EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 8000119/2023

Heard in Dundee on 24, 27, 30 November, 1, 4 December 2023 and 5 January 2024

Employment Judge J Young
Tribunal Member W Canning
Tribunal Member R Martin

GM (Anonymity Order granted)	**Claimant** **In person**
Fife Council	**Respondent** **Represented by:** **Ms K Sutherland,** **Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous judgment of the Tribunal is that:-

(1) The claim of unfair (constructive) dismissal does not succeed and is dismissed.

(2) The claims of discrimination under sections 15, 20 and 21 of the Equality Act 2010 do not succeed and are dismissed.

REASONS

E.T. Z4 (WR)

Introduction

1. In this case the claimant presented a claim to the Employment Tribunal claiming that he had been unfairly (constructively) dismissed and discriminated against because of the protected characteristic of disability.

2. The respondent denied dismissal or constructive dismissal or that there had been discrimination.

3. By the date of the final hearing the respondent conceded that the claimant was a disabled person under s6 of Equality Act 2010 by reason of mental fragility. There had also been identified a list of issues for the Tribunal as follows:-

"*Preliminary issue*

Time Bar – Section 123 of the Equality Act 2010

1 Do any of the alleged acts of discrimination form part of a course of conduct extending over a period ending on or after 18 November 2022?

2 To the extent that any of the alleged acts of discrimination do not form part of a course of conduct as above and occurred before 18 November 2022, would it be just and equitable to extend time in respect of these allegations?

Substantive Issues

Constructive Unfair Dismissal – Section 95(1)(c) of the Employment Rights Act 1996

1 Did the Respondent commit an actual or anticipatory breach of the following implied terms of contract:

1.1 the respondent will make reasonable adjustments in terms of EqA when under a legal obligation to do so;

1.2 the respondent will not without reasonable and proper cause conduct itself in a manner calculated and likely to destroy or seriously

damage the relationship of confidence and trust between employer and employee;

1.3 the employer will comply with his obligations under the Health and Safety at Work etc.1974; and/or

1.4 the employer will comply with its own policies and procedures, specifically parts of the following policies and procedures: Flexi Hours Policy. Supporting Mental Health at Work Policy, Attendance Management Policy, Attendance Management Procedure, Occupational Health Policy and Grievance Policy and Procedure?

2 If so, was the breach a repudiatory breach of contract (it being accepted that breach of the implied term at 1.2 above would amount to a repudiatory breach)?

3 If so, did the Claimant resign in response to that breach?

4 Did the Claimant affirm the contract of employment following any repudiatory breach of contract?

5 If the Claimant was constructively dismissed, was the dismissal unfair?

Failure to make Reasonable Adjustments – sections 20-21 of the Equality Act 2010

1 Did the Respondent apply to the Claimant the provision, criterion or practice of (i) the requirement to work 12 hour shifts at Keir Hardie and/or (ii) the requirement to work at Blairoak?

2 If it did, did the PCP put him at a substantial disadvantage compared to those who do not have the Claimant's disability?

3 Did the Respondent know or ought it to have known that (1) the Claimant was disabled at the material time; and (2) the Claimant would likely be put at a substantial disadvantage as compared to those who do not share his disability by application of the PCP?

4 If the duty arose, did the Respondent take such steps as it was reasonable to have to take to avoid the disadvantage?

Discrimination Arising from Disability – section 15 of the Equality Act 2010

1 Did the Respondent know or ought to have known the Claimant was disabled at the material time?

2 Did the Respondent treat the Claimant unfavourably in the following ways because of his absence from work which arose in consequence of his disability:

2.1 failure to act sooner in relation to his issues with his line manager to allow him to return to work earlier than November 2022;

2.2 the number of occupational health referrals that were made during the claimant's absence which began to March 2022;

2.3 ignoring the claimant's GP's view that he was fit to return to work which the claimant relayed on or around October 2022;

2.4 failure to act on the OH recommendation to keep the claimant's stress levels to a minimum to prevent any more relapse of his mental health;

2.5 failure to make reasonable adjustments to the rota at Keir Hardy; and/or

2.6 a failure to investigate his grievances raised on 27 October 2022 and 30 January 2023?

3 If they did, was that treatment a proportionate means of achieving a legitimate aim?

Remedy

What is the appropriate level of compensation that the Claimant should be awarded in the event he is successful in any part of his claim?" (J111)

4. While the List of Issues included whether the respondent had knowledge or constructive knowledge of disability at the material time, no submissions were made on that issue on conclusion of the hearing.

Documents

5. The parties had helpfully liaised in providing a Joint File of documents comprising two folders paginated 1-864 (J1-864).

The hearing

6. At the hearing the Tribunal heard evidence from:-

(1) The claimant.

(2) Wendy Thomson, Lead Officer with the respondent Social Work Department since 2013 who managed six Senior Social Work Officers and approximately 96 staff.

(3) Karen Dick, a Senior Social Work Officer based at Number 8 Keir Hardy, Methil and who supported core staff of around 10 at Keir Hardy which was occupied by two service users. She was also part of the recruitment team for the respondent.

(4) Caroline Bruce, Interim Service Manager – Adult Services Resources with the respondent since 2021 and who was responsible for the strategic development of the Social Work Service.

(5) Leigh Donnelly, HR Adviser with the respondent since 2012 who gave support to the Health and Care Partnership on HR matters.

(6) Lee Milne, Senior Social Care Worker with the respondent since September 2022 having been employed by the respondent in March 2019.

7. From the documents produced, relevant evidence led and admissions made the Tribunal were able to make findings in fact on the issues.

Findings in fact

8. The respondent includes in its provision of services in the Fife area health and social care which includes help for adults and older people.

9. The claimant had continuous service as a Social Work Officer with the respondent in the period between 17 March 2003 (J263) and 13 February 2023 when he resigned from his employment.

10. As a large employer the respondent have in place various policies including an Attendance Management Procedure (J277-295); a Supporting Mental Wellbeing at Work Policy (J274/276); an Occupational Health Policy (J296/298); and a Grievance Policy (J299/312).

11. The respondent is responsible for various homes occupied by vulnerable service users. The claimant was one of the social workers who supported vulnerable adults who required 24 hours' care. The level of engagement with those users would depend on their needs as identified by a care package. The claimant would work 36 hours in a week comprising 7/8 hours overnight or daytime shifts. In the course of his employment by the respondent he had been engaged as a Social Care Worker in numerous homes within the respondent jurisdiction.

Disability

12. The impairment of the claimant was mental fragility relating to harrowing historic sexual and physical abuse whilst the claimant was a child in care of the respondent between the ages of 8 and 16. That had a detrimental impact on his mental health. In the course of his employment he had various absences due to mental health issues.

Employment position from January 2022

13. In December 2021 following a period of absence the claimant returned to work at 9 Keir Hardie but then requested that he might move his place of work to 8 Keir Hardie. The respondent agreed and arranged three "shadow shifts" at number 8 Keir Hardie. That accommodation housed two vulnerable service users who were supported 24/7.

14. By email of 12 January 2022 (J317/318) the claimant was appreciative of the opportunity to work at 8 Keir Hardie and found that shift had been enjoyable and the service users were a client group he enjoyed supporting. He also acknowledged that support tools had been put in place to assist with mental health issues through counselling at Kingdom Abuse Survivors Project in Fife (KASP).

15. However, while he felt that life was "*getting back on track"* by March 2022 matters had deteriorated and he commenced a period of sickness absence as from 9 March 2022. That absence was identified by successive Statements of Fitness to Work as "*stress at work"* (J376).

16. At that time the claimant advised that he was suffering from anxiety, low mood, difficulty sleeping, nightmares, loss of self esteem and that the sleep disturbance left him feeling fatigued.

17. Around this time the claimant had engaged with the *"Redress scheme"* which sought to assess compensation in respect of the historic abuse. That brought him into contact with lawyers seeking information and compiling that information, reviewing police statements and the like. This recall of past events put him in a "*dark place*". His GP prescribed Mirtazapine as an antidepressant medicine with sleep promoting effects.

18. The claimant then entered the respondent Attendance Management Procedure. Part of the procedure required a long term absence review after the first four weeks of absence and then again after four months. The claimant engaged in that process albeit he expressed surprise on 6 April 2022 that he had never had any prior involvement in that process (J329-333).

19. As part of that review the respondent instructed an Occupational Health Assessment (OHA) and discussed that with the claimant (J332-333). At this time, the claimant expressed feelings of lack of trust or confidence in the respondent and that he would likely leave his employment (J333-336).

OH report of 3 May 2022

20. The claimant attended a telephone consultation with an Occupational Health Consultant on 3 May 2022 and the report was then received by the

respondent (J418/419) together with "*contemporaneous notes*" taken (J420/424).

21. The report advised that the current issues related to the claimant having been abused as a child; as a consequence of an incident at work in approximately 2016 his symptoms had been triggered and he continued to struggle with his mental health; he did not believe he had been supported in relation to his mental health and was now of the opinion that he had lost confidence and trust in his employer; and that he had been "*let down by them not only as a child but now as an adult".* As a consequence it was observed that in the opinion of the consultant the claimant remained "*unfit for work*". The assessment advised that absence was likely to continue until his perceived work stress had been resolved and a mutually agreed resolution found but that he remained unfit for duties for the foreseeable future. It was also advised that it was not the "*actual or role or duties*" carried out by the claimant which caused his "*current symptoms or absence from work however the connection with Fife Council appears to be the trigger ….*" No supports or adjustments were advised as enabling the claimant to make a return to work.

