



EMPLOYMENT TRIBUNALS (SCOTLAND)

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Case No: 8000073/2022

Held at Inverness on 4, 5 and 6 September 2023

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Employment Judge: N M Hosie
Members: R Dearle
J McCaig

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Mrs A McDonald

**Claimant
In Person**

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Parkdean Resorts UK Limited

**Respondent
Represented by:
Ms H Hogben, Counsel,
instructed by Mr S
Duncanson, Solicitor**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

35 The unanimous Judgment of the Tribunal is that:-

(1) for the reasons given orally at the Hearing, the claimant was not a disabled person, at the relevant time, in terms of s.6 of the Equality Act 2010, and her complaint of disability discrimination is dismissed for want of jurisdiction; and

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(2) the complaint of constructive unfair dismissal is dismissed.

REASONS

5 Introduction

1. The claimant, Alexandrena McDonald, brought complaints of constructive unfair dismissal and disability discrimination. Her claim was denied in its entirety by the respondent.

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Disability Status

2. The Tribunal heard evidence, first in respect of the issue of disability status. After an adjournment to consider the issue, the Tribunal advised that it had decided, unanimously, that the claimant was not a disabled person, at the relevant time, in terms of s.6 of the Equality Act 2010. Accordingly, the Tribunal did not have jurisdiction to consider the disability discrimination claim and it was dismissed. An oral Judgment with reasons was given.

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3. This left the complaint of constructive unfair dismissal to be considered.

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The Evidence

4. We heard evidence first from the claimant and then on her behalf from:-

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- Alan Sutherland who was employed at the relevant time by the respondent as its Maintenance Manager

5. We then heard evidence on behalf of the respondent from:-

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- Fraser Park, General Manager at Grannie's Heilan' Hame Holiday Park

- Emma Findlay, HR Business Partner

6. A Joint Bundle of documentary productions was also submitted (“P”). This included a written Statement which the claimant had submitted from Andrew
5 Ross, a former work colleague (P.216-217)

The Facts

7. Having heard the evidence and considered the documentary productions, the
10 Tribunal was able to make the following findings in fact, relevant to the issues with which it was concerned. The respondent is a self-catering holiday park operator. It operates a large number of holiday park resorts in the UK for holidaymakers and holiday home ownership. The claimant was employed at the respondent’s Grannie’s Hielan’ Hame Holiday Park at Embo, near
15 Dornoch, Sutherland (“the Park”) from 22 August 2016 until she resigned on 23 May 2022. When she started, she was employed as an Accounts Assistant. Her contract of employment was one of the documentary productions (P67-74). She was promoted to the position of Administration Manager around June 2017, and she was in that role when her employment
20 ended. The claimant’s husband was also employed at the Park as a Maintenance and Grounds Assistant.

8. Fraser Sharp transferred to the Park on 1 October 2021 and assumed the role of General Manager. He had transferred from another of the
25 respondent’s holiday parks. Mr Sharp was the claimant’s Line Manager from 1 October 2021 until her resignation.

9. On 19 October 2021, the claimant sent a message to Mr Sharp to advise him that her husband was seriously ill. Mr Sharp responded immediately as
30 follows (P123):- *“OMG I’m so sorry to hear that Rena. Concentrate on Robert and yourself, let me know if you need anything and I’ll be in touch later in the week.”*

10. From 23 October 2021, the claimant was granted discretionary compassionate leave in order to care for her husband. On 26 October 2021, Mr Sharp sent a message to her in the following terms (P126):- *“Thanks for keeping me up to date Rena. Look after yourself and Robert, please let me*
5 *know if there is anything you need.”*

11. The claimant’s husband passed away on 19 November 2021.

12. The respondent’s Leave and Holiday Policy (P92-97) provides that
10 employees are entitled to a maximum of one week’s paid bereavement leave, following the death of an immediate family member (P96, para 6). However, Mr Sharp exercised his discretion to grant the claimant bereavement leave for a period of over 6 weeks, until 4 January 2022. The claimant received full pay during her bereavement leave.

