Case Numbers: 2210655/2022

Reserved Judgment

EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**and**	**Respondent**
Miss A Clarke		**Secretary of State for Justice**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

SITTING AT: London Central **ON: 21-23 November 2023**

BEFORE: Employment Judge A M Snelson (sitting alone)

On hearing the Claimant in person and Ms H Higgins, counsel, on behalf of the Respondent, the Tribunal determines that:

(1) The Claimant's complaint of unfair dismissal is not well-founded.
(2) Accordingly, the proceedings are dismissed.

REASONS

Introduction and Procedural History

1 Miss Ameilcah Clarke, the Claimant in this case, was continuously employed in the National Probation Service, now HM Prison & Probation Service ('HMPPS'), an arm of the Ministry of Justice, from 30 June 2008 until 21 July 2022, when she resigned. She is fully qualified as a Probation Officer and at the time of her resignation she held the rank of Prison Offender Manager at a salary of about £39,000 per annum. She was based at all relevant times at HMP Wormwood Scrubs.

2 By a claim form presented on 2 December 2022 Miss Clarke complained of unfair (constructive) dismissal. The Respondent disputed liability.

3 At a preliminary hearing for case management on 17 April 2023, Employment Judge Lewis explored the scope of the claim and gave standard case management directions. The document which she issued following the hearing included these observations:

5. [Counsel for the Respondent] and I agreed that the claim has been written very clearly and it is not necessary for us to put into list form matters which the claimant resigned over.

6. We had a discussion over whether it is necessary for the claimant to identify a 'final straw' over which she resigned. Recent case law indicates that parties and tribunals can become excessively focused on the significance of whether there is a final straw and its effect. The claimant put it like this: 'After everything I have dealt with, you are now giving me a final warning too.'

7. The issues which the tribunal will decide are as follows:

7.1 Did the claimant resign because of an act or omission or series of acts or omissions by the respondent as set out in her claim form?

7.2 If so, did that conduct by the respondent amount to a breach of the implied term of trust and confidence? (Did the respondent, without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee?)

7.3 Did the claimant affirm the breach?

7.4 Did the claimant resign, at least in part, in response to that breach?

7.5 If the claimant was constructively dismissed, the respondent accepts such dismissal was unfair.

4 The matter came before me in the form of a final face-to-face hearing on 21 November this year. Miss Clarke represented herself with moderation, dignity and good grace. I am also grateful to Ms Higgins, counsel, for her helpful advocacy on behalf of the Respondent.

5 At the outset we discussed the fact that, although five sitting days had been allocated, the Tribunal was able to sit only for four. It was agreed that, in the circumstances, the hearing would be confined to the issue of liability only. I then took some time to read into the case. Miss Clarke's evidence began on the afternoon of day one and was completed early in the afternoon of day two. At that point she made an application for permission to call an unheralded witness, Ms Camille Jean-Marie, producing a written statement in her name. After some debate I indicated that I would not consider granting the application otherwise than on the basis that the Respondent would be entitled to an adjournment in order to meet the fresh evidence. (I did not say or suggest that I would be minded to grant the application, only that I would not consider granting it on any other terms.) Having heard this, Miss Clarke decided not to press the application to produce Ms Jean-Marie as a 'live' witness, but nonetheless requested permission to rely on her statement as evidence in the case. She understood that evidence in that form was likely to carry very little weight given that its author would not be tested in cross-examination. Despite opposition from Ms Higgins, I was just persuaded to grant permission and the statement was accordingly admitted, for what it was worth. I heard the Respondent's evidence over the next two sessions and received closing submissions on the afternoon of day three. I then reserved judgment.

The Legal Framework

6 The first prerequisite for an unfair dismissal is a dismissal. As I have stated, Miss Clarke bases her claim on an alleged constructive dismissal. By the Employment Rights Act 1996 ('the 1996 Act'), s95 it is provided that:

> **(1) For the purposes of this Part an employee is dismissed by his employer if …**
>
> **(c) the employee terminates the contract … (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct.**

The provision embodies the common law. The leading case is *Western Excavating (ECC) Ltd v Sharp* [1978] ICR 221. A party to an employment contract is entitled to terminate it summarily in circumstances where the other party has repudiated it by breaching an essential term. But the resignation must be in response to the breach. In other words, the breach must be the cause, or at least a material cause, of the resignation.

7 Terms of employment contracts may be express or implied. Some terms are automatically implied. These include the obligation of the employer not, without reasonable and proper cause, to conduct itself in a manner likely to destroy or seriously damage the relationship of trust and confidence between employer and employee (see *Malik v Bank of Credit & Commerce International SA* [1997] ICR 606 HL). The test as to whether there has been a breach of the implied term of trust and confidence is objective (*Omilaju v Waltham Forest LBC* [2005] ICR 481 CA, para 22). Any breach of the duty to preserve mutual trust and confidence is inherently repudiatory (*Morrow v Safeway Stores plc* [2002] IRLR 4).

8 It is well established in our contract law generally that an innocent party who affirms a contract following a repudiatory breach by the other party thereby loses the right to treat herself as discharged by the breach. Accordingly, in the employment law context, an employee's right to treat herself as constructively dismissed will be lost if, following a repudiatory breach, the contract is affirmed. But this statement of general principle must be qualified. A breach of the implied term may consist of a series of acts or omissions which cumulatively have the effect of repudiating the contract. Here, it has been recognised that the 'last straw' which precipitates the resignation need not itself amount to a breach of contract. On the contrary, it may be, in itself, relatively insignificant. But it must contribute *something* to the overall breach. If the 'last straw' relied upon meets that (low) standard, the task of the Tribunal is to enquire whether the entire series of acts or omissions amounts to a repudiation. And that series may include events which predate an affirmation of the contract by the employee. To put it another way, the 'last straw' may revive an employee's right, lost through affirmation, to rely on an earlier breach (see generally *Omilaju*, paras 15-22).

