time to master certain aspects of it and was not fully utilising the option of seeking help from the respondent's external accountants. She was finding herself unable to get
20 around to certain objectives, particularly on the Administrator side of her role, such as updating employment policies and procedures and dealing with Health and Safety tasks. She was making errors and then spending time identifying and rectifying them. On occasion key reports and figures were not prepared on time. She was finding it difficult to undertake training because of
25 all of the day-to-day short term demands on her time. Her absences in August and September had highlighted that the claimant was working at full capacity and having to complete work in her own time or whilst certified as unfit to work. The fact that she was taking time to catch up with work on her return from her absences supported this assessment.

30 28. It should be noted that the tribunal does not imply any criticism of the claimant in making these findings, and nor did it find that Ms Macleod was criticising

the claimant in explaining in her evidence that this was the view she reached. It was simply a question of the claimant having too much on her plate. This was a situation Ms Macleod had seen before, in the sense that people's roles within the organisation had expanded or diminished at various times in response to the changing balance of activities being carried out.

29. Also by October 2022 the Administration part of the claimant's role had reduced since September the previous year. One particular factor was that the respondent had ceased to act as chair of a partnership across various islands.

30. Ms Macleod sought board approval to discuss a change in the claimant's role in light of the above, and the approval was given at a meeting on 18 October 2022 [2c, 2d]. The board minute recorded:

'The board noted the issues experienced with the employee N Cross. The board agreed to the CO's recommendation to remove the administrative management duties of the role in order to offer enhanced focus on the delivery of the finance function. This will involve the reduction of hours, pay and responsibilities. It was agreed that an informal conversation would be the best approach to try to agree a new role with N Cross going forward. This would be the preferred option before commencing with any form of capability procedure. Administrative responsibilities would then move to M Mackay whose role will change to Office Manager.'

31. The respondent did not have a capability procedure in its employee handbook but had a performance review procedure, which Ms Macleod said would have been the alternative to reaching mutual agreement with the claimant about a change to her role.

Meeting on 20 October 2022

32. On 20 October 2022 Ms Macleod and the claimant had a meeting. The claimant and Ms Macleod, who were the only attendees, gave differing accounts of what happened.

33. What is agreed is that during a normal workday, Ms Macleod asked the claimant to come into her office for a discussion. The two then spoke about the claimant's role, the challenges she was experiencing in it and possible ways of alleviating them. It was agreed that the claimant would go away to consider possible changes to her role.
34. The claimant's account of the meeting was that she was asked to it unannounced, which caught her off guard. Ms Macleod referred to the claimant's role being too much for her, and brought up some mistakes she had made in the months recently before, including a missed deadline to prepare quarterly management accounts which had fallen during her Covid-19 absence. Following the remit she had been given by the board, Ms Macleod suggested taking the administrative responsibilities from the claimant's role, leaving only finance tasks. The claimant was initially receptive to a discussion but preferred to have someone recruited to support her and for her responsibilities to remain as they were. She said that in the course of the meeting Ms Macleod became more abrupt with her and would speak over her. The claimant felt that Ms Macleod was raising the matter out of the blue and she could not give fully considered answers. She was still suffering from the residual effects of her Covid-19 infection. She agreed to go away and consider how her role could possibly be changed, although she still believed she just needed more support. She was upset and in tears by the time she left the meeting. The meeting lasted around 45 minutes.
35. Ms Macleod's recollection of the meeting was that it was calmer and more amicable. It was a semi-regular catch up similar to several that had happened in previous months, and which had been the basis for the comments which she added to her Monthly Report. Ms Macleod wanted to have a gentle conversation about the claimant's performance. With the claimant's absence the month before overlapping with her own time away from the office on the trip, the two had not caught up properly for some weeks. She had in mind a number of issues, some by that time which were some months old as they had not been fully addressed at the time. Ms Macleod saw that the claimant was not managing to deal with some overdue matters and was also making

repeat errors in her work. She wanted to focus on finding a solution rather than be seen to reprimand the claimant. She had hoped that the new accounting system would result in there being fewer mistakes, but they persisted. She did not think training would help, nor the engagement of someone to support the claimant. She was of the view that the administration function needed to be looked after by someone else and the claimant should focus on the finance parts of her role, as she had done before. She referred back to the claimant's role being solely concentrated on finance until it was expanded the year before, and wanted to revert back to that. She recognised that the claimant would need time to process what she said and suggested they reflect on things and meet again in around a week's time. There were no arguments and the claimant did not seem uncomfortable. She recalled the meeting taking around half an hour.