22. The claimant and the respondent discussed the contents of the report on 4 May 2022 (J426). The claimant clarified that the incident referred to in the report which triggered his symptoms took place in 2013 and not 2016 as indicated in the report. He was asked what supports might be put in place to allow a return to work but at that time *"could not think of anything which could help".* It was agreed that fortnightly contact would be made. He advised that his engagement with the Redress scheme was continuing to impact on his mental health at that point. He advised that he considered the mental health and work related stress had been an issue for a number of years which had not been addressed but that was not a reflection on his line manager at the time Karen Dick. He was assured he was a valued member of staff (J426).

Contact after OH report of 3 May 2022

23. Contact continued to be made with the claimant who remained off work with submission of the appropriate Statements of Fitness for Work (J427/430).

24. A meeting was arranged for the claimant for 26 May 2022 at which time he indicated by email of 24 May 2022 (J433) that he may be able to return to work were he on night shift only for a period. However, discussion took place between the claimant and Karen Dick on 25 May 2022 when it was explained that the respondent could not support night shifts only in 8 Keir Hardie as they were working at that point with "*sleepover rotas".* In any event in a further conversation the claimant advised that he was unable to return to work at present as the discussions on the Redress scheme had overwhelmed him and he had disturbed sleep. At that point he had stopped counselling sessions with KASP.

25. The claimant met with Caroline Bruce and Leigh Donnelly on 26 May Notes of that meeting (J441/447) reveal an extended conversation with the claimant. He explained that he was in a "*dark place"* at that point. There was consistent reference to connection with the respondent being the source of his stress and anxiety due to the historic sexual abuse. The difficulty was in knowing how that could be overcome to allow the claimant a return to work. The outcome of the meeting was that the claimant was offered certain options for consideration namely whether (a) he might consider redeployment into other areas of the respondent; (b) possibly relocate to a separate NHS post (which would involve application/interview process) and (c) whether he would wish to be considered suitable for permanent ill health retirement. When the notes of the meeting were forwarded to the claimant on 30 May 2022 (J449) those options were repeated. The claimant in his response (J449) advised that he would "*just discard"* the notes as they were not "*needed any more".* He advised that NHS employment and ill health retirement was not a preferred option for him but redeployment might be advantageous for night duty as he had restless leg syndrome and night duty would suit that condition. He suggested a further meeting might be appropriate to

consider the matters again as he had been given a few "*home truths"* by his partner which had had a positive effect (J449).

26. A further meeting was held with Caroline Bruce and Leigh Donnelly on 31 May 2022 (J451/453). At that time the claimant gave more detail of discussions with his partner; that he was now more positive about matters; and hoped he would be *"much better and hopefully determined"* after the existing sick line expired on 27 June 2022. . He was advised that a further OHA would be required within the *"next few weeks".* He explained that he did not want to proceed with ill health retirement at that point and that NHS work was not attractive. He advised that he saw no issues about coming back to duties with Karen Dick as his line manager.

27. However the following day the claimant advised by email of 1 June 2022 (J455) that after discussion with his partner he would wish to apply for ill health retirement as he considered that was the *"most responsible thing to do and request due to the ongoing mental health issues I have suffered…".* Again he indicated that his mental health was still unpredictable and the main issue with the respondent was the historic abuse. He asked for assistance in making the application for ill health retirement.

Ill health retirement application.

28. That assistance was forthcoming. The respondent completed a referral to OH and advised the claimant that a medical report would be required (J457). The claimant was advised of the questions that were to be asked of the OH consultant (J480) which included whether the claimant was fit for his substantive post taking into account the OH report of 3 May 2022 and the triggers for the claimant's anxiety, working hours and shift patterns; that he worked with vulnerable service users and could be lone working. It was also asked what effect any medication prescribed might have on his ability to undertake a role with vulnerable adults.

29. The claimant prepared a note to give *"more appropriate insight"* as to why the state of his mental health had brought him to make this claim for ill health retirement (J463/465). That was a comprehensive account of

matters that affected him as a youngster and the incident which affected him in 2013 and was provided with the referral to OH.

30. In the meantime the claimant reported on further conversations with his GP and while initially indicating medication did not assist in a contact report of 17 June 2022 (J472) the claimant advised that he had been prescribed antidepressants and sleeping tablets by his GP and he felt his mood was improving but overall his mental health was still not good.

31. The OHA was completed on 20 June in 2022 (J475/476) and gave the opinion that the claimant remained unfit for work and *"as a result of childhood abuse (the claimant) had continued to deal with an underlying mental health condition for many years".* It was the opinion of the Occupational Health Consultant that the claimant remained *"unfit for any work with no foreseeable return to work anticipated"* and there were no adjustments which might facilitate a return. On the issue of the redeployment the advice was that based on the assessment *"medical redeployment would not be appropriate at this time".* It was noted that the relevant consent forms had been sent to the claimant to request a GP report in order to discuss the option of ill health early retirement. The consent forms were sent and returned and thereafter a report received from his GP on 27 June 2022 by the OH consultant (J479/480). That report noted that the claimant had been prescribed Mirtazapine and Zopiclone for sleep issues.

32. Thereafter the case was forwarded for consideration by an independent Occupational Physician approved by the Pensions Board who would advise if the application for ill health retirement should be granted (J490/496).

33. In the meantime the claimant had commenced half pay from 30 May 2022 and he was anxious that his application be progressed as quickly as possible (J482/486).

Result of ill health retirement application and review.

34. By report of 9 August 2022 (J497/498) the claimant's application for ill health retirement was not supported. The physician advised that there was

"*insufficient evidence to conclude that (the claimant) is permanently incapable of discharging his own role as I believe that not all available treatment has been explored without benefit in this case."*

35. The claimant requested a review (J499). He considered that the report did not appear to have taken into account the available information on his past trauma and current mental health. He also advised that while the report stated that his underlying mental health issues were aggravated by ongoing issues at work with particular reference to the relationship "*with his manager"* he advised that he had never said that was the issue and that information was incorrect. He also advised that he had been with KASP for robust psychological intervention and that was not beneficial to him. These matters were reiterated in an email to Karen Dick of 15 August 2022 (J500A-500B and 500C). He reiterated his intention to appeal the outcome by email of 24 August 2022 (J504).

36. Further information was provided by the claimant in support of his appeal (J518) which was associated with the guide to ill health retirement issued by Scottish Public Pensions Agency (J519/535). The claimant agreed that all information that he provided was put in support of the appeal which was submitted on 2 September 2022.

37. The outcome of the appeal was intimated on 14 September 2022 and advised that on the "*balance of probabilities the applicant cannot be said to be permanently incapable of performing his duties and unable to partake in any gainful employment…"* before his normal retirement age and so the criteria for ill health retirement was not met.

Claimant's request to return to work

38. The outcome of the review was intimated to the claimant who stated his concerns regarding that decision (J547). Again he emphasised the effect of the historic abuse and that he couldn't comprehend why the adviser was indicating he was fit for his role as a "*social care worker supporting very vulnerable adults yet I would have to be doped up on medication putting myself and the service users I care for at risk"* (J547).

39. The claimant also contacted his line manager to state that he would like to request a referral to Occupational Health for a "*fitness to return to work".* He asked that the referral be made with all the *"recommendations to be put in place…."* in accordance with the previous reports to allow a return to work. In a telephone discussion with Karen Dick on 15 September 2022 the claimant expressed his disagreement with the report on ill health retirement but that he felt the new medication prescribed by his GP "*has started to take effect and this has been improving his mood"* and that he was currently again attending KASP. He also indicated in that conversation that the trigger for his stress was the respondent as an establishment and not the duties involved in his role as Social Care worker (J553).

40. A further conversation took place on 16 September 2022 (J554) when the claimant advised that he felt fit for work and it was explained to him that there would be a need to refer him for an OHA to assess his current fitness to work. Karen Dick advised that it was necessary to ensure that the claimant was indeed fit to return to work given the short period that had existed since his statements to the effect that he was permanently unable to return. In evidence the respondent witnesses explained that the reason for making a further referral to OH at this point was that given the claimant's role would be to support vulnerable users it was necessary to be satisfied that he was indeed fit and able to return to that role without any risk.

41. In the period 14 September-27 September 2022 various emails passed between the claimant and Karen Dick (J551/562) and in that exchange the claimant made a complaint that Karen Dick did not seem to be responding quickly enough to his various requests. One of those requests related to a "*capability hearing*" which he had been advised to request. He was concerned that no such date appeared to be being fixed. In any event Karen Dick prepared the necessary referral to OH based on the request by the claimant to return to work and asked whether the claimant would prefer to deal with another manager. In a response of 26 September 2022 (J563) the claimant advised that his GP would not be issuing a sick line for the following four weeks as he is *"happy with the way my medication*

is working and the effects and benefits these are having on my mental health…."