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Claimant’s Return to Work on 4 January 2022

13. On 19 November, Emma Findlay, the respondent’s People Business Partner, sent an email to the claimant with a condolence message for the loss of her
20 husband.

14. She also sent an email later the same day in which she suggested that the claimant return to work on 3 January 2022 (P133/134).

25 15. The claimant responded by email later that day as follows (P133):-

“Hi Emma

30 *I can’t think everyone enough in the company as I have been treated amazingly and everyone has been so understanding. I especially appreciate Fraser allowing Catherine the time to support me and Robert at the time of his passing. I really appreciate the amount of time I have been given to try and come to terms with Robert’s passing. His funeral is being held down the road as that was his wished and all the family are down there. I will let you know nearer*
35 *the 20th as to if I feel up to meeting with yourself and Fraser. I am just taking a day at a time at the moment”.*

16. Ms Findlay responded to the claimant's email as follows (P133):-

5 *"Ahh you're most welcome, we all know how sad and difficult it is for you. That's absolutely the right way to approach it, don't put too much pressure on yourself.*

Take care I will be thinking of you and your family on the 10th".

Claimant's Return to Work

10 17. As it transpired, it was agreed that the claimant would return to work on 4 January 2022. On that date, she attended a return-to-work meeting with her Line Manager, Fraser Sharp, in accordance with the respondent's Absence Management Policy (P136). At that meeting, the claimant and Mr Sharp agreed that she would return on a phased basis, working Thursdays and Fridays only, for a period of one month. The claimant received full pay during her phased return to work.

15 18. In her absence, Mr Sharp, the General Manager, had decided to change the layout of the office. He arranged for a small shop area to be converted into an office and for Catherine Murray the Owner and Guest Experience Manager ("the OMEG") to work there. Prior to this, the claimant had shared the administration office with Ms Murray. Mr Sharp explained that the reason for the change was that the safe was in the administration office where the claimant worked, and he decided, mainly for security reasons, that the administration office should only be occupied by one person as the OMEG often had meetings with owners and others. While the safe had always been in the administration office where there was dual occupancy, Mr Sharp explained that when he worked at other parks there was always a separate office for administration.

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35 19. The claimant was upset when she saw the changes and concerned that she would not be working in the same office as Ms Murray. She said she felt "isolated". She asked Mr Sharp if the office could be changed back to the way it was for a few weeks to enable her to settle in, but Mr Sharp explained that

he was arranging for the Park to be set up for the new season and it didn't make sense to change the office back for only a short period.

- 5 20. On 5 January, the claimant sent an email to Emma Findlay to express her concern at not being able to share an office with Catherine Murray (P137). Ms Findlay spoke with her, by way of a Microsoft Teams meeting, the following day when she explained the business reason for the renovation of the offices. She also told the claimant that the matter could be reviewed.
- 10 21. What the claimant was unaware of was that Ms Murray had advised Mr Sharp and Ms Findlay that she wanted to be in an office on her own. She had found her involvement with the claimant and her late husband before his passing very stressful and she feared that sharing an office with the claimant would add to her stress. However, she asked that this should not be shared with the
15 claimant.
22. So far as the claimant's work was concerned, Mr Sharp asked her to concentrate on the respondent's health and safety system which was being changed and payroll tasks.
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23. As a consequence of the claimant's absence and phased return, it was necessary for Mr Sharp to distribute the claimant's other duties among other employees. In particular, he arranged for the purchase order process for the Park to be dealt with by Jackie Callum and Catherine Murray. Part of that
25 process involved matching purchase orders with invoices.
24. On 11 January, the claimant sent an email to Ms Findlay to advise her of a consultation with her doctor. She ended her email as follows (P138):- *"Thank
30 you for your continued support and the company's as I think they have been amazing and I am very fortunate to have Parkdean Resorts as my employer"*
25. When the claimant returned to work full time in early February, Jackie Callum the Administration Manager at the respondent's Park in Nairn and Catherine

Murray were dealing with the purchase orders process. However, the claimant did not complain about this, and she did not raise a grievance although she was familiar with the process having raised a grievance in the past about another matter. When asked about this at the Hearing she said
5 that she “*didn’t see the point*”.