36. Considering both individuals' evidence of this meeting it is found that:

- a. The evidence of the claimant is accepted as to how she felt in the meeting, and generally, save that it is not accepted that Ms Macleod became abrupt or spoke over her to a greater than normal extent; and
- b. The account of Ms Macleod is accepted, although she omitted to say that the claimant was upset and in tears by the end of the meeting, which she was.

Meeting on 26 October 2022

37. The claimant and Ms Macleod met again on 26 October 2022. There were no discussions between them about the claimant's role in the meantime. They acted as normal and went about their work in their usual way.

38. As with the earlier meeting, they met alone in Ms Macleod's office. They continued the discussion about the claimant's role. This meeting took longer than the first and was closer to an hour.

39. The claimant's evidence is that Ms Macleod told her at this meeting that her job would be changing, and that had now been decided. The Administration responsibilities would be taken away and given to another employee named

Melanie Mackay and this had already been agreed with her. She was a Development Coordinator working part time at that time. The claimant disagreed with that and said the two roles were intertwined. She also said she did not think Ms Mackay was capable of taking on those responsibilities. Ms Macleod replied that Ms Mackay had a qualification in Human Resources. The claimant said she was extremely unhappy with the decision and saw the solution to be keeping her role intact and engaging an assistant to support her. She also made the point that if the decision had been made based on her health and her absences, she had largely recovered and that should be less of an issue going forward. She said that Ms Macleod shouted at her at times in the meeting but she did not shout back herself. At the end of the meeting she left in shock and asked colleagues outside the room if they had heard shouting, but they said no. She went to her own room and cried for around ten minutes. She understood that there was nothing now she could do as the decision had been made to change her role.

40. Ms Macleod said that she was prepared to listen to the claimant in the meeting, but the solutions the claimant offered were centred around making more work for other people. They did not address the fundamental issues with the claimant herself, such as not checking her work, not seeking external help or failing to learn from her mistakes. She said the claimant spoke about going on HR training but that she herself felt that was not a high priority or a good use of the claimant's time. The focus should be the existing aspects of her role. Ms Macleod acknowledged that the claimant saw things differently from her but both were professional enough to share their views and respect those of the other. She expected they would reach a solution by agreement. She was trained in conflict avoidance and used her experience in a number of previous situations including formal and informal capability procedures, as a volunteer and mentor, and as a leader at the Samaritans, to stay calm and avoid being aggressive. She did not raise her voice. Unlike the claimant, she said that the meeting ended with in being agreed that there would be further discussion and not that the matter was now closed.

41. Again, there was some commonality in both individuals' accounts of the meeting, but both had a distinct perception of it. The claimant's evidence is again accepted save that it is not found that Ms Macleod shouted at her in the meeting or told her the matter was now closed. Ms Macleod's evidence is preferred on those two points as it is more consistent with the surrounding evidence.

Meeting on 8 November 2022

42. The claimant and Ms Macleod had a third meeting on 8 November 2022. They did not discuss the claimant's role in between the previous meeting and that point. The claimant said she was still in a degree of shock and largely avoided Ms Macleod. On some of the days one or other of them was not in the office.

43. This meeting again took place between the two individuals alone in Ms Macleod's office. It took around thirty minutes and was the shortest of the three.

44. The claimant said she thought it was going to be a finance meeting and only realised it was a continuation of the conversation about her role when Ms Macleod began speaking. Both individuals agree that the focus of this particular conversation was the effect of the removal of the Administration duties on the claimant's working hours and her pay. Ms Macleod's view was that the role would reduce to one involving three days per week rather than five, with a proportionate reduction in pay. The claimant's position was that the Finance duties had increased over the year to the point that it was almost a full time role in itself, and this is what she proposed. She had in mind in particular that the group of charities the respondent was supporting at that time required more time in dealing with funding processes. She did not want to have her pay reduced. She said she was trying to explain her position but Ms Macleod would not let her speak and was not listening to her. Ms Macleod said the new terms were what the board wanted and she wanted to make the change immediately. The claimant agreed in a moment of panic to the role changing at the beginning of December. The meeting ended on this point.