42. On a request for information on progress from the claimant of 27 September 2022 (J566) Karen Dick responded that day to advise that the referral for OHA had been made and in respect of the request to proceed "*to a capability hearing instead of a return to work I would advise you to make OH aware of your reasons for making this request when you have your assessment*" and that if no such recommendation was made then the respondent would make a decision on whether a capability hearing should be convened. By reply the claimant advised "*that all sounds fair"* and that his GP would not be issuing further sick line as he considered that there had been a *"major improvement*" in the claimant's mental health.

43. Further contact took place between the claimant and Karen Dick on 30 September 2022 with the claimant advising that when he had his OH appointment he would be *"making it clear I do not want to return to Fife Council to resume employment".* He indicated he had been advised to put such in writing. While his mental health was going well at the present time thanks to medication he found that his calls and emails were being ignored and he did not want to be treated in that way (J571). Karen Dick responded that evening seeking to explain that the OH report of 14 September 2022 had stated that the claimant's GP reported the claimant's "*work environment seems to make your health condition worse and is likely to exacerbate it if you return to it";* that the claimant had recently wished to progress to a capability hearing; and in recent months he had indicated that he was not fit to return to work in any capacity and matters had proceeded to an application for ill health retirement. Accordingly, the respondent considered it necessary to have a further OH assessment to "*ensure your health and safety at work and ensure your mental health needs are met"* and provide any recommendations as to reasonable adjustments and supports which might be put in place.

44. Meantime, it was indicated that some mandatory e-learning and refresher training online could be undertaken until the OH appointment on 18 October 2022 and subsequent discussion. The claimant was also

asked if it would be helpful to pay him for accrued annual leave at this point (J573/574) which the claimant accepted (J572)

45. Further exchanges took place between the claimant and Karen Dick on 7/10 October 2022 wherein the claimant expressed a view that he was confused as to the next steps as he had not indicated that he would not be returning to work but only *"expressed feeling I do not want to return".* He was unsure why the respondent had considered that he was not returning to work as he did not consider he had stated that in any of the emails (J578/579). Karen Dick responded indicating that the email of 5 October 2022 had indicated that the claimant had decided not to make a return to work (J579). That then resulted in further email exchanges wherein the claimant advised that his GP would not be sending out any further Statements of Fitness to Work and if it was not believed that he was fit to return to work it was suggested that the respondent contact his GP direct.

46. Caroline Bruce then suggested to the claimant that they meet (J681) as a "*catch up"* and a meeting was then arranged for 14 October 2022. That meeting (J583/588) was attended by the claimant, Caroline Bruce and Leigh Donnelly. The claimant confirmed the appointment with OH on 18 October 2022. There was discussion around recent indications that the claimant did not wish to return to work at all and had been assessed as being unfit for return. It was also noted that from 28 September 2022 the SSSC registration for the claimant had lapsed. It was the claimant's responsibility to restore the SSSC registration. In those circumstances (once Statements of Fitness to Work to 28 September 2022 had been received) the claimant would require to remain on annual leave until leave had been exhausted and then move on to unpaid leave. Once an OH report was available a decision could be made on return to work.

47. An email from Caroline Bruce (J596) advised of these issues and the claimant responded to indicate that he had completed a form to be re-registered on SSSC. By a Statement of Fitness to Work issued 24 October 2022 the claimant was certified as being unfit for work in the period 21 September-28 September 2022.

48. It was confirmed to the claimant that on the basis of that statement being forthcoming he would be paid half pay sick pay between 21-28 September 2022; from 29 September until 24 October 2022 he would be on annual leave and thereafter on unpaid leave until such time as his SSSC registration was complete.

Complaint on Occupational Health referral

49. By email of 18 October 2022 (J599) the claimant complained that an approach had been made by Karen Dick to the Occupational Health Consultant prior to the consultation that day and he had been advised that Karen Dick had made *"numerous concerns etc regarding my work practice, fitness for work amongst other things. Elaine O'Hara stated to Karen Dick that she has already said all the way through her report that my sickness and referrals she has clearly stated that the issue was not my work practice, care to the service users and my ability to carry out the role of Social Care Worker but the issue with the historic abuse and my mental health. Elaine O'Hara explained to Karen Dick she was not prepared to contact my GP again asking for more information when the information received from my GP would confirm what she has already stated."* He advised that Elaine O'Hara wished to have a further consultation with a physician to confirm her findings that she was happy to advise of a major improvement in the claimant's mental health and that would take place on 26 October 2022. He hoped that would put all these *"negatives from Karen Dick to rest".* He indicated he was now starting "*to take this personal and very offensive by Karen Dick"* and even though Elaine O'Hara felt he was fit to return to work now required to have a further opinion following the conversation with Karen Dick. He advised this was an unacceptable practice by Karen Dick and was unsure why *"she continues to make life difficult for me".* He wanted to know from Leigh Donnelly what steps he should take as this is "*highly irregular".* It was also pointed out by the claimant that the referral to Occupational Health had stated that "*managers have safety concerns regarding a return to work with vulnerable clients"* (J603/611).

50. Leigh Donnelly asked Karen Dick if she had any pre-consultation meeting with Occupational Health prior to the claimant's assessment and if so

asked for the nature of that conversation (J600). Karen Dick responded that she had asked for a pre-consultation when putting in the referral to Occupational Health as she wished to highlight the fact that she *"had concerns regarding his mental health possibly being effected if he returns to working for Fife Council as he has stated on numerous occasions that Fife Council is a trigger for his mental health".* She had also indicated that the claimant saying he was *"fit to return to work has happened very quickly as a few weeks ago he was looking at ill health retirement and that this could be more financially driven. I was also concerned that (the claimant) had asked to be put in a single tenancy so we'd need to ensure that he is 100 percent fit to return to work".*

51. The report on the consultation of 18 October 2022 (J613) advised that following the assessment and evaluation of that day the claimant had been referred to a telephone appointment with the Occupational Health physician to review his case before assessing fitness to work with regards to working with vulnerable clients and the report would then follow.

52. In the meantime Leigh Donnelly advised the claimant that she would wish to speak to Elaine O'Hara to establish the situation on the pre-consultation discussion but it was common practice for a line manager to have such discussion. In response the claimant advised "*no worries"* as he had spoken to "*Karen on Tuesday and she reassured me this conversation did not take place so confused as to what to believe*" (J614).

53. Contemporaneous notes of the conversation between Leigh Donnelly and Elaine O'Hara on 20 October 2022 (J616- 618) showed that Elaine O'Hara had refuted certain matters raised by the claimant being for example the claim that she had been asked to provide a statement which could be passed on to the claimant's legal representatives. She also confirmed that Karen Dick had not said anything new in the discussion prior to consultation; it seemed that the conversation had been taken out of context by the claimant; a pre-consultation discussion was normal and there was no question of the referral to an Occupational Health physician being for the purposes of safeguarding. The claimant in evidence advised that he may have been confused on his discussion with Ms O'Hara. He

advised Ms O'Hara had indicated that she would need a second opinion and he was not sure who was being safeguarded.

54. The claimant raised separate concerns in an email of 24 October 2022 to Leigh Donnelly with particular reference to the meeting of 14 October 2022 He felt the questions asked were inappropriate and discriminatory of him. The principal issue appeared to be the suggestion that the respondent required to be sure of his mental health condition prior to return to work as he would be looking after vulnerable care users. His point was that he had been absent through mental health illness in the past and it had never been suggested that he would be anything other than caring and responsible towards vulnerable service users. In the course of the email exchanges over 24/26 October 2022 (J620-623) Leigh Donnelly sought to reassure the claimant on the conversation with Elaine O'Hara; the claimant indicated that there should be no more contact with Karen Dick as his line manager; and he was advised he should contact Caroline Bruce on that issue so that options could be explored.

55. The OH report following the assessment with the claimant on 26 October 2022 was released and stated that in the opinion of the OH physician the claimant was *"fit for work and all duties*" and there was "*no requirement for work adjustments given his reported improvement in mood and sleep pattern".* It was reported that a phased return over three or four weeks would be recommended to gradually reintroduce the claimant back to work and that he would perform all duties and there were no issues about his dealings with vulnerable service users. In answer to the question *"Is the condition likely to re-occur in the future?"* the physician responded:-

> *"(The claimant) has struggled with his physical and mental health intermittently due to restless leg syndrome and perceived work stress including his historical trauma issues. However, if perceived stress can be minimised, his risk of relapses would be low given that he appears to have responded well to treatment and sleep pattern is reported to be much improved." (J624/638)*

56. The contemporaneous notes attached to the report (J626/638) from the Occupational Health physician advised that *"Managers have raised*

numerous concerns regarding the safety of the vulnerable service users on (the claimant's) return to work". However, it was advised in the notes that there were *"no medical barriers to resuming duties".*

Complaint and grievance by claimant and return to work issues

57. On 27 October 2022 the claimant sent an email to Caroline Bruce and Leigh Donnelly advising that he wished an internal investigation into the actings of Karen Dick. He made reference to an email from Karen Dick of 30 September 2022 to support the complaint. In essence that complaint related to:-

(1) Failure of the application for ill health retirement should be sufficient for the respondent to allow a return to work particularly given that the claimant's GP had indicated no more absence notes would be issued.

(2) The claimant not being believed when he intimated he was fit to return to work and this was confrontational. He alleged Karen Dick had stated she had legitimate concerns regarding his abilities but the OH consultants and his GP had all stated there were no concerns regarding service users and that he was capable of carrying out his role.