9 The outcome of the claim turns on the proper application of the 1996 Act, s98. It is convenient to set out the following subsections:

> **(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show –**

> **(a) the reason (or, if more than one, the principal reason) for the dismissal, and**
> **(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.**
>
> **(2) A reason falls within this subsection if it – …**
>
> **(b) relates to the employee's conduct …**
>
> **(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –**
>
> **(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and**
> **(b) shall be determined in accordance with equity and the substantial merits of the case.**

10 The first effect of s98 is that, if the matter is in dispute, the employee must establish that she was dismissed. If a dismissal is shown, it falls to the employer to prove a potentially fair reason for it. The 'reason' for a constructive dismissal is the reason for the employer's breach which provokes the resignation. If a potentially fair reason is not shown, the dismissal is necessarily unfair. Subject to a permissible reason being shown, s98 requires the Tribunal to weigh the reasonableness of the employer's action. No burden applies either way. That said, given that a complaint of constructive dismissal does not get off the ground unless it is shown that the employer has committed a repudiatory breach of the employee's contract of employment, it will be a rare case in which such a dismissal is not also found to have been unreasonable and unfair. Hence the Respondent's realistic concession before EJ Lewis that, if she was dismissed at all, Miss Clarke was unfairly dismissed.

Evidence and Documents

11 As I have mentioned, I heard oral evidence from Miss Clarke and read the statement of her supporting witness, Ms Jean-Marie. Four witnesses were called on behalf of the Respondent: Ms Christina Rowe, Senior Probation Officer and formerly Miss Clarke's line manager, Ms Clair-Louise Winch, Senior Probation Officer and formerly Miss Clarke's interim line manager, Mr Neil Walters, formerly Interim Head of Service and the officer charged with deciding Miss Clarke's grievance appeal, and Ms Samantha Fallows, formerly Interim Deputy Head of Service.

12 In addition to witness evidence I read the documents to which I was referred in the main (two-volume) bundle of some 1,385 pages and the additional bundle of some 128 pages.

13 The paperwork was completed by the useful documents produced by the Respondent: a chronology, a cast list, a proposed hearing timetable and the comprehensive opening skeleton argument of Ms Higgins.

The Facts

14 The evidence was extensive. I have had regard to all of it, but it is not my function to recite an exhaustive history. The facts essential to my decision are as follows.

Events before April 2019

15 Ms Rowe took up her post as Senior Probation Officer at HMP Wormwood Scrubs ('the prison') in October 2017. With that role came responsibility for the team of Probation Officers based at the prison. It was her first appointment with line management responsibilities. A recent inspection had identified some concerns within the Offender Management Unit, of which the Probation Team was a part. In particular, Ms Rowe was made aware that there were some 'issues' to do with timekeeping.

16 Miss Clarke was absent from work on her first period of maternity leave during a substantial part of 2016. She returned in October that year part-time and, in October 2017, resumed full-time working.

17 Between October 2017 and March 2018 Miss Clarke was absent from work on a number of occasions on account of her own ill-health or that of family members. She was also late for work twice, once because of child care commitments and once to attend a hospital appointment. Ms Rowe dealt with these events supportively and no action, formal or informal, was taken against her by reason of her attendance and timekeeping record.

18 Miss Clarke took a second period of maternity leave commencing on 2 April 2018, from which she returned just over a year later, on 29 April 2019. During her absence Ms Rowe maintained contact with her and gave her a rating of 'good' in her annual appraisal. Before her return, Miss Clarke mooted the possibility of coming back part-time but later advised that she had secured suitable child care arrangements which would enable her to return full-time.

A*pril 2019 – July 2020*

19 Soon after Miss Clarke's return to work, some difficulties arose concerning timesheets. A little background may be helpful. The contracted hours for a full-time Probation Officer were 148 per 4-week accounting period. Under the 'Flexible Working Policy' staff were required to work 'core hours' between 10:00 and 15:30 but (subject to any special managerial direction in order to meet a business need) were otherwise free to decide upon their working hours on any particular day. This freedom, however, was subject to the requirement that, at the end of the accounting period, staff members must not exceed the permitted 'flexi-time' credit and deficit limits, which were fixed with striking precision at 22h12m and 14h48m respectively. The Policy states that exceeding these limits is a breach of the scheme which may lead to disciplinary action and provides that, absent 'exceptional circumstances', any offending credit or deficit should be brought within the permitted bounds during the next accounting period.

20 I heard more evidence than was necessary about the dealings between Miss Clarke and Ms Rowe concerning the timesheets. The following simple facts are all that need to be recited. Ms Rowe did not require Miss Clarke to submit timesheets during her first month back at work. She asked her to complete them from 27 May 2019 onwards. Miss Clarke had some difficulty in completing the timesheets correctly (it seems that they had been introduced during her absence). Ms Rowe assisted her and the technical difficulty was overcome.