National Finance Administration Officer Post

26. The claimant had discussions with Mr Sharp about her possibly moving back
10 to Ayrshire to be with her daughter. They had various conversations about her looking for another job which would enable her to move. Mr Sharp told the claimant about this post which could be done anywhere, and she applied.

27. She attended an interview with Victoria Toas of the respondent on 24 March
15 2022. The interview notes were produced (P141). They record (in red type) that the claimant said nothing about “processes and procedures” and that she could not think of a work situation when she achieved something working in a team.

20 28. Ms Toas met with the claimant on 29 March by Microsoft Teams to inform her that her application had not been successful.

29. Shortly thereafter she spoke with Mr Sharp and told him that her application
25 had been unsuccessful. She was visibly upset. She told him that she was going to, “sign herself off sick” and he replied that she, “could not do that”, or words to that effect.

30. The following day Mr Sharp sent an email to Emma Findlay in the following
terms (P143/144):-

30 *“I just wanted to update you on the conversation I had with Rena McDonald yesterday.*

*Rena approached me in the morning whilst I was returning to my office (in front of the main entrance), to advise me that she was going
35 to sign herself off sick for a week. When I enquired why, she told me that she had not been successful in progressing to the second stage*

of an interview she had had with Parkdean and she needed time to think whether she still wanted to work for the company or not. She said she was thinking of (jacking it in), resigning from her post with immediate effect and didn't want to come back.

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After reflecting on the conversation earlier in the day, I thought I would talk to Rena to see what had happened earlier in the day and how she was feeling. I explained that the way she had conducted herself earlier that day were very unprofessional and not what I would expect from an HOD in any department of the business. At this point she shouted, "Well what you bloody do if your partner had just died", although very sympathetic to Rena's situation, I told her that shouting at me would not be tolerated and to calm down.

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Rena was visibly upset; however, we discussed her behaviour further and how she had been with team members lately, how she had become very unapproachable and hostile towards various members of the team and how people avoided asking for her help or advice.

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Rena has made it more than clear on various occasions that she is looking for a new job and has had several interviews.

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I explained that as a business we had been more than understanding of her situation, however whilst in the work environment I expected her to continue with her role in a professional manner. Since returning to work and to help Rena settle back into the workplace, we agreed a phased return to work and have approved various holiday, days off and special leave to allow her to visit family, attend interviews and attend a friend's husband's funeral.

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She then commented on various people leaving the business because of the atmosphere, and how people had confided in her about this over the past few months. When I asked her to explain this in more detail, she refrained from giving any more information saying that that would break their trust.

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She has cleared out her desk, taken all her personal belongings from Park and told various team members she will be off for a considerable time, if she will be back at all.

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Where do I go from here, and how can I offer Rena more support".

31. Ms Findlay spoke with Mr Sharp and told him that she could understand why she was upset at not getting the job as it was a way to move where she wanted to live and stay with her daughter. She advised him to "leave her be".

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32. However, the claimant did not return to work the following day and Mr Sharp wrote to her, therefore, to advise that she had not complied with the respondent's Absence Management Policy (P145).

5 33. On 1 April, the claimant sent an email to Mr Sharp along with a sick line (P147). She alleged that there had been "a distinct lack of support" and that she had been "isolated in the office" (P147). Mr Sharp responded shortly thereafter by email. He thanked her for her sick line and suggested that they meet to discuss matters (P147).

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34. The reason for the sick line was given as "low mood and bereavement". The claimant was signed off until 27 April 2022.

15 35. On 5th April Mr Sharp sent another email to the claimant (P149) in response to her email of 1 April (P147). His email was in the following terms:-

"Thank you for your response dated 01, April 2022, I do understand your mental state of mind at the moment and as support I have agreed all requests for holiday and special leave.