(3) This had all created unnecessary stress and Karen Dick was expressing *"personal feelings"* rather than "*legitimate concerns."* (J639/640)

58. The email of 27 October sought an internal investigation from a *"professional whom is completely impartial…"* into what the claimant felt was "*discriminatory practice throughout my sickness absence*". In essence the concerns related to:

(1) Number of referrals made to OH.

(2) While those referrals related to concerns in respect of vulnerable service users no explanation was given as to what those concerns were. The OH consultant had not called in to question his ability to carry out his role.

(3) The OH consultants had concluded there was insufficient evidence to say that the claimant was incapable of discharging his role and made no mention of concerns regarding service users. The same related to the OH physician.

(4) The respondent had insisted on further referral despite his GP stating that he would not issue any further Statements of Fitness to Work and he was fit to return to work.

(5) He was not being believed that he was able to return to work. No-one had been in touch with the surgery to confirm matters with his GP.

(6) It was discriminatory practice to indicate that there were concerns relating to vulnerable service users when the OH consultants/physicians or other medical professionals had not known what those concerns were and no measures had ever been put in place for the claimant in carrying out his role.

59. Caroline Bruce acknowledged the email from the claimant of 27 October 2022 to say that due to other commitments she would be unable to get back to the claimant that week but would be in touch.(J644) By way of seeking clarification Caroline Bruce emailed the claimant on 3 November 2022 (J652) to ask if he wished the complaint to be dealt with as a formal grievance and received a response to say that it was to be an independent investigation "*from someone who is a professional and impartial and has had no dealings, intervention or had any knowledge of the process throughout my sickness absence"* as he felt *"discriminatory practice has been conducted as per the conversation with the latest physician from Occupational Health…."* By email of 11 November 2022 Caroline Bruce indicated that given the detail contained in the emails and requests for internal investigation it was appropriate that the complaint was dealt with under the respondent's grievance procedure. She sought clarification on certain issues in the complaint and advised that on receipt would provide that information along with the email of 27 October 2022 to an independent representative of HR for investigation.

60. Caroline Bruce explained that on the request for an internal investigation she had discussed that matter with HR and it was thought possible to

appoint an independent person from a separate directorate to conduct that investigation. She had approached "*Criminal Justice"* but they had no-one available. She had considered instructing an outside legal firm to take the investigation but felt that it was more appropriate to be undertaken internally. It had then been decided that it would be best to consider this complaint within the grievance procedure as that gave appropriate format and a structure in the appointment of an investigating officer and then a nominating officer. Those steps had taken a little time and explained the gap between the initial request for an internal investigation on 27 October 2022 and advice to the claimant of 11 November 2022 that the matter would be dealt with under the respondent's grievance procedure.

61. Meantime by email of 31 October 2022 (J651) the claimant asked if his request for internal investigation had been accepted or not and also requested what would "*happen next as OH report was forwarded last Wednesday".* Caroline Bruce responded to say that Karen Dick was off on leave at the moment and no contact had been made to go over the report but she would be returning on 7 November 2022 when she would contact the claimant (J650) and that took place (J653).

62. The claimant's SSSC registration was restored on 9 November 2022 and as a consequence normal payments were resumed from that date. He was advised he should get in touch with Karen Dick to arrange a start time the following Monday (J657). He was advised that the shift pattern at 8 Keir Hardie had been altered in his absence to 12 hour shifts and had indicated he was "*happy with this*" (J653).

63. The claimant on 10 November 2022 (J659) advised Caroline Bruce that he had reflected on the suggestion that he phone Karen Dick regarding her return to work but failed to understand why he should make a return to work with Ms Dick as line manager given he had raised the issue of breakdown of trust and confidence with her. He considered he was being *"set up to fail".* Caroline Bruce responded to indicate that she had hoped that she could work with the claimant and Karen Dick to resolve concerns and wished to suggest a meeting to seek a resolution to repair the working relationship and asked if the claimant would be amenable to that request. In the meantime on the request for a move given that he had requested

and been granted "*at least 18 moves across the service"* limited options were available the claimant was offered a return to work at *"Blairoak in Kelty or the respite unit in Cowdenbeath".* The claimant indicated in response that he had "*never heard of Blairoak*" and considered the respite unit in Cowdenbeath may not be suitable for his *"stress/anxiety levels"* and he would *"leave it up the service to decide where I go".* (J658) Thereafter he indicated he did not consider Blairoak would be suitable and after discussion and further emails it was arranged that he would return to 8 Keir Hardie to resume his role with agreement to have an informal discussion along with Karen Dick on the following Tuesday. In the meantime it was confirmed that until the investigation was complete that Lee Milne would be his line manager at Keir Hardie. Also the claimant was able to do training on "*Oracle at home on my laptop".* (J661/664)

64. In the meantime the intended meeting amongst the claimant, Caroline Bruce and Karen Dick did not take place as a result of Covid affecting Caroline Bruce's household.

Return to work meeting; notice of resignation and retraction; withdrawal of grievance.

65. Thereafter the claimant did commence a phased return to work at Keir Hardie from 18 November 2022. He worked between 10am-2pm on that day (J666) and had a return to work meeting with Lee Milne which was recorded by Mr Milne (J667/668). At that point the claimant had indicated he did not want to be at work and that he wanted a "*package to leave".* He indicated that he felt fit to be at work and mentioned he had put in a "*grievance"* for the way he had been treated in his sick absence. He then indicated in terms of the note that a service user at 9 Keir Hardie had *"acted like an animal on a previous occasion"* and made other comment regarding matters involving the respondent.

66. The claimant was given a copy of this note and took exception to what had been stated and by email of 18 November 2022 made those concerns known to Mr Milne and Caroline Bruce. He made further dispute in relation to the report to Caroline Bruce in email of 19 November 2022 (J672) 21 November 2022 (J679) and 23 November 2022 (J680). Caroline Bruce

responded to say that she was very concerned about the content of these emails and would make a reply. In the meantime she asked Lee Milne for his response to the matters raised by the claimant and he made that response on 24 November 2022 (J682/687).

67. In this period the claimant was scheduled to work between 9am-5pm on 23 November 2022 and Sunday 27 November 2022 as part of his phased return (J674). However by email of 21 November 2022 (J678) which followed an earlier email that day (J675) the claimant advised that he had decided to take advice and *"go for constructive dismissal"* and would need to speak to his lawyer regarding the next steps. In response to the email from Caroline Bruce offering support he responded on 23 November 2022 (J680) that he had left "*the Council on the grounds of unfair constructive dismissal. I am unsure what supports can be given."*

68. In evidence Lee Milne advised that the comments made in the "*return to work"* note were accurate and the Tribunal accepted his evidence on that point. The claimant may not have been aware of a detailed report being prepared of that meeting but the Tribunal accepted that it was an accurate account. In any event as a consequence of a conversation between Caroline Bruce and the claimant on 24 November 2022 the claimant retracted his resignation. He confirmed this by email of 24 November 2022 (J688) and stated that he would be in for work on Sunday 27 November 2022 *"and shifts thereafter"* as after discussion he would "*like to retract my notice and focus as agreed on the service users".* He confirmed that his mental health was stable and going well and *"long may this continue"* and he needed to move forward.

69. Caroline Bruce with an email of 1 December 2022 (J692) acknowledged that the claimant had made a return to work on the previous Sunday and that she would add his comments on the return to work discussion to his personal file. She also asked whether the claimant wished to progress his grievance in relation to the allegations of discrimination. After a telephone discussion that evening the claimant responded (J691) to advise that he was grateful for the opportunity to retract his notice and that his physical and mental health was good and that he was now "*back at work and settled in exceptionally well again especially focussing on the service*

users". He stated that he would like to *"continue to focus on the important issues which is the service users and my role as Social Care Worker and end any further complaints, grievance etc. I do feel that this won't do me any good with regards to keeping my mental health on the level it is just now and the more positive focussed attitude and outlook I have and don't want to jeopardise this in any way now or in the future."* He also indicated that since being back at work he had more of an understanding of how busy management, senior management and HR were in their roles and *"had no idea when I was off sick which I now take on board and apologise for the volume of emails. This is a sincere apology."* Caroline Bruce acknowledged that email clarifying that the claimant no longer wished to pursue any grievance and was glad he was "*settled back into work and things are going well" (J691).*

Phased return at Keir Hardie.

70. The claimant then resumed working on a phased return. He worked 8 hour shifts between 9am-5pm on 29, 30 November and 1 December 2022 ;then 7 hour shifts between 9am and 4pm on 5, 6, 7 and 8 December 2022; and 12 hour shifts between 8am-8pm on 12 and 13 December 2022. He was scheduled to work a shift on 17 December 2022 but was excused as his dog was unwell and he was allowed emergency leave. He then worked a 6 hour shift on 21 December 2022, a 12 hour shift between 8am-8pm on 22 and 23 December 2022 and a 6 hour shift on 25 December 2022. In that period therefore he had worked four 12 hour shifts (J694/698).