21 What became apparent quite quickly once the hours were correctly recorded was that Miss Clarke seemed to be struggling to maintain attendance at the level required under the Flexible Working Policy. By the end of the June accounting period she had a deficit of 16h48m, which, by the end of the July accounting period, had risen to 22h14m. Through August the deficit remained steady but it was reduced at the end of the month to 13h33m as a consequence of her sacrificing one day of her annual leave entitlement. It soon grew again, however, reaching 19h46m by 18 September.

22 One factor which clearly contributed to the stubbornly high deficit was Miss Clarke's frequent absence from the workplace on various days or part-days between June and September 2019, on sickness grounds, to attend medical appointments and for child care reasons. Ms Rowe treated these absences sympathetically and took no action (formal or informal) in relation to them.

23 A natural consequence of working fewer hours than she was contracted to work was that Miss Clarke fell behind in her tasks. In particular, Ms Rowe noted more than once that, according to the records, there was an appreciable number of prisoners whom she had yet to make contact with. In her evidence before us, Miss Clarke agreed that by September 2019 she had a significant amount of work (involving in particular interviewing prisoners and writing reports) which needed to be completed in fairly short order.

24 At a meeting on 19 September 2019 Ms Rowe and Miss Clarke discussed the current deficit (19h46m) and made the point that it must be brought down to the maximum of 14h48m by 27 September, the end of the current accounting period. Miss Clarke did not disagree, and assured her that she was in a position to comply with the requirement and fully intended to do so.

25 In her email of 4 October 2019 (to which I will shortly come) Miss Clarke claimed that Ms Rowe had mentioned to her on five occasions between 14 May and 19 September 2019 that in view of her family commitments she might benefit from considering reducing her hours or applying for compressed hours (presumably, working a five-day week in four days). It was common ground that both possibilities are catered for under the Respondent's procedures. I am not able to make a precise finding but I am satisfied that, as Ms Rowe did not deny, the subject was raised on several occasions during the relevant period. Miss Clarke found this irritating. She did not protest or complain but she did make it clear by her response on each occasion that she was aware of the procedures and was not minded to make use of them.

26 On 24 September 2019, Ms Rowe sent an email to Miss Clarke which included the following:

> **As of last Thursday, an additional 4 hours 58 minutes would need to be worked (in addition to an average of 7 hours 24 minutes per day), in order to reduce the deficit to 14 hours 48 minutes by the end of the current reporting period, which is this week, Friday 27/09/2019.**
>
> **As discussed, 14 hours 48 minutes is the maximum permitted deficit which staff can carry over (although any staff at that point should be looking to reduce that deficit over the following weeks). As discussed, I do acknowledge that you have family commitments - however we would need to look at reducing the contracted hours if this isn't sustainable (via a Flexible Working or Work Life Balance application which we've discussed), or alternatively by considering an application for compressed hours.**

27 In the event, as is common ground, Miss Clarke worked the necessary hours to reduce the deficit to below the prescribed limit by the end of the September accounting period.

28 By a lengthy email of 4 October 2019, Miss Clarke strongly challenged Ms Rowe over her email of 24 September 2019. She made several points, of which three stand out. First, she said that it had been agreed on 19 September that the deficit would be cleared by the due date and that in sending the email of 24 September Ms Rowe had not 'given her the chance' to do so. Second, she claimed that the reference to 'family commitments' suggested or implied that she had used her family commitments as an excuse for failing to get the deficit down earlier. Third, she complained that the repeated mention of the possibility of switching to alternative working patterns had caused her to feel anxious, not least because reducing her hours could have adverse consequences for her family. At the end of her message she set out, in bold type, five questions to which he asked Ms Rowe to reply.

29 Ms Rowe's first reaction was to propose a meeting in order to discuss Miss Clarke's message. It seems that Miss Clarke was against a special meeting but said that she was prepared to discuss the matter at a forthcoming supervision meeting scheduled for 29 October. But she also made it clear that she required a written response to her email. Ms Rowe then took HR advice before drafting a very full reply. The draft was, it seems, in note form by 29 October but it was not deployed because there was no time at that meeting to discuss the 4 October email. Ms Rowe and Miss Clarke met again on 8 November 2019, at a scheduled supervision meeting. Ms Rowe then summarised her response to Miss Clarke's email (see below). Miss Clarke again made it clear that she was looking for a written response and Ms Rowe promised to deliver one by 22 November. It seems that she then took HR advice again on her draft and perfected it. The finished article was presented in the form of a letter, on the Respondent's letterhead, attached to an email dated 22 November 2019. Miss Clarke told me that she regarded the use of the letterhead as intimidatory in that it signalled a formalising of the correspondence, but it is right to point out that the document was headed with an explicit reference to two 'informal' meetings. In bare summary, Ms Rowe rehearsed the history of the running deficit, reminded Miss Clarke that the Flexible Working Policy did not permit staff members to maintain deficits above the

maximum, and stressed that her suggestions about possible alternative working patterns had been intended as support and not to cause any distress or upset.

30 Through disclosure in these proceedings, Miss Clarke discovered that the HR team had recorded Ms Rowe's request for assistance with the letter of 22 November 2019 as a 'Discipline' matter. That was a point of classification on which, I am satisfied, Ms Rowe was not consulted. There would have been no reason to consult her about how HR should classify one of its own files. I am also satisfied that Ms Rowe did not say or imply that she was seeking to initiate any form of disciplinary action against Miss Clarke. Nor did she envisage doing so in the future.