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I do believe we have provided every support you have asked for and given more than you have requested. In addition to further our support, I can agree to reduce the contact between us while you are absent to aid your recovery, however I do ask that you update me weekly on your circumstance and how you are. This can be conducted via e-mail from yourself directly to me at the end of each week, I believe this to be a reasonable adjustment to our policy.

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I would like to highlight the absence policy also states a meeting will take place is (sic) you are absent from work for 4 weeks or more, this is a normal process and should your absence be 4 weeks or more, I will arrange the meeting with you. In the meantime if there is any further support that you require, please let me know".

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Claimant's Resignation

36. On 26 April, the day before the likely Absence Management Procedure meeting, the claimant intimated her resignation by email in the following terms (P152):-

"Hi Fraser,

Please find attached my sick line for the next four weeks and as of today I am giving my four weeks notice. Due to lack of support and being isolated in the office I have no other option than to tender my resignation. My mental wellbeing is more important than any job. I will hand in the original copy of my sick line and any uniform and all my keys tomorrow".

37. Mr Sharp replied by email on 26 April 2022 in the following terms (P154):-

"Acknowledgement of Resignation

I acknowledge receipt of your resignation letter dated 26th April 2022 and confirm with regret our acceptance of your intention to leave Parkdean Resorts.

Your contractual notice period is NOTICE PERIOD, so this means your last working day at PARK will be recorded as 23rd MAY 2022. I am in receipt of your sick line and confirm your intention to remain off sick until your leave date.

I can confirm that you will be paid your final salary up to 23rd May which includes any outstanding holiday pay. This will be paid to you on the 28th May. Your final payslip will be issued to you on the same day and your P45 will be issued within a week of your final pay.

May I take this opportunity to thank you for your contribution to Parkdean during your time with us and wish you all the best for the future".

38. The claimant was able to secure employment as a Facilities Administrator at Haven Craig Tara Holiday Park, Ayr close to where her daughter stays. She started work there at the end of May. She denied that she had applied for this job before she resigned. However, prior to her resignation she had already

given notice to her landlord and signed a lease of a property in Ayrshire for her son who had been staying with her.

Respondent's Submissions

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39. The following is a brief summary of the submissions by the respondent's Counsel. In support of her submissions she referred to ***Western Excavating (ECC) Ltd v Sharp*** [1978] ICR 221.

10 40. She reminded me, with reference to the List of Issues, that the claimant relied on one breach of contract by the respondent: "*Fundamentally breached my contract of employment by failing to provide me with the work I was employed to do*" (P62 para 8). This was in accordance with her Further and Better Particulars (P46) and related to the work required with purchase orders. She
15 submitted that this was an alleged breach of an express term of her contract of employment with the respondent. However, the respondent denies that there was any repudiatory breach on its part.

20 41. There was evidence that prior to the claimant being absent from work that other employees had helped out with purchase orders. The Park is one of the respondent's smaller ones and at peak times, according to Mr Sharp, "everyone has to muck in".

25 42. When the claimant returned to work in January it was agreed that she would work 2 days a week. However, there was still "work to be done" and that was why Mr Sharp involved Catherine Murray and Jackie Callum to help with the purchase orders. But there was no intention to deprive the claimant of work and she never complained at the time.

30 43. Counsel further submitted that the claimant gave her evidence in a forthright manner at the Hearing and had been able previously to raise a grievance about the respondent's Regional Manager and Operations Director.