71. On 26 December 2022 the claimant emailed Karen Dick and Lee Milne asking "*when you both return is it possible to discuss 12 hour shifts. I am struggling really badly with these and request that I be put back on normal 7.12 hour shift pattern. If this is not feasible then I am willing to be transferred to a property that does normal shift working. I am physically exhausted especially with the way the shift pattern is. I'm not sure how long I can continue working 12 hours. Sickness is the last thing I want or need."* The claimant explained that the reason for him wishing to work shorter shift hours was that the 12 hour shift meant that he returned home tired and went to bed but would awake with dreams/nightmares of previous abuse and it was *"just too exhausting".* The advantage of the 7/8

hour shifts was that he would get home earlier and able to catch up on sleep.

72. In the absence of the claimant through ill health during 2022 the shift arrangements at 8 Keir Hardie had changed to 12 hour shifts rather than 7/8 hour shifts. This suited the staff who were able to have more days off in the week having completed their 36 hour week in three days. It also meant better continuity for service users who had less change of personnel in day to day living. It was not possible to accommodate a member of staff who wished to work 7/8 hour shift in the routine which had been established. The claimant's position in evidence was that there were always three people on shift at any one time and so the hours could be altered to suit his desired working shift pattern. However examination of the rota sheets and the evidence from Karen Dick satisfied the Tribunal that it was not the case that three members of staff were on shift at the same time to accommodate the claimant's request for shorter hours (Rota sheets J690, 694, 695, 698, 699, 701-705).

73. It was explained that Keir Hardie had a small staff team and to fit in a third person on shift who worked 7/8 hours meant another member of staff would require to work 4/5 hours. It was not possible to hire an extra member of staff to work those shorter hours as budgets only allow the hiring of staff to meet the needs of vulnerable users and not to accommodate an extra member of staff to allow shorter shift working. Karen Dick had no discussion with the claimant on his email of 26 December 2022 . She returned to work on 28/29 December 2022 but the claimant was not on duty on those days and then was off for seven days on annual leave.(J701) However over 28/29 December 2022 she did make enquiry of existing staff to see if any member would wish to work shorter hours but there were no volunteers. Some staff indicated that they would leave if they required to work shorter shifts as they were happy with the three shifts of 12 hours. Working 7/8 hour shifts meant *"odd handover spells"* but with 12 hours there was no confusion regarding who was rostered to do what and staff were happier with that routine. Also given there was more time off in the week on a 12 hour shift pattern staff were more willing to take extra shifts which diminished the requirement for relief

staff to the benefit of the service users. The respondent considered for these reasons the request from the claimant could not be met.

Request for transfer

74. The claimant emailed Lee Milne on 11 January 2023 requesting transfer to property that "*does normal 7 hour working shift pattern. I have tried 12 hour shifts and find these exhausting and would like to go back to normal working pattern with normal working hours."* Lee Milne responded to say that he would discuss the matter with his "*lead officer".* The claimant responded to say that he was "*more than willing to change to another manager and team"* and on 11 January the claimant was advised that he could be offered a "*move to Blairoak Group Home"* The claimant advised he would prefer "*Glenrothes or Kirkcaldy"* (J706/710).

75. It was explained that Blairoak accommodated six service users (five at the relevant time) and due to larger staff teams there was greater flex in the rota. Normally there would be four or five care workers plus two senior workers on day shifts; and two care workers on night shift. Accordingly, it was possible to meet the request for 7/8 hour shift working pattern in that unit which was also geographically suitable for the claimant. That contrasted with Keir Hardie with two workers on day shift and one working night shift.

76. Wendy Thomson spoke with the claimant on 12 January 2023 and he confirmed that he would work at Blairoak (J711).

Grievance by claimant of 15 January 2023

77. The claimant emailed Wendy Thomson and Caroline Bruce on 15 January 2023 raising a grievance (J715/716) stating that he felt the move from Keir Hardie "*was personal and not professional"* and set out his reasons. Essentially he felt that it was *"incredible that no accommodation could be made for me with the rota regarding changing my shift from 12 hours to 7 hours considering that Blairoak and many other properties that I have just found out do a mixture of shifts to accommodate staff to have that balanced workforce".* He stated that he felt this was now a personal matter due to the "*issues that myself and senior Karen Dick had when I was off*

sick and me moving onto Lee Milne as my line manager which was supposed to be temporary. I found there was no working relationship with Lee Milne which I appreciate he has Dunfermline to manage as well as Keir Hardie but he was very distant from me. I got the feeling he was uncomfortable around me probably due to the issues with myself and Karen when I was off sick and his friendship with Karen." He felt that the issues with the 12 hour shifts and "*non negotiation of this was the perfect opportunity to have me removed from Keir Hardie which is unprofessional and unfair."* Ms Thomson replied that day to advise that she would be in touch once she had looked into the matter (J715/716).

Work at Blairoak and departure.

78. The claimant commenced work at Blairoak around 13 January 2023. In an email to his new manager of 16 January 2023 (J712) he advised:-

> *"Just to confirm that I really enjoyed my shift at Blairoak and staff were very friendly. The service users were all support needs I'm used to so I think I will fit in well. Definitely no issues."*

79. However on his second shift on 18 January 2023 at Blairoak he left after about three hours. He described the shift as "*chaos".* He explained that two service users were "*at odds and I thought could not do this and asked senior and allowed to go home".* The users were *"noisy/screaming".*

80. Wendy Thomson becoming aware of him leaving his shift emailed him asking if he could call and the claimant advised by email (J717) that he was not going back and was *"officially off sick with work stress."* He maintained that nothing he had said had been or would be taken into consideration and was of the view that no accommodation had been made to enable him to have a 7 hour shift in Keir Hardie. No thought had been given of his mental health and a move to "*such a huge staff team etc is too much".*

81. In a response of 18 January 2023 Ms Thomson asked the claimant that he give Blairoak a chance as he had only worked one shift and he would be supported in that home. Because he did not wish to work 12 hour shifts the move to Blairoak would resolve that matter. It was explained that

Karen Dick and Lee Milne worked together on recruitment and that required them to be shortlisting candidates, attending interviews and the like. She asked that the claimant give some thought about coming back to Blairoak and the claimant agreed to return by his email of 18 January 2023 timed at 17:21 (J721A).

82. However by email of 23 January 2023 (J724) the claimant stated that he had reflected on matters and would not be returning to Blairoak because having read through the emails *"nothing I have said has been taken on board apart from the constant defending of your management team at Keir Hardie".* He stated that he was going to *"remain off sick as again I cannot believe that no accommodation could be made regarding the 12 hour shifts at Keir Hardie".* He did not consider that he had any choice in the matter but to go to Blairoak. He stated that he would welcome another "*Occupational Health referral so I can explain to the OH physician the issues on why we have ended up here again".*

83. Ms Thomson responded indicating that she did not consider the claimant had given Blairoak a "*reasonable try"* and would take advice from HR as to a referral to Occupational Health. It was asked that the claimant send in his "*sick line"* before any referral was made (J723) which was intimated indicating that the claimant was not fit for work through to 20 February 2023 due to *"stress at work with discrimination".*

Response of OH to claimant's concerns on referral.

84. The respondent received on 25 January 2023 (J728) an email which responded to the request for information from the Occupational Health physician following the claimant's concerns about what had been said regarding referrals to Occupational Health *"without a reason".* Essentially it was indicated that a conversation during consultation had been taken out of context and apologies were made. It was explained that towards the end of that referral *"Dr Liew was explaining that employers (not specific to Fife Council) cannot make referrals to OH without a reason and they must confirm why a referral is being made and supply any concerns in the referral etc… if employers send employees to OH without discussing referrals and not supplying a reason for the referral this may be seen as*

discriminatory in nature… She did not say that FC was discriminatory or discriminating against this particular employees or others…"

Grievance by claimant of 30 January 2023

85. The claimant then intimated a grievance by email of 30 January 2023 (J729/730). That grievance related to "*workplace discrimination as per the concerns of Occupational Health and my GP which has been added to my fit note and included in Occupational Health report".* He advised that this "*workplace discrimination"* had been ongoing since March 2022. In essence the complaint related to:-

(1) Communication between himself and Karen Dick became strained and he alleged she had ignored all communications and stopped taking calls.

(2) Numerous referrals were made to Occupational Health about his fitness to work. Despite his GP advising that he was *"fit to return to work"* another OH referral was considered necessary and *"my GP medical opinion was overruled".*

(3) When sending for OH referral no details were given of the concerns and the OH physician stated this was now *"workplace discrimination and needs to stop".*

(4) Lee Milne was very distant and withdrawn on his return to work. The claimant considered this was due to issues between himself and Karen Dick and what Mr Milne had been told by Karen Dick.

(5) During his absence the rota had been changed at Keir Hardie. At no time had been asked how he felt about this or did he have any say or opinion.

(6) On return he had settled back to work and had a great working relationship and bond with the service users but he found the rota of 12 hour shifts "*exceptionally difficult"* and was "*physically exhausted".* He felt he had been given a raw deal on the rotas. He asked for the rota to be changed and accommodated but that was refused and a move to Blairoak was the only option.

(7) He was required to start *"all over again building up relationships"* after returning to work after nine months sick.

(8) His GP had told him that as he was employed in place within Keir Hardie allowance had to be made and hours had to be honoured in the rota especially as there is mostly *"three or four staff working 12 hour shift most days".* However no interest was taken in that request.