45. Ms Macleod said that the claimant accepted that the Finance duties could be covered in three days per week, but was worried about the financial effect of taking a pay reduction. They discussed figures and the claimant proposed a salary based on a pro rata share of a full time salary of £23,000 which Ms Macleod said she could agree to. This would have equated to £13,800 for three working days per week. Her full-time salary at that point was £22,000. The implementation date of 1 December was discussed and agreed. The conversation was matter of fact and amicable. Nothing made Ms Macleod think that the claimant was uncomfortable or that they should not be having the discussion. Her take was that this was a more positive meeting as the claimant had come to accept a reduction in her role, pay had been agreed and the changes could now be made. She said to the claimant the situation was always open to discussion and review in the future and the change was not final.
46. The tribunal accepts that the third meeting was amicable and that both individuals reached agreement on the key details of the variation to the claimant's role, namely that she would concentrate on Finance only, she would work three days per week and her salary would be £23,000 pro rata, all with effect from 1 December 2022. The claimant may have felt that she had little choice by this point but to accept that the Administration responsibilities would be allocated to someone else, but she did agree with Ms Macleod that the changes would be made.

Draft contract and related emails

47. On 9 November 2022, the day after the third meeting, Ms Mcleod emailed the claimant a job description document [3a] and a revised contract of employment [3b]. These were in a similar format to the documents the claimant had been given when her role changed in September 2021.

48. The claimant replied the following morning at 09:28 to say:

'Hi Tina,

Just to clarify I did not and do not agree with the new contract attached.

Please can you send me the staff handbook? I haven't had one since my current contract started. Once I've received this and had time to read it thoroughly I will get back to you over this matter.

With thanks,

5 *Natasha Cross'*

49. Ms Macleod responded at 10:17 to say:

'Hi Natasha,

We spoke at length about your role yesterday.

We both agreed:

- 10
- *The job description was correct*
 - *We agreed that it was a three-day role. I asked you how many days work you thought the role would need and you said three. I agreed.*
 - *We agreed the salary of £23k as a fair reflection of the role. I asked you what you thought the salary should be and you hoped we could*
- 15
- *meet in the middle and we agreed £23k.*
 - *We agreed, at your suggestion, that the role would commence from 1st December.*

This is what we agreed yesterday. What part of your contract are you not in agreement with?

20 *The handbook you should have as you have all the HR materials. The new handbook is a work in progress.*

Tina'

50. The claimant emailed back at 11:00, saying:

'Hi Tina,

I understand we had a conversation yesterday but that was not an agreement to a new contract.

As you know the staff handbook is outdate[d] (2015) I had expected the new handbook would be complete by now however I will use the old one.

5 *To go forwards it need to be very clear what I am and am not agreeing to, as the contracts refer to the staff handbook throughout I'll need to review it.*

As stated in my previous email I will get back to you on this matter when I've read through the staff handbook thoroughly.

Thanks,

10 *Natasha'*

51. Ms Macleod replied at 11:52 as follows:

'Hi Natasha,

15 *I'm sorry I don't understand. A new contract gets updated when the role changes, this is standard. The only changes made to your contract were as per the new job description and the terms we agreed. Everything else remains the same as they were in your previous contract, the same format that is used in all staff contracts. It wouldn't make sense not to agree changes to your role and not update the contract. So, sorry Natasha, I'm a bit lost at what you're saying.*

20 *You have been leading HR so you will have the handbook details.*

Quite rightly you have mentioned that the handbook could do with updating, this responsibility was part of the HR function that has been unfulfilled.

Tina'

25 52. The exchange continued by way of response from the claimant at 13:21. She said:

'Hi Tina,

To reiterate for your clarity I will not be signing the contract enclosed as it stands, I've thought on it a lot and I just cannot accept the terms as you have stated them.