31 In December 2019 Miss Clarke was away from work for some days owing to a broken toe. She told me that she had returned to work earlier than her doctor had advised because she felt that otherwise she would somehow find herself in trouble with Ms Rowe. It was not suggested to Ms Rowe that she had been aware that Miss Clarke was at work when unfit and I am satisfied that she was not.

32 On 22 January 2020 Ms Rowe informed Miss Clark that she had given her a rating of 'good' in her mid-year review.

33 On 5 February 2020 Miss Clarke and Ms Rowe attended a Formal Attendance Review Meeting ('FARM'), resulting from the fact that Miss Clarke's sickness absences since June 2019 had reached the 'trigger' point for action under the Respondent's absence management procedures. Ms Rowe exercised her discretion to take no formal action.

34 On 6 February 2020 Miss Clarke raised a formal grievance against Ms Rowe. My findings of fact relating to the grievance process are collected under a separate heading below.

35 Ms Rowe was not made aware of the grievance until 22 June 2020.

36 On several occasions between November 2019 and July 2020 Miss Clarke informed Ms Rowe, sometimes at very short notice, that she would be absent from work on specified days or for parts of specified days, for reasons given (for example, visiting schools to which she was considering sending her daughter, and taking her mother to hospital). Ms Rowe accommodated these absences without objection.

37 During the same period, there were also some communications from Ms Rowe in addition to those already mentioned, to which Miss Clarke took exception. These included an email of 5 February 2020 reminding her of the need for timely delivery of draft reports to allow for them to be read and considered before the deadline for countersigning. Miss Clarke also objected to notably mild messages about her timekeeping on two occasions in April and May 2020.

38 On 29 July 2020 Miss Clarke commenced a period of sick leave, from which she did not return until almost a year later. GP certificates referred to 'work-related stress'.

The grievance process (February 2020 – April 2021)

39 As I have mentioned, Miss Clarke issued her grievance on 6 February 2020. In broad terms, she complained of being undermined and bullied by Ms Rowe, in particular by her raising the subject of compressed hours and flexible working arrangements, the contents of the email of 24 September 2019 and subsequent correspondence arising out of it (including communicating the full response to her complaint on 22 November 2019 in the form of a letter rather than an email) and generally, her 'lack of empathy'.

40 The Respondent's grievance procedure provides for certain 'mandatory actions'. These include the requirement for the manager conducting the grievance to hold a meeting with the aggrieved employee within 20 working days of receipt by the manager of the grievance. The time limit may be extended where the employee exercises the right to be accompanied and his/her representative or companion cannot attend on the date initially offered. In such circumstances, the meeting is to be held within five working days of the date originally proposed, 'wherever possible'. The procedure further stipulates that, 'wherever possible' grievance appeal meetings should be held within 20 working days of receipt of the notification of intention to appeal and that the appeal outcome should follow within 10 working days of the appeal hearing.

41 The grievance was referred to Ms Lizzette Ambrose, Interim Head of Service.

42 On 3 March 2020 Ms Ambrose interviewed Miss Clark to explore her complaints.

43 The first national Covid-19 lockdown began on 23 March 2020.

44 Ms Ambrose does not appear to have taken any material further step in relation to the grievance until 22 June 2020, when she invited Ms Rowe to an interview.

45 Owing to difficulties in co-ordinating dates, Ms Ambrose's interview of Ms Rowe did not take place until 22 September 2020.

46 On 28 October 2020 Ms Ambrose sent her decision on the grievance to Miss Clarke. She found that Ms Rowe had not acted inappropriately and dismissed the grievance.

47 Miss Clarke appealed against the grievance outcome, presenting her grounds of appeal on 25 November 2020. Mr Walters (a witness before me) was appointed to handle the grievance appeal. He held meetings with Miss Clarke and Ms Rowe on 14 January and 16 March 2021 respectively. (The meeting with Miss Clarke had initially been set for 21 December 2020 but was put back at her request in order to enable her trade union representative to accompany her.)

48 On 9 April 2021 Mr Walters issued his decision on the appeal. He acknowledged that the first stage of the grievance process had been much delayed and apologised to Miss Clarke for that fact. He did point to the disruptive effect of the first national Covid-19 lockdown and to the fact that Ms Ambrose had been undergoing treatment for a serious condition (from which, sadly, she had later died). He further maintained that there had been valid reasons for the interval between 22 June and 22 September 2020. He also made the point that, since he had been unable to confer with Ms Ambrose, it had been necessary for him to re-visit the evidence for himself, which had unavoidably increased the time needed to examine and decide the appeal. As to the substance of Miss Clarke's complaint, Mr Walters agreed with Ms Ambrose. He did not accept that Ms Rowe's email of 24 September 2019 had conveyed a veiled threat to reduce Miss Clarke's hours. He found that Ms Rowe had properly raised the question whether she was struggling with her contracted hours.

49 I find as a fact that the explanation for the delay in completing the grievance process offered by Mr Walters was broadly correct. It was not helped by the fact that the Respondent did not have an independent mechanism for keeping track of grievances. I have no doubt that the Covid-19 lockdowns instituted on 23 March and 5 November had a severely disruptive effect upon all facets of HMPPS's administration, as they did upon almost all public and private enterprises. That said, remote working arrangements had become commonplace by March 2020 and served to enable most well-run organisations to continue to perform most of their functions. I have been presented with no evidence that the initial lockdown or the second, or the longer-term consequences which followed each after the main restrictions had been lifted, were a bar to progressing the grievance process (at first instance and on appeal) within a reasonable period. I have not been provided with any detailed evidence relating to Ms Ambrose's ill-health or the treatment prescribed for it. It seems that she must have been grievously ill by late 2020, given that, most regrettably, she died at the end of the year or early in 2021. That said, it appears that she was working up to 12 October 2020, when she gave her decision. I have been shown no evidence to demonstrate that the delay in the first-instance stage of the grievance can be attributed to Ms Ambrose's medical condition or any related treatment.