(9) He wanted a formal grievance and receive compensation for "*workplace discrimination".*

Resignation

86. By separate email of 13 February 2023 the claimant advised that he would be "*terminating my employment with Fife Council on the grounds of unfair constructive dismissal"* and that any communication was to be done through *"legal teams".*

87. Prior to that resignation without prejudice discussion and a protected conversation under s111A of Employment Rights Act 1996 took place and the content of those discussions deemed inadmissible in these proceedings.

88. The claimant advised that the resignation on 13 February 2023 came about as a *"build up and all came to a head at end of January 2023"* with a significant factor being "*unable to get 7/8 hours at Keir Hardie".*

Breach of policies

89. The claimant considered that certain of the respondent Policies had been breached being in essence:-

(i) The Health and Safety policy had been beached regarding "*management standards"* in that if an individual was absent through stress there should be put in place a proper risk assessment on return and that was not instituted. Knowing his mental health condition that should have been put in place (J238).

(ii) The Flexi Hours policy had been breached as it had not been utilised as no offer had been made under that policy. He had made

no application under the policy because he was told it was not sustainable to work 7/8 hours at Keir Hardie rather than the 12 hour shifts (J273).

(iii) The Supporting Mental Wellbeing at Work policy had been breached in that he had been made to feel not trusted by reference to safety concerns when he came back to work. There was no evidence to suggest that he was at risk with the vulnerable users and that *"really hurt him"* (J274).

(iv) The Attendance Management policy (J277) had been breached when he was absent through ill health. Communication could have been a lot better with Karen Dick and the service generally.

(v) The Occupational Health policy (J296) had been breached because too many OH reports had been sought and one of them said that stress was a management issue and not an Occupational Health issue.

(vi) The Grievance Policy had been breached (J299) in that the first referral had been delayed and not taken seriously. He had given a clear account and yet when he had already said that he had wished an investigation to take place was asked if the complaint was to be dealt with as a grievance or an investigation.

Events since resignation

90. The claimant produced a Schedule of Loss (J818-825). His base salary at resignation ran at the rate of £29,254.89 gross per annum. He had commenced half pay during sickness absence from 30 May 2022 and that ceased end November 2022. The respondent paid a different rate for unsocial hours being hours worked between 8pm-8am and at weekends.

91. The claimant had commenced work in Orkney through an agency from 24 August 2023. He was contracted to work with Orkney Council Social Work Department and paid at the rate of £20 per hour over a 36 hour week. There were no pension rights available. He was provided with rent free housing and subsistence by Orkney Council but was unable to

quantify that benefit. He advised that his hours were not guaranteed with Orkney Council.

92. There were job opportunities on a permanent basis with Orkney Council but he was "*better off being an agency worker".* He had no comment to make on the Pension loss report which had been lodged (J859/861).

Submissions

93. The parties lodged written submissions. No discourtesy is intended in making a summary of those submissions.

The claimant

94. The claimant submitted that his contract had been breached on the grounds of "*disability discrimination and failure to make reasonable adjustments"* leaving no alternative but to resign. He submitted that all trust and confidence in his employers had been destroyed due to the treatment and behaviour in the handling of his mental health illness and refusal to make reasonable adjustments to allow him to carry out his role at Keir Hardie.

95. He considered that the evidence provided by Karen Dick was based on her own personal assumptions and that she did not want him back at Keir Hardie due to "*unresolved issues*". He considered that the evidence of Wendy Thomson; Caroline Bruce and Leigh Donnelly was based on assumptions at what had been "*passed to them by Karen Dick".*

96. No solid evidence had been provided to justify any safety risks to vulnerable service users that he cared for and supported and that was *"blatant discrimination".* He submitted there was nothing to indicate that he was ever a serious safety risk to the service users he cared for and the evidence showed that he was simply frustrated by the respondent's actions and behaviours. None of the OH reports had indicated that he was in any way a danger to service users.

97. He submitted that the respondent had blocked any suggestion put to them; that he had not been believed about any matter and "*made to feel a liar".* In particular, in November 2022 he was "*more than ready to come back to*

work" but his GP medical opinion was not accepted and there was a continuation of unnecessary frustration, stress and anxiety by blocking his return to work.

98. It was submitted that the respondent simply did not want him back at work and hoped that he would eventually leave employment. That was confirmed when it was proposed he could apply for medical redeployment to the NHS or ill health retirement.

99. He had been badly let down as a child when the respondent had not offered him protection and again as his employers the same had happened.

100. He emphasised that his claim was not about historic sexual abuse but disability discrimination of his mental health illness and failing to make reasonable adjustments. He considered that the respondent had used the historic abuse as a weapon to discredit him without addressing the real issues.

101. He stated that he had been *"continuously asked what supports the respondent could offer"* which he found *"increasingly difficult and frustrating to determine when there was nothing forwarded of what supports the respondent could offer".*

102. The refusal to alter his shift at Keir Hardie seemed to be based on budgets. That was a failure of duty of care when the respondent *"put budgets over someone's disability needs".*

103. While his claim was from March 2022 until resignation in February 2023 "*in reality this had been a long-standing issue with the respondent for over 11 years"* since he discovered that his *"then line manager was a daughter of one of his abusers*".

104. At no point had any of the medical professionals indicated that his intentions were suicidal. These were only *"feelings".* In any event after medication started to take effect his mental health stabilised in 2022 and by the time he made a return to work no concerns were raised regarding safety of service users. By November 2022 his medication had taken

effect and there was no concerns regarding his ability to return to work at that time.

105. His GP had indicated that he did not issue "*fit notes on my fitness to return to work"* and the respondent could have contacted his GP themselves. They did not do so. The respondent had opted for another OH referral and the Occupational Health consultant advised that she agreed with his GP that there were no medical barriers preventing a return to work. If the respondent had only contacted the GP themselves they would have been provided with that information and would have prevented "*any more stress and anxiety to myself instead of waiting on another OH referral assessment".*

106. He submitted that employers could not continuously make an OH referral without detailing the concerns for the OH consultant. That could be seen to be discriminatory by nature. That was confirmed by Dr Liew. Furthermore, in the OH report of October 2022 the respondent was advised to keep stress levels to a minimum but that was not done.

107. It was stated that there was no vacancy within Kirkcaldy or Glenrothes but that was not true given that the service was struggling with staff shortages. There was just no attempt to seek alternative suitable placements. The respondent made no attempt or explored other ways to keep him at Keir Hardie. It was "*Blairoak or nothing".*

108. It was stated by the respondent that he had sought ill health retirement when in fact it was the respondent who had offered this as an option at the meeting in May 2022.

109. In his 20 years of service caring for very vulnerable adults there had never been any doubt or concerns raised until the last year of his employment. It was only because he had raised a complaint that these alleged concerns were raised by Karen Dick regarding the safety of the service users on his return to work. There was no evidence to suggest there was any legitimate concern.

110. He made reference to the case of ***Archibald v Fife Council [2004] UKHL32*** in support of his submission that there had been a refusal by the respondent to make reasonable adjustment.

For the respondent

111. The respondent referred to the List of Issues which related to claims of constructive unfair dismissal; discrimination arising from disability and a failure to make reasonable adjustments. It was not the case that there was any claim under sections 39(2)(c) and 39(7)(b) of Equality Act 2010 (EA) that the dismissal itself was discriminatory. The List of Issues also raised the issue of time bar.

112. It was submitted that the respondent's evidence should be preferred to that of the claimant as he had shown himself to be unreliable in certain matters. In submission and evidence he had alleged that Wendy Thomson and Caroline Bruce had said to him that Blairoak was not suitable whereas that was not the case as he had accepted in cross examination. He had stated he had been performing 12 hour shifts at Keir Hardie for 4-5 weeks by 26 December but examination of the rota showed that he had done four of those shifts in that period. He stated there were always three people on during the day doing a 12 hour shift at Keir Hardie whereas the rota showed that was not the case.

113. While he had indicated the 12 hour shifts meant being exhausted and having nightmares and a shorter shift would enable him to catch up on sleep he accepted that on a return to work on 18 November he had told the respondent that the medication he was on dealt with his mental health fragility including sleeping issues. Also he gave evidence that he no longer had any sleeping issues from the report in October 2022 from Dr Liew. That undermined why he thought he found 12 hour shifts difficult. It was also a misconstruction of the position to state that OH had told him that the respondent was discriminating against him. The emails at J723 and J728 referred to this matter. That tendency to misconstrue the position also related to his claim that he had asked one of the Occupational Health consultants for a statement which was not the case.

Time bar

114. It was submitted that time bar affected the claims that the respondent failed to act timeously to issues he was having with his line manager; the number of OH referrals made during his absence; ignoring the view of his GP on fitness to return; and the failure to investigate his grievance of 27 October 2021 sooner. It was also submitted it would not be just and equitable to extend time to allow those claims.

Failure to make reasonable adjustments

115. It was submitted that the burden of proof was on the claimant to establish a prima facie case that the duty to make reasonable adjustments was engaged and had been breached.

116. In this case the preliminary hearing note advised that *"if the PCP of the respondent is (i) the requirement to work 12 hours shift at Keir Hardie and/or (ii) the requirement to work at Blairoak this claim is adequately specified".*

117. It was accepted there was a requirement after the claimant's phased return to work to work 12 hour shifts at Keir Hardie. It was not accepted there was a requirement for the claimant to work at Blairoak. The claimant was offered a move to Blairoak in light of his request for shorter shifts because that could be accommodated there. But if he had remained at work and continued to say that Blairoak was not suitable other options would have been explored. However the claimant resigned.