5 *Again I'll repeat, I will get back to you with a reply on this matter when I've read through the staff handbook thoroughly. I expect to reply by Tuesday 15th at the latest.*

10 *This whole situation as you know has caused me a lot of stress and worry and I currently have a very bad migraine and feel very nauseous with it. I am going to contact the doctors about this but I'm sorry I don't feel well enough to continue my work today so I will be heading home.*

With thanks,

Natasha'

53. The conversation ended for that day with Ms Macleod replying at 13:38:

'Hi Natasha,

15 *That's fine, there is no hurry to sign the contract. I hope your migraine eases and you feel better soon.*

Take care

Tina'

54. The above emails were produced to the tribunal [4a].

20 55. In her evidence, the claimant clarified that the reason why she requested the staff handbook was to check if there was a procedure in place for implementing changes to employees' contracts. There was no such procedure in the most current version of the handbook which had been last reviewed in 2015 and which the claimant was aware of.

25 56. Ms Macleod said in her evidence that she was stunned to receive the claimant's first email of 10 November 2022. She thought she was simply

confirming what had been agreed, and could not understand why the claimant would object to being given an updated contract.

57. The claimant was absent through illness for the remainder of 10 November 2022, a Thursday, and the following day.

5 58. In relation to the above email exchange, it is found that Ms Macleod was genuine in thinking that the key changes to the claimant's contract had been agreed, which they had. She was therefore entitled to email an updated contract and job specification to the claimant. The claimant did not expect to be issued with these documents, but that was difficult to understand why as
10 she had been given both when her role was expanded in September 2021. Ms Macleod was following the same process.

The claimant's grievance

59. On Monday 14 November 2022 the claimant was well enough to return to work. She did so by working from home and did not go into her office. At the
15 end of that day she submitted a letter of grievance to the respondent's board [6g]. It was emailed to all members of the board at 18:01. It raised issues with Ms Macleod's conduct under the headings of:

- a. Failure to comply with the organisation's policies and procedures;
- b. Favouritism and lack of work support and training; and
- 20 c. Workplace harassment and bullying.

60. Mr Silver as the Chair of the board agreed with the other board members that he would acknowledge receipt of the claimant's grievance. A decision would then be taken about who would deal with it more substantively. He emailed the claimant at 17:07 on Tuesday 15 November 2022 to say that the grievance
25 had been received, that he was looking at the most appropriate way to deal with it, and that he would be back in touch as soon as possible. As such he was following a normal procedure within suitable timescale.

61. The claimant emailed back to thank him for the acknowledgement at 17:49. This last email exchange overlapped with the claimant's intimation of resignation as dealt with below.

The claimant's resignation

5 62. The claimant went back into work on Tuesday 15 November 2022. She worked as normal. At 17:07 that day she submitted her resignation by letter to the respondent's board by email [6q]. It was therefore sent at the same time as Mr Silver emailed her to acknowledge her grievance. He was not one of the recipients of the email attaching the resignation letter. It was forwarded to
10 him at a later point.

63. The claimant said in her evidence that the atmosphere in the office on that day was negative and that Ms Macleod was glaring at her. She was feeling ill and had to take anti-nausea tablets. She felt she could not go on working under those conditions. This was the final thing which prompted her to resign.
15 Ms Macleod denies any form of negative behaviour or body language. She said she was shocked and upset herself at reading what the claimant had said in her grievance letter as she had considered the two to have had a very positive working relationship. She only recalled seeing the claimant once that day, in passing.

20 64. In her letter the claimant said that her full reasons for resigning could be found in her grievance letter. She said that in summary:

*'I am being harassed into changing my role and signing a contract I don't agree with. The change in role and contract not only demotes me but means I will be on less hours and pay. These actions by the Chief Officer are a form
25 of constructive dismissal and break my statutory rights as an employee of Third Sector Hebrides.*

As the HR function part of my job involved listening and helping staff with their issues, issues I am very aware they don't feel comfortable discussing with others. I have always been there for the staff no matter what they need me

for, be it work issues, technical issues or personal. I will be thinking of the staff upon my leaving with concern.

However I also cannot stay in an organisation where the Chief Officer does not appreciate, respect and value me for all the work I do, especially considering all the times I've gone above and beyond for the organisation.

The Chief Officer has been verbally aggressive and I cannot work for someone who is behaving unprofessionally and whom I can no longer trust.'

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65. In the letter the claimant gave one month of notice, which was the requirement under her contract of employment. Her last day of service would be 15 December 2022.