29 July 2020 – 21 June 2021: first long-term sickness absence

50 In the meantime, as I have already mentioned, Miss Clarke had, on 29 July 2020, commenced a period of sick leave which, in the event, lasted some 11 months. 'Fit notes' cited 'work-related stress'.

51 In light of the grievance against Ms Rowe, Ms Winch (already mentioned) was assigned to manage Miss Clarke's sickness absence.

52 In February 2021 Miss Clarke made an application for 'sick leave excusal' ('SLE'). This is a measure by which, in special circumstances, sickness absence may be discounted for the purposes of the Respondent's absence management procedures. Applications for excusal must be presented on a prescribed form, bear the applicant's 'wet' signature and be supported by medical evidence. Decisions on such applications are reserved to a small group of very senior managers. Aside

from cases of assault, the power to grant excusal may be exercised only where employees contract relevant conditions[1] or sustain injuries whilst on duty. Where the qualifying criteria are met, the discretion to excuse is limited to a maximum of six months' sickness absence.

53 The gist of Miss Clarke's SLE application was that her sickness absence record since July 2020 was attributable to a combination of 'insidious bullying' by Ms Rowe and a failure to deal with her grievance appropriately or in a timely way.

54 Ms Winch completed the part of the SLE application form designated for the line manager. On what she regarded as the key question, namely whether Miss Clarke's absence from work was 'directly caused' by the 'situation at work' or by 'how she perceived the situation at the time', she offered no opinion.

55 The SLE application was the subject of some initial delay because of the need for Miss Clarke's 'wet' signature.

56 In the usual way, OH evidence was commissioned for the purposes of the SLE application. It was delivered no later than 11 May 2021 but, for reasons that are not clearly or adequately explained, Mr Walters did not have sight of it until some two months later, whereupon he gave his decision without further delay. I will return to that decision and related events in my narrative under a separate heading below.

57 It appears that, apart from the delay in dealing with the SLE application, the only complaint of substance raised by Miss Clarke in relation to the period of absence from July 2020 to June 2021 concerns remarks made by Ms Winch at a FARM on 30 April 2021. In the course of a discussion about Miss Clarke's proposed phased return to work, Ms Winch made the point that if she was to return to the prison, she would do so under the line management of Ms Rowe. She explained that there was, at least for the time being, no alternative: remote management by someone located elsewhere was not workable (tasks and duties needed to be allocated by a manager on site) and Ms Rowe was the sole Senior Probation Officer at the prison (it seems that, had it been 'fully resourced', there would have been more than one). Ms Winch also stated that mediation would be available to support Miss Clarke's return to the prison, subject to both her and Ms Rowe consenting. Miss Clarke, who was accompanied by a trade union representative, was not put to an election on the spot and the meeting ended with agreement that she would consider her options.

58 Following discussions at further meetings it was agreed that Miss Clarke would commence a phased return to work, nominally at the prison but working from home, with effect from 26 June 2021. It was further agreed that during the phased period she would continue to be managed by Ms Winch, and that during that time mediation between her and Ms Rowe would be arranged.

[1] 'Work-related stress' is a recognised qualifying condition according to guidance published by the Respondent.

June 2021 – January 2022

59 Miss Clarke duly returned to work (remotely), under the (provisional) line management of Ms Winch.

60 A mediation between Miss Clarke and Ms Rowe was arranged for 5 August 2021.

61 On 12 July 2021 Mr Walters issued his decision on the SLE application, which was to refuse it, stating: 'Having received advice from OH that the cause of stress was unlikely to impact on their [sic] ability to perform their [sic] duties I do not authorise the sickness absence excusal.' It was not suggested that his interpretation of the OH evidence was wrong.

62 The mediation fixed for 5 August 2020 did not take place because, by an oversight, Miss Clarke failed to attend. She wrote the following day to apologise.

63 Following a further FARM on 27 August 2021 Ms Winch wrote to Miss Clarke on 3 September 2021 to issue her with a Stage 1 Unsatisfactory Attendance Warning. It was not in dispute that this action was compatible with the Respondent's absence management procedures.

64 On 24 September 2021 Miss Clarke submitted an appeal against Mr Walters's decision on her SLE application.

65 In accordance with the Respondent's procedures, a further OH report was commissioned for the purposes of the SLE appeal. The report was duly produced and, on 8 November 2021, sent to Miss Clarke. In broad terms, it stated that the criteria for SLE were not likely to be met but the appeal was for HMPPS to determine. Miss Clarke chose not to send the report to the Respondent. Instead, she wrote to OH proposing amendments to the report.

66 On 6 December 2021, Miss Clarke and Ms Rowe were informed that a fresh mediation date had been set on 19 January 2022.

67 On 23 December 2021, OH wrote to Miss Clarke explaining that the report of 8 November 2021 could not be amended because the practitioner responsible for it had left the service. Accordingly, if the report as it stood was not to be used, a new referral would have to be made.