118. It was submitted that there was no PCP of a requirement to work at Blairoak and the only relevant PCP for the purpose of the claim was the requirement to work 12 hour shifts at 8 Keir Hardie.

119. It was submitted that the claim that he had sleeping issues was not supported by the evidence in that he advised Karen Dick on 27 September 2021 that his sleep pattern was returning to normal (J567) and the OH report of 26 October 2021 (J625) reported improvement in sleep pattern.. Also, he had worked very few of these shifts.

120. Accordingly, it was submitted there was no substantial disadvantage caused to the claimant.

121. In any event, it was submitted that the respondent could not know or reasonably have known of the disadvantage. He never advised why he was "*struggling with the 12 hour shift"* beyond saying that he found them exhausting (J700/707). When he requested shorter shifts he did not explain the connection between his mental health fragility and his finding the shift difficult.

122. He had also been told about the 12 hour shift before returning to work and had raised no issues of concern (J653). None of the OH reports suggested the claimant would struggle with 12 hour shifts. The last report of 26 October 2022 noted there were no duties that the claimant could not do and that the shift work would not be a problem. There was no actual or constructive knowledge that 12 hour shifts would put him at a substantial disadvantage.

123. In any event the PCP did not put the claimant at a substantial disadvantage. Reference was made to ***General Dynamics Information Technology Ltd v Carranza 2015 ICR 169*** and ***Smith v Churchills Stairlifts plc 2006 ICR 524, CA.*** Also in ***Garrett v Lidl Ltd [2010] All ER(D) 07*** the EAT confirmed it was not unreasonable for employers to conclude that adjustments could be best achieved by moving the claimant to a different place of work even though the claimant did not want to move (where there was a mobility clause in the contract). In this case the claimant could work at different places across Fife as reflected in his contract.

124. To provide shorter shifts at Keir Hardie would interrupt the shift pattern there which had been set in consultation with the existing staff. It could only have been accommodated if the claimant had been taken on as a "*supernumerary"* on a shorter shift. That would have reduced the budget available for the service and it was imperative to stay within costs to ensure that the service could be delivered. ***Cordell v Foreign and Commonwealth Office [2012] ICR 280*** made it clear that financial cost of making an adjustment will go to the reasonableness of the adjustment.

125. The assertion by the claimant that his request could be accommodated as there were three people completing a day shift at 8 Keir Hardie was undermined by the evidence and rotas produced. Also if the night shift was taken into account there would have been a need to find an extra person while the claimant only working 7/8 hours rather than the 12 hour shifts formerly undertaken.

126. It was reasonable for the respondent to make the adjustment by having work at Blairoak. It would not have been reasonable to compel others at Keir Hardie to reduce their shifts (***Garipis v VAW Motorcast Ltd ET case 1803194/99***).

127. The evidence of Caroline Bruce was that in any event there were no vacancies in any of the services in Glenrothes or Kirkcaldy. Taking into account the claimant's role, hours of work and various restrictions on where he had said he would work following his previous 18 moves across the service there were no other vacancies for him at that time. In any event the claimant's role was to care for vulnerable adults which was the position at Blairoak.

Discrimination arising from disability

128. It was submitted that on a review of the authorities the "*something arising in consequence of the claimant's disability"* was not a "*but for*" test but that the unfavourable treatment must be "*because of"* the something which arises out of the disability.

129. In terms of the note following the preliminary hearing in this case (J85/86) the "*something"* for the purposes of this claim was understood to be the claimant's absence from work. It was submitted that the alleged acts of unfavourable treatment did not support a finding that any of the alleged acts or failures were done because of the claimant's absence from work or indeed because of anything else arising in consequence of the claimant's disability.

130. On the issue of (i) the number of OH referrals (ii) the one OH report referring to safety concerns on a return at a time when the claimant said he was fit to return and (iii) that the respondent was ignoring his GP view

that he was fit to return, it was submitted that if the claimant had not been absent the respondent would not have been making referrals to OH, or have any safety concerns or taking the decision that they required a report from OH deeming him fit to return. That would satisfy the "*but for*" test which is not the applicable test.

131. The reason for the referrals was either to try and ascertain any supports which could help the claimant to return to work; or to further his application for ill health retirement on his request; or to ensure that the claimant was fit to return to work in circumstances where he had gone quickly from saying he was permanently incapable to saying that he was fit to return.

132. Also, evidence supported the view that there was a concern the claimant was maybe saying he was fit to return to work for financial reasons as opposed to being actually fit. Neither did the respondent have any direct evidence from the GP of fitness for work other than lack of further fit notes. Their reason not to agree to working shorter shifts at 8 Keir Hardie or the decision to offer him Blairoak was not because of the claimant's absence from work. The claimant's own evidence was that the failure to agree shorter shifts was personal as opposed to a professional decision. There was no evidence to support a finding that the claimant's grievances were not investigated because of his absence from work. On that basis this claim should fail.

Did the respondent treat the claimant unfavourably?

133. It was submitted that the first act of alleged unfavourable treatment was the failure to act sooner to deal with the issues the claimant was having with his line manager Karen Dick. On a review of the evidence the Tribunal was invited to find that the reason for the claimant's mental health deteriorating in March 2022 was due to him being required to revisit the trauma he had experienced in the past while in the care of the predecessor to the respondent as part of the Redress scheme. There was no other source of work stress until the claimant felt there were issues in communication between him and Karen Dick which began around 1 September 2022 and no perceived communication issues led to any delay in the claimant returning to work.

134. The evidence showed that Karen Dick did her best to communicate with the claimant in reasonable time while he was absent. It was submitted that in terms of the evidence the claimant had unreasonable expectations. At one point the claimant had apologised for the volume of emails sent (J692).

135. In any event issues were not ignored in that the claimant was offered the chance to change his manager (which offer he declined). Also, Lee Milne was made line manager before a return to work as a means of dealing with any concerns.

136. So far as any concerns about safety of service users was concerned it was not disputed that in the referral to OH of 18 October it was written "*Managers have safety concerns regarding a return to work with vulnerable clients".* While the claimant emphasised at various times that the respondent had "*serious*" concerns that was not conform to the words used. The issue for the respondent was that there were no specific concerns other than the fact that there was a very quick turnaround in the claimant's position that he was incapable of return to work and then fit to return to work. It was reasonable for the respondent to be reassured of the claimant's fitness.

137. Also it was submitted that the respondent did not ignore the GP's view that the claimant was fit to come to work. There was no positive view provided directly to the respondent. In any event it was part of the respondent's duty of care to him to be reassured that he was fit to return.

138. The claimant made reference to the respondent not following the *"OH recommendations of keeping my stress levels to a minimum…".* This would appear to relate to the respondent not agreeing to alter his shifts at 8 Keir Hardie and being offered a move to Blairoak. Not agreeing to shorten shifts was not unfavourable treatment in the circumstances where the claimant was being given the opportunity to work shorter shifts with Blairoak being a suitable place of work for the claimant.

139. It was alleged the unfavourable treatment was a failure to investigate grievances of 27 October 2022 and 30 January 2023. The claimant gave no evidence about a failure to investigate a grievance of 30 January and

so there could be no finding of unfavourable treatment. The correspondence over the complaint of 27 October 2022 showed that there was progress in that matter with a view to the claimant stating that he did not want to pursue that grievance. Thus there can be no unfavourable treatment.

Was the unfavourable treatment a proportionate means of achieving a legitimate aim?

140. On a review of authorities it was stated that the Tribunal considered that the claimant had been treated unfavourably because of his absence from work then the Tribunal should find that this treatment was a proportionate means of achieving a legitimate aim.

141. The legitimate aims being pursued by referral to Occupational Health was to ensure the duty of care that the respondent had to both the claimant and to vulnerable service users was met. There was a duty of care to see that care workers were fit to care for users. That was in the interests of the users themselves. The extensive evidence heard from respondent's witnesses referred to the need to ensure the safety of vulnerable service users who relied upon the abilities of care workers.

142. In so far as not agreeing to reduce the length of shifts at Keir Hardie was concerned that also was in pursuit of the legitimate aim of ensuring that the respondent stayed within its budget and this decision was not purely a cost saving one. The claimant was offered an alternative suitable workplace at which he could work shorter shifts without delay. Karen Dick had spoken to staff at Keir Hardie regarding their appetite to work shorter shifts.

Constructive unfair dismissal

143. It was submitted that the claim rested on breach of the implied term of trust and confidence. That required an objective approach.

144. The claimant's pled case appeared to rest on (a) alleged communication issues with his line manager Karen Dick, (b) the number of OH referrals that were made during his absence particularly when his GP stopped issuing fit notes, (c) the alleged manner on which Lee Milne treated him

on his return to work, (d) finding the 12 hour shift difficult and being required to work 12 hour shifts and (e) that a move to Blairoak was the only option. He did not make any reference to "*safety concerns"* about a return to work.

145. In the evidence when asked why he resigned he explained it was a *"build up of things"* and the trigger was the failure to agree to him having shorter shifts at 8 Keir Hardie and that safety concerns about him returning to work with vulnerable service users had been raised. That did not reflect his pled case.