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66. Mr Silver emailed the claimant on 17 November 2022 to confirm receipt of her resignation letter. He said that the respondent accepted her resignation, and would make her a payment in lieu of her notice so that her last day of employment would be that day, 17 November. He said her final pay would be received on 30 November which would include her notice pay and a sum equivalent to any accrued holidays. He asked her to make arrangements to return any of the respondent's property she held.

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67. In his evidence Mr Silver explained that he believed the step of terminating the claimant's contract earlier than she had intimated and paying her in lieu of her notice was more advantageous to her than having her serve her notice. This was for two reasons, namely that she could begin seeking new work immediately and so that she would not have to continue working with Ms Mcleod who she had complained about. The claimant's position however, unknown to him or anyone else within the respondent, was that she wished to serve her notice because she hoped her grievance would be dealt with during that period. Although she accepted there would be awkwardness in working with Ms Macleod she was prepared to carry on with her work, some or all of which from home. She also wanted to use up some accrued leave so that her last working day would be on 30 November. She also hoped that in that time she would be asked to withdraw her resignation.

68. Mr Silver in his evidence explained that he took the view that as the claimant had resigned there was no requirement to investigate her grievance under the respondent's grievance process or issue her with any findings. However, as it raised wider issues about the conduct and management style of Ms Macleod and how other employees might be affected, an informal investigation was carried out. This involved a board member interviewing Ms Macleod and other members of her management team. Mr Silver said that the investigation uncovered nothing to support the claimant's allegations that her conduct or management style being inappropriate.
69. Two of the individuals interviewed were Ruth Miller and Gordon Scott. They provided statements dated 15 May 2023, and in connection with this hearing rather than the respondent's internal investigation. They each signed their statement [5a, 5b] but did not attend the tribunal to give evidence. Their statements were therefore considered but given less weight than the evidence of the witnesses who attended the hearing and submitted to cross-examination.
70. Ms Miller was a Development Manager. She had worked under Ms Macleod since 2018. In her current position she works closely with Ms Macleod. She suggests that she, Ms Macleod and other colleagues were supportive of the claimant during her periods of illness in 2022. She said she brought an increasing number of errors in the claimant's work to the attention of Ms Macleod. She said at times she could not complete tasks of her own due to errors in the work of the claimant or a lack of access to financial information. She was copied in on emails from Ms Macleod to the claimant in which the claimant's errors and omissions were picked up, and said that the tone was always supportive. She said that the working culture within the respondent generally was supportive and caring.
71. Mr Scott was a Project Manager and joined the respondent in 2020. He also spoke of a culture of support which Ms Macleod exemplified. He formed a view that the claimant had a poor grasp of her role from monthly meetings at which each attendee discussed their achievements. He sensed that Ms Macleod was compensating for her shortcomings.

72. Ms Miller's evidence is accepted to the extent it corroborates what Ms Macleod said about the claimant making errors in her work and this having a knock-on effect for others meeting the requirements of their roles. Mr Scott's evidence is more subjective and provided no material assistance to the tribunal.

73. The claimant was not asked to reconsider her decision to resign.

74. The claimant's employment with the respondent therefore ended on 17 November 2022 and she was paid in lieu of the balance of her notice period and her accrued annual leave.

10 **Post-termination matters and mitigation of loss**

75. The claimant sought other work after her employment with the respondent ended. She applied for two roles with the local Council and one with a transport company. She was offered the last of those roles after an interview on 17 December 2022 but it was not scheduled to start until 23 January 2023. The role was for a Finance Administrator. The claimant worked there until 10 March 2023 but the parties ended the contract by mutual agreement as the claimant considered it to be much more junior than what she normally did. She earned £420 gross per week and had the option to join a pension scheme, but opted out of joining.

76. The claimant secured an interview for one of the Council roles in January 2023 but she was not offered it. It was for a Clerical Assistant.

77. The claimant began working for a charity on 29 April 2023 and is still employed there. She works part-time and earns £10.47 per hour. She works a minimum of 15 hours per week and occasionally works 21 hours per week, but not more.

78. She claimed Jobseekers Allowance between 10 March and 29 April 2023. She did not claim it earlier. Since 10 March 2023 she applied for further roles, including another at the Council.