68 On 6 January 2022 Miss Clarke wrote to Ms Winch asking her to submit a fresh referral to OH, which she agreed to do. The further referral failed because, as Ms Winch advised Miss Clarke on 12 April 2022, the OH provider had closed the case owing to Miss Clarke's failure to respond to its correspondence asking her to submit a particular form. It seems that, at Miss Clarke's request, Ms Winch submitted yet another referral, but it did not result in any fresh report being produced (presumably because it was overtaken by events - in particular Miss Clarke's resignation). As I understand her, Miss Clarke does not direct any

complaint of culpable delay at Ms Winch (or any other manager) in respect of these referrals. In any event, I find none.[2]

13 January 2022 – 27 June 2022: second long-term sickness absence

69 Miss Clarke was signed off sick between 13 January and 27 June 2022 as a consequence of the psychological impact of a most tragic and distressing series of family bereavements which occurred suddenly and unexpectedly between December 2021 and February 2022.

70 On 9 June 2022 Ms Rowe communicated her decision that she was no longer prepared to engage in mediation with Miss Clarke in view of the time which had passed.

27 June 2022 – 21 July 2022

71 Miss Clarke returned to work on 27 June 2022. One of her pleaded complaints is that she was permitted to return without mediation between her and Ms Rowe having taken place. Mediation would have been possible only with the agreement of Ms Rowe. Her decision in June 2022 that the time for mediation had passed was rightly not challenged before me as impermissible. There was no disagreement between Miss Clarke and Ms Winch about the necessity for her to return to work. Ms Winch explained to her that it was not practicable for her to report to any other manager. She was not challenged about that at the time or in her evidence before me. Ms Winch did moot the possibility of a transfer to another prison but Miss Clarke was not interested in that idea. That made it inevitable that her return would lead to her being managed as before by Ms Rowe.

72 By agreement the return was to be on a 'phased' basis, with a view to Miss Clarke resuming full-time working at the end of a specified period. She began with two days' working from home. This was part of a 'settling in' process devised by Ms Winch. Her first day back at the prison was 29 June 2022. On that day a brief, informal meeting took place at which Miss Clarke, Ms Rowe, Ms Winch and Ms Fallows were present. It was not pre-arranged. It seems to have been held at the suggestion of Ms Fallows, who was not based of the prison but happened to be visiting. She was aware of the background. In the course of the meeting, which was mainly directed to welcoming Miss Clarke on her return to work, Ms Fallows at one point asked about her child care arrangements. This did not provoke a strong reaction from Miss Clarke at the time, but she told Ms Winch afterwards that she had been upset by the enquiry.

73 Having been told by Ms Winch about Miss Clarke's comment following the meeting, Ms Fallows proposed a further meeting with a view to clearing the air. It was set up for 6 July 2022 and was conducted by video conference call. Those present were Miss Clarke, Ms Fallows and Ms Winch. Ms Fallows asked Miss Clarke why she felt unhappy about what had been said on 29 June. She replied that she had taken the reference to child care arrangements as some sort of

[2] The OH referrals mentioned in this paragraph are those related to the SLE appeal. There were separate referrals arising out of Miss Clarke's sickness absence between January and June 2022, but it is not necessary to record any findings about those.

insinuation (presumably about her readiness to meet her obligations as a full-time member of staff). Ms Fallows expressed regret, stressing that no insinuation been intended and that her purpose had been only to welcome her back and assure her of support. The overall tone of the meeting was constructive and quite amicable.

74 A further meeting took place between Ms Winch and Miss Clarke on 12 July 2022, for the purpose of discussing her sickness absence record. On 19 July 2022 Ms Winch issued her with a Final Written Improvement Warning. It was not in question that this measure was within the discretion afforded to her under the Respondent's absence management procedures.

75 At the same meeting, Miss Clarke's trade union representative raised the question of extending the period of the phased return to work. Ms Winch agreed to extend it by at least a further week (holding open the possibility of further extensions) and to pause further case allocations to Miss Clarke in the meantime.

76 By an email of 21 July 2022 Miss Clarke communicated her resignation 'as of today', giving no reason. She later clarified that her intention was to resign on notice but to take accrued annual leave during the notice period.

Secondary Findings and Conclusions

Is any legitimate ground of complaint shown?

77 I should say at the outset that I am in no doubt that Miss Clarke feels genuinely aggrieved about all the matters on which she relies in this case. But the sincerity with which a claim (or defence) is pursued is not the touchstone. My analysis must be objective.

78 I take the view that most of Miss Clarke's complaints are about matters on which no reasonable sense of grievance can rest. Those which I place in that category can be listed as follows.

(1) Ms Rowe's response to the email of 4 October 2019.
(2) Alleged bullying by Ms Rowe between February and July 2020.
(3) Alleged misrepresentation by Ms Rowe to Ms Ambrose concerning Miss Clarke's timekeeping.
(4) Ms Winch's conduct of the FARM of 30 April 2021.
(5) Ms Winch's imposition of the Stage 1 Warning on 3 September 2021.
(6) Ms Winch's management of Miss Clarke's return to work (June-July 2022).
(7) Ms Winch's imposition of the Final Written Warning on 19 July 2022.

Treating all of these as 'live' complaints (I heard little or no evidence or argument in support of some), I will consider them briefly in turn.