44. Further, it was submitted that the claimant did not resign in response to any breach on the part of the respondent. She referred to Mr Sharp's email of 30 March to Ms Findlay when he recounted the conversation he had had the previous day with the claimant (P143). Her unsuccessful application for the National Finance Administrative Officer post was the reason that she went off sick. She was aggrieved and angry at not getting the job. She was looking for a job to be near her family in Ayrshire. It was submitted that she decided then that she was going to leave the respondent's employment. The fact that she cleared her desk that day is further evidence of that. Although she said that she had cleared her desk because previously belongings had gone missing, it was submitted the "obvious reason" was that she had decided not to come back.
45. Counsel also referred in her submissions to the claimant's email of 1 April which was the first time that she had alleged "lack of support" (P147). Counsel submitted that that was "no coincidence".
46. Counsel further submitted that the respondent had done as much as it possibly could to support her by allowing compassionate leave on 23 October 2021; giving her friend Catherine Murray time off on full pay to support her; and allowing the claimant extended bereavement leave from 19 November 2021 to 4 January 2022. They also agreed to a phased return to work 2 days a week "and all on full pay".
47. It was submitted that these were, "not the actions of an employer intent on holding an employee back in any way".
48. Further, it was "not coincidental" that the claimant resigned the day before the 4 week period was due to expire before the claimant's absence management policy was likely to be engaged.
49. The claimant resigned not because of anything to do with the purchase orders or the way that she had been treated by the respondent but rather

because of, “her own desire to work remotely and her anger at not getting the job”.

50. Finally, it was submitted that, in any event, the claimant had affirmed any
5 alleged breach of contract by the respondent.

51. She was aware that others were doing the purchase order work even before
she returned on 4 January 2022 and yet she did not resign until 26 April and
only then by giving 4 weeks’ notice. It was submitted that she “waited too
10 long”. There were only a relatively small number of people employed by the
respondent doing the same work and “it must have been obvious that others
were doing the purchase order work in January”.

52. For all these reasons, therefore, the respondent’s Counsel submitted that the
15 claim should be dismissed. The respondent had failed to discharge the onus
on her.

Claimant’s Submissions

20 53. The claimant submitted that she only realised that the purchase order work
was being done by others in February or March 2022. She also discovered
that others were “putting people on the system” which she had been doing
before (I understood this to mean recording details of new employees).

25 54. She also reminded me that she had been asked to work on a Sunday to raise
purchase orders during her phased return and questioned why she had been
requested to do so (P127).

55. So far as Mr Sharp’s email to Ms Findlay on 30 March was concerned
30 (P143), she submitted that Mr Sharp could not recall what she had said to
him the previous day and she denied that she had ever told him that she had
attended “several interviews”. She also pointed out that he had delayed
sending that email to Ms Findlay which was difficult to understand if its
contents were so important.

56. So far as Ms Catherine Murray's support was concerned, she said that she was only allowed one day off work on full pay and that the rest of the time she would "just drop in" to see her and her husband.

5 57. Finally, although she had been given compassionate and bereavement leave she had also used her holiday entitlement when she was off.

Discussion and Decision

10 Relevant Law

58. Having resigned, it was for the claimant to establish that she had been constructively dismissed. This meant that, under the terms of s.95(1)(c) of the Employment Rights Act 1996 ("the 1996 Act"), she had to show that she terminated her contract of employment (with or without notice) in
15 circumstances such that she was entitled to do so, without notice, by reason of her employer's conduct. It is well established that means that the employee is required to show that the employer is guilty of conduct which is a fundamental breach going to the root of the contract of employment, or which
20 shows that the employer no longer intends to be bound by one or more of the essential terms of the contract. The employee, in those circumstances, is entitled to leave without notice or to give notice, but the conduct in either case must be sufficiently serious to entitle the employee to leave at once.

25 59. The correct approach to determining whether or not there has been a constructive dismissal was discussed in **Western Excavating**, the well-known Court of Appeal case, to which I was referred by Counsel. According to Lord Denning, in order for an employee to be able to establish constructive dismissal 4 conditions must be met:-

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(1) there needs to be an actual or anticipatory breach of the contractual term by the employer;

(2) such a breach must be sufficiently serious (a “fundamental breach”) to justify the employee’s resignation;

(3) that he or she resigned in response to the breach;

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(4) that he or she did not delay too long in resigning in response to the employer’s breach, affirming the contract and losing the right to claim constructive dismissal

10 60. Accordingly, whether an employee is entitled to terminate his or her contract of employment, by reason of the employer’s conduct and claim constructive dismissal, must be determined in accordance with the law of contract. It is not enough, therefore, to establish that the employer acted unreasonably. The reasonableness, or otherwise, of the employer’s conduct is relevant but
15 the extent of any unreasonableness has to be weighed and assessed and a Tribunal must bear in mind that the test is whether the employer is guilty of a breach which goes to the root of the contract or shows that the employer no longer intends to be bound by one or more of its essential terms.