Discussion and decision

Did the respondent materially breach the claimant's contract of employment?

79. The claimant alleges that she was constructively unfairly dismissed. This entails first that she establishes that her contract of employment was materially breached by the respondent. The breach can be of a specific term, or of the underlying relationship of mutual trust and confidence.
- 5 80. The concept of the latter is described in ***Malik v Bank of Credit and Commerce International SA [1998] AC 20***. It is an underlying and permanent feature of every employer-employee relationship. Implicit in that is that at all times the parties will not act in a way calculated to destroy the relationship. It is possible for a breach of this type to occur even if no express
10 term is broken. So, for example, an employer exercising a contractual power in a particularly malicious or capricious way may breach the implied duty. Whether the duty has been breached is to be objectively tested. The perceptions of the parties may assist but they will not determine the question.
81. The breach must be material in the sense that it has to be sufficiently
15 fundamental or serious. It must go 'to the root' of the contract. A minor infringement will not be enough.
82. A material breach may be committed by the employer, or it may be threatened, amounting to an anticipatory breach.
83. It should also be recognised that in constructive unfair dismissal cases, a
20 material breach may be established by a series of events which cause sufficient damage to the relationship when considered together. By extension, the 'last straw' in such a sequence may not be a material breach, or even a breach of contract at all, or and yet when viewed along with related previous conduct it may count towards establishing a breach overall - ***Omilaju v Waltham Forest LBC (No.2) [2004] EWCA Civ 1493***.
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84. The claimant gave her reasons for resigning in her resignation letter, which in turn referred to her grievance letter, and also in her claim form (ET1) and her evidence at the hearing.
85. Those reasons collectively are summarised as follows:

- a. The changes to her role were being forced on her by Ms Macleod and amounted to demotion;
- b. If there were concerns over her performance then this approach should not have been taken, and instead the respondent's performance review process ought to have been followed;
- 5 c. However, even that was not necessary as she had gone above and beyond in her role despite the challenges of a large workload and illness;
- d. Ms Macleod did not give her the information she needed to fulfil her role in a timely fashion, and was not accessible generally;
- 10 e. Ms Macleod had offered no coaching or support, but by contrast others such as the Development Manager (Ms Miller) had been trained;
- f. A part of her role was being taken from her to give to someone else (Ms Mackay) simply because the latter did not have enough to do in her own role – this was favouritism towards that individual at the claimant's expense. The claimant believed the appropriate way of dealing with that situation was to have Ms Mackay work in a supporting role to her; and
- 15 g. Since 20 October 2022 Ms Macleod had behaved in an aggressive and bullying way towards her, and dictated the contractual changes without listening to alternative suggestions.
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86. It is understood that the claimant's case is that the relevant breach or breaches were of the obligation of mutual trust and confidence rather than any express terms of her contract. She did not refer explicitly to any contractual terms, and her evidence in the above forms suggested the former.
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87. The claimant's reasons for resignation were considered by the tribunal as individual events, each potentially a breach of mutual trust and confidence, and also as part of a potential sequence of events, or continuous act, culminating in a last straw, with the combined effect of breaching that term.

88. The tribunal's finding in short is that there was no breach of mutual trust and confidence on any analysis of the evidence.
89. Chronologically, the first complaint of the claimant was that Ms Macleod did not give her necessary information to carry out her role in a timely and efficient fashion, or sufficient support. This was not expanded upon in the claimant's evidence. Ms Macleod gave evidence to say that she supported the claimant by way of the monthly meetings, although she accepted they did not happen with absolute regularity. She also offered support outside of those meetings and had arranged for the claimant to be able to seek assistance from the respondent's external accountants in relation to questions arising out of the new accounting system they had installed. She was away from the office at times but not to an excessive amount. The only period specifically referred to in evidence was the befriending trip in September and October 2022 which was planned for four days but unexpectedly extended to ten. The evidence from Ms Macleod, which was accepted, was that the claimant's main challenge was not obtaining information needed to carry out her job, but her repeatedly making errors or omissions in her work, which had been occurring for most of that year and was a matter she was capable of addressing without help from anyone else.
90. It was therefore found that in the absence of evidence of any detail suggesting a lack of information or support from Ms Macleod, together with the evidence which was given, suggesting that the claimant had the support she needed, there was no breach of mutual trust and confidence by way of Ms Macleod withholding information or support.
91. The next matter in time which the claimant raised was that, if Ms Macleod had concerns with how she was fulfilling her role, she chose not to follow a performance management process and specifically the Performance Review Procedure in the respondent's Staff Handbook [6c, p7]. Whilst this was an option open to Ms Macleod and acknowledged as such by her in her evidence, she was not bound to follow it to the exclusion of other options, so that her decision not to follow it was a breach of mutual trust and confidence. She opted to take an informal approach with the claimant, which the board agreed