79 As to (1), in my view Ms Rowe's response to Miss Clarke's email of 4 October 2019 was unobjectionable. As I will record below, I do accept that she made a slight error of judgement in raising Miss Clarke's contractual hours as often as she did between May and September 2019 and particularly in returning to that subject in her email of 24 September 2019 in circumstances where the matter had

been fully debated five days before and Miss Clarke had agreed to take the necessary action to get the deficit within permitted limits by the end of the relevant period. But, having received the email of 4 October 2019, Ms Rowe did nothing deserving of any reproach. She apologised and stressed that it had not been her wish to cause any upset, only to emphasise the applicable rule and point out choices that might be available if she had a real difficulty in abiding by it. Her communications on the subject were clear, courteous and fair. And she cannot be faulted for sending a letter (rather than email) on 22 November 2019. She rightly wanted to set out the position fully and in detail and a letter was the appropriate means of doing so. If writing it amounted to 'formalising' the issue to a certain extent, it is as well to bear in mind that it was Miss Clarke who had insisted that the matter be dealt with in writing at all. There was no veiled threat or ulterior 'agenda'. I am satisfied that Miss Clarke's repeated allegations to this effect are misplaced.

80 As to (2), there simply was no bullying between February and July 2020 (or at any other time). It may be that Miss Clarke did not regard Ms Rowe as her preferred sort of manager. It was common ground that Ms Rowe tends to do things 'by the book'. She has a solid grasp of the rules and is not slow in enforcing them. Her style is more 'hands-on' than that of some other managers. It may be that her manner in dealing with those who report to her is more brisk than that of some of her peers. But this is what employees in any hierarchical system must expect. It is not a proper basis for any sort of complaint let alone a legal complaint.

81 Turning to (3), I am satisfied that there was no misrepresentation on the part of Ms Rowe to Ms Ambrose (or anyone else) concerning Miss Clarke's timekeeping. I find no evidential basis for this allegation.

82 The complaint concerning Ms Winch's conduct of the FARM of 30 April 2021 (item (4)) is also groundless. If Miss Clarke was upset to be told that if she returned to the prison she would report again to Ms Rowe, she cannot fairly hold that fact against Ms Winch. What Ms Winch told her was entirely correct and she would have been doing her a disservice to tell her anything different.

83 It is convenient to take items (5) and (7) together. In my judgement, Ms Winch's application of the attendance management procedure to Miss Clarke was unimpeachable. Of course, Miss Clarke was no doubt disappointed to receive both warnings. But that does not mean that she has a legitimate ground for feeling aggrieved. It was common ground that on both occasions the 'trigger points' under the procedure had been massively exceeded. In the case of the first warning, the absence had lasted for nearly a year. The grievance accusing Ms Rowe of bullying had failed at first instance and on appeal. The SLE application had also failed at first instance. And the fact that Miss Clarke was seeking to pursue an appeal against the SLE decision was not a good reason not to issue a warning. The warning would have been apt even if the SLE application (or appeal) had fully succeeded and six months' sickness absence had been expunged from the record. It is true that the second period of absence, which precipitated the Final Written Warning, did arise out of a string of truly distressing and unforeseeable family bereavements, but it was, again, a very lengthy period of absence and Ms Winch had a duty to operate the procedures objectively and even-handedly, with an eye to all relevant circumstances including the pressing needs of the prison service.

Miss Clarke was not a 'special case' as, for example, a disabled employee in her situation would have been. As I have noted, prior occasions on which it would have been open to the Respondent to take formal action under the attendance management procedure had been allowed to pass. In my judgement it was entirely permissible for Ms Winch to conclude in July 2022 that a Final Written Warning was needed.

84 As to (6), I find no foundation for any reasonable complaint (if one was really intended at all) in relation to the arrangements for Miss Clarke's return to work. My findings of fact can be left to speak for themselves. The arrangements were carefully considered and entirely reasonable.

85 That leaves the following matters about which, in my view, Miss Clarke is entitled to feel aggrieved, to a greater or lesser extent.

(8) Ms Rowe's persistent questioning of her about her hours (May to September 2019).
(9) Ms Rowe's email to her of 24 September 2019.
(10) The conduct of the grievance process.
(11) The conduct of the SLE application.
(12) Ms Fallows's remarks at the meeting on 29 June 2022.

Again, I will consider these in turn.

86 It is convenient to take items (8) and (9) together. As I have already stated, I do take the view that Ms Rowe showed rather poor judgement in her exchanges with Miss Clarke between May and September 2019 on the subject of working hours. It was perfectly proper to draw attention to the rules and, if need be, the possible consequences of breaching them. The error was in doing so repeatedly, in circumstances where she had no reason to doubt that her message had got through. It was compounded by the email of 24 September 2019, sent only a few days after a meeting at which Miss Clarke had given an assurance that she would get the deficit within the permitted limit by the end of the month. Ms Rowe had very little experience at that stage of line management and no doubt she made the common mistake of focusing narrowly on a desired result (compliance with the deficit rule) without reflecting on the possible impact of her behaviour on the sensibilities of the person in front of her. With careful thought, she ought to have appreciated that returning to the scene repeatedly ran the risk of irritating Miss Clarke and perhaps impairing the cooperation between them. That said, she had no good reason to anticipate the quite disproportionate reaction which eventuated.

87 As to item (10), I am satisfied that Miss Clarke has a legitimate ground for complaint. On any view, the period of 14 months which it took for the Respondent to consider and determine the grievance at first instance and on appeal was wholly unreasonable. I do not find it necessary to repeat my findings of fact set out above. There was no bar to disposing of the grievance process within a reasonable period.