20 **The Present Case**

61. We had little difficulty arriving at the unanimous view, based on the respondent’s evidence from Fraser Sharp and Emma Findlay, which was credible and reliable, corroborative to a degree and consistent with the
25 contemporaneous email documentation, that the respondent had been extremely supportive of the claimant throughout the relevant period. She had been afforded compassionate leave then extended bereavement leave and was not pressured to return to work; Catherine Murray, her friend, was given paid leave to provide further support; when she returned to work on 4
30 January 2022 it was on a phased basis, for a month working 2 days a week; she received full pay throughout.

62. We now address the 4 conditions detailed in ***Western Excavating***.

Was there a breach of contract?

5 63. We were mindful that the alleged fundamental breach of contract, according to the claimant's pleadings (P46) and the List of Issues (P62) was, "*failing to provide me with the work I was employed to do*".

10 64. This related primarily to the purchase order work which she had been doing before she went off, being reallocated to Jackie Callum and Catherine Murray.

15 65. Although not part of her case, as pled, she also claimed when giving evidence that the work involving "putting employees on the system" which we understood to mean recording details of new employees had also been reallocated.

20 66. However, the claimant did not work full time for over 3 months and her work had to be covered. Also, the Park is relatively small and it was normal practice for work to be shared out.

25 67. The reallocation of work in this way was understandable, in the circumstances. It was done to support the claimant. It was a perfectly reasonable thing to do. It went nowhere near amounting to a breach of contract, let alone a fundamental breach.

30 68. Indeed, it seemed to us that this claim was something of an afterthought on the claimant's part. In her emails of 24 November (P. 133) and 11 January (P.138), she expressed her thanks for the way she had been treated by the respondent and for its "continued support"; she did not complain about "lack of support" until her email of 1 April 2022 (P147); in her resignation email she did not specify that the reason for her resignation was failing to provide her with the work she was employed to do (P152).

69. The claimant is an intelligent person, well able to articulate her concerns, as she had done in the past when she raised a formal grievance against senior managers but on this occasion she failed to do so.

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70. The onus was on the claimant to establish a breach of contract. She failed to do so. She failed to establish that there was any breach, let alone a fundamental one. Accordingly, her constructive unfair dismissal claim is dismissed.

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71. For the sake of completeness, we also address the 2 remaining conditions in ***Western Excavating***.

Did the Claimant resign in response to the alleged breach?

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72. In our unanimous view she did not. She resigned because she wanted to work and stay near her daughter in Ayrshire and although there was no direct evidence we strongly suspected that she had at least an indication that she would be able to secure work at Haven where she was employed soon after, before her resignation. The catalyst for her resignation was an overreaction to not being offered the National Finance Administration Officer post. It was clear from her demeanour when she spoke with Mr Sharp shortly after being advised that she had been unsuccessful that she was angry and told Mr Sharp that she intended being signed off work due to ill health. The fact she cleared her desk that very day was indicative of her deciding then to leave for these reasons.

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Did the Claimant affirm the alleged breach?

73. In our unanimous view she did. She knew about the reallocation of her work from at least 4 January 2022 when she returned on a phased basis and also at the beginning of February when she returned full time. However, it was not until 26 April 2022 that she resigned and even then she gave 4 weeks' notice during which she continued to be signed off work due to ill health.

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74. Even if there had been a fundamental breach of contract by the respondent, therefore, her claim would still have failed.

5 **Employment Judge: N M Hosie**
Date of Judgement: 15 September 2023
Date sent to Parties: 15 September 2023