with and approved, and this is what she did. A performance improvement or review procedure has a its objective the raising of performance standards and the reduction or removal of shortcomings. Ms Macleod had decided by October 2022, after raising broadly the same matters with the claimant for a number of months, that the claimant would not respond to the initiation of such a procedure in the way intended. She believed that the claimant needed to have some of her responsibilities taken away so she could focus better on those remaining. To her the logical way to do so was to take back from the claimant the administrative duties which had been given to her the previous September and have someone else with capacity carry those out. The claimant could then concentrate on her Finance responsibilities. It was within her discretion as a manager to reach that view of how best to run the respondent organisationally.

92. In any event, the claimant believed that to follow such a process would have been unnecessary as she had gone above and beyond in the fulfilment of her role. In that sense her argument contradicts the one before. This however does not matter because on the evidence it was accepted that the claimant had been making errors in her work, was repeating them, and that this was taking up a lot of time to resolve them. It also from time to time had a real detrimental impact for Ms Macleod when she could not obtain from the claimant accurate reports. The efforts which the claimant made at times to carry out her role are recognised but that is distinct from the end product, which was what Ms Macleod was concerned with.

93. The next matter, and in reality the main issue for the claimant, was that as she viewed it Ms Macleod had forced the contractual changes on her. Based on the evidence as recorded above in the tribunal's findings of fact, this is not accepted to have occurred. Ms Macleod opted to try and agree the changes with the claimant and over a process involving three meetings this is what was achieved.

94. Clearly the evidence of the claimant and that of Ms Macleod is in dispute over a number of aspects of what happened in the three meetings. In short, the claimant's position was that there were three conversations involving Ms

5 Macleod putting to her that she should agree a reduction in her role (and with that, her hours and pay) which she agreed to consider but did not accept until the last of those meetings, when she only accepted the changes when she felt pressured to do so. At the same time she believed in a better solution involving the recruitment of an assistant, but Ms Macleod would not hear her out on it. The meetings were upsetting, and at times Ms Macleod was domineering but she persevered. Ms Macleod on the other hand recalled the meetings as being amicable and productive, involving mutual acceptance of the issues and a willingness to find a solution to resolve them. By the third meeting all of the changes had been agreed and they simply had to be documented as they had been done when the claimant's role changed the year before.

95. Both witnesses gave credible accounts of how the meetings went. A number of differences in their evidence are undoubtedly down to their individual perceptions. So, for example, Ms Macleod was more relaxed in the meeting as she was the more experienced and senior person controlling the meeting, whereas the claimant felt more powerless, under criticism and that her efforts were undervalued. Similarly, Ms Macleod would have recognised herself as being gently assertive when having to deliver a point but the claimant may have perceived it as aggression. In this way it is possible for the account of each witness to be credible in itself to a large degree even where each describes the meetings in a different way.

96. The legal test to be applied is whether the respondent, and therefore Ms Macleod as its agent, acted in a way calculated or likely to seriously damage or destroy mutual trust and confidence. It is found that she did not do so. She identified over a period of at least six months that the claimant was not performing her finance duties adequately and at the same time did not have sufficient time to devote to her administrative responsibilities. She discussed with the board her proposal to remove the administrative side of the role rather than follow a performance management process which she realistically anticipated would not achieve the required changes. As an experienced manager and head of an organisation she was entitled, as discussed above,

to take the decision not to follow a performance review process and instead approach the claimant informally about the possibility of changing her role. Her conduct in the meetings intended to implement that decision did not breach the legal requirement to maintain mutual trust and confidence. She put her proposal forward and gave the claimant time to consider it. She was entitled to reject the claimant's alternative suggestion, both as part of her remit as a manager and because there were adequate grounds for her to consider that the proposal would not have worked. She made an evaluative decision using her best judgment. That was not a breach of mutual trust and confidence. The decision was not forced on the claimant, whether in the first meeting, or either of the later two, or otherwise. The claimant agreed to the changes and when they would be made. Ms Macleod was therefore entitled to email the claimant the revised job description and contract corresponding to that.