88 Turning to item (11), I am satisfied that there was a culpable delay in determining the SLE application at first instance, between 11 May 2021 (when the

first OH report was ready) and 12 July 2021 (when Mr Walters issued his decision).[3] This seems to be attributable to an internal failure of communication. I find no culpable delay on the part of the Respondent in the long saga of the proposed appeal. It was common ground that the appeal could not run without OH evidence. Such evidence was generated promptly but suppressed by Miss Clarke, presumably because she judged that it was not favourable, or sufficiently favourable, to her case. Subsequent attempts to commission fresh OH evidence seem to have been defeated by her failure to engage appropriately and/or timeously with the process. Again, my findings of fact above can be left to speak for themselves.

89 As to item (12), I find that Ms Fallows did misjudge matters at the meeting of 29 June 2022 by gratuitously asking Miss Clarke about her child care arrangements. She knew the background. She was aware that the situation was delicate. The entire focus should have been on welcoming Miss Clarke back to work, rather than venturing into territory which (for good reason or not) she clearly judged threatening. And in the case of Ms Fallows, the mitigation of being new to line management was certainly not applicable.

Is a repudiatory breach of Miss Clarke's contract of employment shown?

90 I start by reminding myself that the law does not require an employer to act *reasonably*. The *Malik* test, which sets the bar much higher, means what it says.

91 It is convenient to consider items (8), (9) and (12) together. Here I have found minor instances of insensitive and ill-judged comments by two managers, one over a period of months in 2019 and the other on an isolated occasion in June 2022. Whether taken singly or together, these come nowhere near to amounting to a breach of Miss Clarke's contract employment let alone a repudiation of it.

92 The unexplained two-month delay in the first-instance stage of the SLE process (item (11)) was the product of some sort of incompetent oversight. It is to be regretted. But again, it was not an event of legal significance. If it amounted a breach of contract at all, it was a minor one and no question of repudiation arises.

93 That leaves the unacceptable delay in the grievance procedure (item (10)). Again, the challenge is procedural and Miss Clarke rightly did not argue that the outcome of the grievance was impermissible. The EAT has recognised the right of an employee to a proper and timely means of redress for his or her grievances (*WA Goold (Pearmak) Ltd v McConnell & another* [1995] IRLR 516). Whether this is seen as an incident of the term of trust and confidence or as a free-standing implied term is unimportant. Either way, in my judgement, the Respondent repudiated Miss Clarke's contract of employment by failing to provide her with such a means of redress in this case.

[3] Not unnaturally, Miss Clarke disagreed with the *substance* of the SLE decision as well as the *process* which led to it, but she rightly did not argue that Mr Walters had approached his task in bad faith or reached an impermissible conclusion on her application. Her challenge was based on a procedural ground only.

Did Miss Clarke resign in response to any repudiation of her contract?

94 In my judgement, it is very clear that Miss Clarke resigned when she did because of the final warning of 19 July 2022. But for that warning, she would not have sent her email of resignation two days later. Certainly, she had not ceased to feel aggrieved about many other events which had occurred between May 2019 and 29 June 2022, but she was nonetheless prepared to contemplate a future at the prison up to the moment when she received the final warning. In other words, the final warning was, for her, the 'last straw'.

95 Among those prior events was one which, as I have found, constituted a repudiation of her contract of employment, namely the failure to provide her with a proper and timely means of redress for her grievance (item (10)). I am satisfied that this failure constituted a material factor in her decision to resign.

Affirmation?

96 Did Miss Clarke affirm the contract following that repudiation? In my view it is inescapable that she did. She remained in her employment for a further period of over 15 months after the grievance process came to an end. Her behaviour can only be seen as signalling her election to affirm the contract rather than exercising a right to treat it as being at an end.

97 I have identified two matters post-dating the repudiation about which Miss Clarke is entitled to make some complaint. These are the Respondent's culpable delay in the first-instance stage of the SLE application (May to July 2021) and Ms Fallows's ill-considered intervention at the meeting on 29 June 2022 (items (11) and (12)). Could either be seen as having operated to revive Miss Clarke's right to rely on the repudiation as entitling her to resign and treat herself as constructively dismissed? The obvious answer is no. Both were minor matters. And in both cases Miss Clarke did not choose to rely on them as grounds for leaving her employment. If they added anything legally to the repudiation, she clearly affirmed the contract as (further) breached, in the one case by remaining in her employment and pressing on with the SLE appeal and in the other by attending the meeting of 6 July 2022 and thereafter continuing to work and giving every indication of a willingness to treat Ms Fallows's question of 29 June 2022 as forgiven.

98 This analysis leaves Miss Clarke with a solitary 'last straw' on which to rely: the Final Written Warning. But here, as I have found, she has nothing to complain about. The warning was entirely proper. She cannot rely upon it as adding *anything* to the antecedent breach. The right to rely on that breach had been extinguished by affirmation and only a valid 'last straw' event could have revived it. There was none.

Conclusion

99 No constructive dismissal is established. Miss Clarke did not resign in response to any breach of her contract of employment.

Outcome and Postscript

100 For the reasons given, the complaint of unfair dismissal, sincere and heartfelt as it is, fails.

101 Although the Respondent has succeeded in this litigation, it should learn lessons from it, particularly about the importance of managers exercising judgement and sensitivity in the way in which they communicate with those for whom they are responsible and about the pernicious consequences which so often result from failures to complete internal processes in an efficient and timely fashion.

Employment Judge Snelson
09/01/2024

Judgment entered in the Register and copies sent to the parties on : 11/01/2024

For Office of the Tribunals