15 97. Having dealt therefore with the way the discussion went, the conduct of Ms Macleod was considered, It is not accepted that Ms MacLeod was aggressive or bullying towards the claimant, either in the three key meetings or at any other time. The claimant perceived that Ms Macleod was being unduly forceful or heavy-handed in those meetings but Ms Macleod's conduct must be assessed objectively. It did not overstep the mark. She pointed out the ongoing issue with the claimant's performance as she had to do and steered the discussion towards mutual acceptance of the way that that she saw something had to change. Again, viewed objectively, the claimant accepted what she said.

25 98. There was no evidence of Ms Macleod being motivated by favouritism in the discussions she had with the claimant, and the outcome in the form of the agreed contractual changes. The claimant saw Ms Mackay as a beneficiary to her own loss, but operationally it was within reason for Ms Macleod to identify where capacity and capability lay to take on some of the claimant's duties and to utilise the existing people she had to share the workload sensibly.

99. The last straw relied upon by the claimant was the way she said Ms Macleod behaved towards her on 15 November 2022, the day on which she resigned. She believed that Ms Macleod was creating a hostile atmosphere in the office, including by glaring at her, and this impacted on her state of mind and ability to carry out her work. Ms Macleod admitted to being upset as a result of the claimant's reaction to the proposed new contract, followed up by the grievance. She said she barely came into contact with the claimant on that day.

100. Ms Macleod's conduct on this day could not qualify as a 'last straw' as her conduct up to that point was too innocuous. It was entirely reasonable and could not be converted into a breach of mutual trust and confidence by what happened on that day. It could only therefore serve the claimant's case if it was a breach of mutual trust and confidence in itself.

101. It is difficult to make precise or extensive findings of fact about Ms Macleod's conduct on 15 November 2022. There was little detailed evidence about how she acted on that day. Ultimately, it is found that she did not behave towards the claimant as she normally would have done, in that she was more withdrawn and was preoccupied with the complaints that the claimant had made about her. She was not however unprofessional or hostile towards the claimant in the very limited contact that occurred between them on that day. Therefore, and not to diminish the real discomfort that the claimant felt at work, it is found that nothing Ms Macleod did (or for completeness did not do) on that day amounted to a free-standing breach of mutual trust and confidence.

25 **Conclusion**

102. Considering all of the above, the claimant has been unable to discharge the onus of proof upon her of establishing that the respondent materially breached her contract of employment. It follows that she did not resign in response to any material breach of her contract and therefore was not constructively dismissed. It is not necessary to analyse whether the respondent would have constructively dismissed the claimant fairly by having a fair statutory reason

for dismissing her and acting reasonably in implementing the dismissal having regard to that reason. Nor is it necessary to examine her efforts to find other work so as to mitigate her losses, or to calculate compensation.

5 103. Her complaint of constructive dismissal therefore must be rejected and dismissed.

10 104. As a postscript and for completeness, it was noted that the respondent had no contractual power to bring the claimant's employment to an end at an earlier date after she had intimated notice of her resignation, even by payment in lieu of that notice. That is to say, there was no provision in her contract to allow the respondent that option, as is legally required. Technically therefore the respondent breached the claimant's contract and dismissed her by changing her termination date to 17 November 2022, which was done by way of Mr Silver's email of that date. However, the matter is academic in the context of this claim for two reasons. Firstly, the claimant did not resign in response to that breach (since it came the day after she intimated her decision to resign) and therefore it does not support her case. Secondly, the claimant was paid the equivalent of her wages for the balance of the notice period she had given. Therefore, the claimant was fully compensated in damages for that breach.

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25 **Employment Judge: B Campbell**
Date of Judgment: 19th July 2023
Entered in register: 24th July 2023
and copied to parties