146. The issue of the "last straw" as referred to in the preliminary hearing note was a matter which had been redacted following that previous preliminary hearing and so in essence there was no "last straw" on which the claimant could rely and so the claim should fail.

147. However in any event there was no breach of the implied term. Many matters had been covered previously. In relation to any suggestion that Lee Milne was distant from the claimant there was no evidence that was the case. The claimant was of the view that there had been a failure to put in hand a risk assessment on a return to work but that was the point of the OH report.

148. It was also submitted that when the claimant retracted his resignation on 24 November 2022 he affirmed the employment contract and if it was considered there had been an earlier breach of the implied term that was waived at that point. The only events relied on after 24 November were the requests for shorter shift and the claimant being unhappy about the move to Blairoak which had been addressed.

Remedy

149. Submission was made on remedy and it was accepted that the claimant suffered financial loss in the period prior to him obtaining work at Orkney Council. That was for a period of 27 complete weeks. Submission was made on the net loss that would have occasioned.

150. It was submitted there should be no award in respect of any financial loss beyond 24 August 2023 being the time the claimant commenced his new

role at Orkney Council. Basically the pay was higher than when he worked with the respondent and while there were no guaranteed hours there were many shifts available and effectively he could work whatever hours he wished. The higher rate of pay would take into account any unsocial hours for which he may have worked with the respondent.

151. Submissions were made on pension loss and the decision of the claimant that he had preferred to remain an agency worker with Orkney Council which would break the chain of causation so far as pension loss was concerned. In any event no career long loss should be awarded.

152. Submissions were also made in relation to any losses or compensation in respect of any act or discrimination. Should the Tribunal determine the claimant was constructively unfairly dismissed and that this was discriminatory compensation should be awarded for loss on the principles applying to discrimination cases.

153. On injury to feelings it was submitted that it would only be if the claimant's dismissal was found to be discriminatory should any award lie in the mid Vento band. Otherwise any award should be in the low band.

Discussion and conclusions

General

154. It would not appear that the list of Issues identified had the explicit agreement of the claimant prior to this hearing but he did confirm his claims were for unfair (constructive) dismissal; discrimination arising from disability; and failure to make reasonable adjustments. He made no objection to the List of Issues and having perused the initial claim; Note of the preliminary hearing which sought to identify the particular issues between the parties; and the matters raised in correspondence to identify the issues (J102,105,107) the Tribunal was satisfied that the List of issues set out in this Judgment was accurate.

155. In the evidence heard the Tribunal considered that the respondent witnesses were reliable and gave their evidence to the best of their recollection. There was a great deal of contemporaneous documentation available by way of email and notes and the respondent evidence was

consistent between oral evidence and the documentation. Evidence from the claimant was not as reliable. In certain matters his interpretation of events did not conform to the documents produced and there was a tendency to misconstrue or exaggerate certain events.

156. The Tribunal considered that it would be appropriate to consider in the first instance the discrimination claims as success in any of those would inform the claim of unfair (constructive) dismissal.

Failure to make reasonable adjustments – sections 20-21 of the Equality Act 2010 (EA)

157. Part 5 of EA which covers work and employment states that *"A duty to make reasonable adjustments applies to an employer."* The duty comprises three requirements and in the context of this case the requirement is:

- A requirement where a provision, criterion or practice (PCP) puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage – s20(3).

158. The employer's duty is to *"take such steps as it is reasonable to have to take"* to alleviate the substantial disadvantage to which the disabled person is put. Accordingly, the fact that a disabled employee and/or his or her medical advisers do not or cannot postulate a potential adjustment will not without more discharge that duty.

159. In determining a reasonable adjustment claim a Tribunal should consider the nature and extent of the substantial disadvantage relied on by the claimant, make positive findings as to the state of the respondent's knowledge of the nature and extent of that disadvantage, and assess the reasonableness of the adjustment (step) that it is asserted could and should have been taken in that context.

160. Also the cost of an adjustment may be a relevant factor in determining whether it is reasonable.

161. It has been confirmed that the test of reasonableness in the context of section 20 EA is an objective one and it is ultimately the Employment Tribunal's view of what is reasonable that matters. For example in ***Smith v Churchill's Stairlifts plc 2006 ICR 524*** it was made clear that where an employer objects to a proposed adjustment on the ground that it would be disruptive it is for the Tribunal to determine objectively the extent to which the step would cause disruption, not whether the employer reasonably believed that such disruption would occur. It is necessary for the Tribunal to look at the proposed adjustment from the point of view of both the claimant and employer and then make an objective determination as to whether the adjustment is or was a reasonable one to make. That means that it is possible for a Tribunal to conclude that a different adjustment from the one that the claimant proposed or preferred was reasonable. As was submitted the case of ***Garrett v Lidl Limited EAT0541/08*** is authority for the employer being entitled to transfer a disabled employee to a different location pursuant to a contractual mobility clause for the purpose of facilitating reasonable adjustments. That was the case notwithstanding that the move was not favoured by the employee.

162. In this case the provision criterion or practice (PCP) claimed was (i) the requirement to work 12 hours shifts at Keir Hardie and/or (ii) the requirement to work at Blairoak.

163. It was accepted that there was a requirement to work 12 hour shifts at Keir Hardie. The second element however, that there was a requirement to work at Blairoak, was not accepted as a PCP. It was stated that there was no absolute requirement that the claimant work at Blairoak. Certainly Ms Thomson of the respondent considered that Blairoak was a suitable place for the claimant to work but essentially the claimant was offered a move to Blairoak to resolve the problem of the 12 hour shifts at Keir Hardie and he accepted that move. In his email of 16 January 2023 (J712) he advised that he had "*really enjoyed my shift at Blairoak…"* and *"I think I will fit in well. Definitely no issues."* The situation appeared to be that the claimant was encouraged to take a role at Blairoak but there was no compulsion or requirement to do so.

164. The sequence of events appeared to be that despite the claimant indicating he felt Blairoak was a good move on 16 January 2022 he had stated he did not want to go back there by 18 January 2022 and had indicated he was now "*off sick".* There then quickly followed a period of without prejudice discussion and a "*protected conversation"* under section 111A of Employment Rights Act 1996. Thereafter the claimant resigned by email of 13 February 2023. The Tribunal accepted the evidence from Wendy Thomson that had the claimant not resigned and remained off sick because he did not wish to work at Blairoak then she would have made enquiry as to whether he could be placed in homes in Glenrothes or Kirkcaldy. That would have required some time to work through because these homes were not under her management and would have required consultation with other managers. However, the Tribunal did not accept that there was a PCP that required the claimant as he put it to work at "*Blairoak or nothing".*

165. The remaining PCP was that the claimant was to work 12 hour shifts at Keir Hardie.

Did the PCP put him at a substantial disadvantage compared to those who do not have his disability?

166. Section 212(1) of EA provides that a substantial disadvantage is one which is more than minor or trivial. Paragraph 6.15 of the EHRC Code of Practice on Employment (2011) (EHRC Code) advises that whether such a disadvantage exists is a question of fact and is assessed on an objective basis. In terms of paragraph 6.16 of EHRC Code the purpose of the comparison with people who are not disabled is to establish whether it is because of disability that a particular PCP disadvantages the disabled person in question.

167. The claimant's return to work at Keir Hardie was on a phased basis to gradually increase his hours over a month to achieve the normal requirement of 36 hour working week. He returned on 18 November 2022 and so by 18 December 2022 was working a normal 36 hour week. In his absence from March 2022 the shift pattern at Keir Hardie had for various reasons gone to 12 hours. Initially in evidence he said he had worked for

4/5 weeks on 12 hour shifts and found it exhausting but that was an exaggeration as examination of the rotas J674/698 showed that he worked four 12 hour shifts to 26 December 2022 when he put in his request to work a shorter shift. His explanation for that request was that he found that the 12 hour shifts were *"too much";* he would have dreams or nightmares; and lack of sleep rendered him exhausted.

168. The Tribunal was invited to find that there was no substantial disadvantage and certainly the evidence threw doubt on whether there was as interrupted a sleep pattern as the claimant alleged. However the Tribunal accepted that there was interruption to his sleep pattern at this point albeit he had indicated previously that his sleep pattern was returning to normal in the email to Karen Dick of 27 September and the OH report of 26 October reported improvement *"in his mood and sleep pattern".* The Tribunal accepted that while there was improvement in sleep pattern that did not rule out that the claimant was finding sleep pattern disturbed once back at work with 12 hour shifts was in place and nightmares leaving him as he put it "*exhausted".*

169. The Tribunal then found there was substantial disadvantage.

Did the respondent know or could it reasonably have known that the claimant would likely be placed at that disadvantage?

170. Schedule 8 Part 3 paragraph 20 of EA states that the respondent would not be subject to the duty to make reasonable adjustments if it "*does not know and could not reasonably be expected to know that the interested disabled person has a disability and is likely to be placed at the substantial disadvantage".*

171. The claimant knew that he would require to work 12 hour shifts when he made a return to Keir Hardie.

172. In his evidence he referred to the fact that it was nightmares that kept him awake so that he felt exhausted the following day whereas if he worked a 7/8 hour shift he got home earlier and he was able to catch up. However he did not explain that when he sought to change his shifts from 12 to 7/8 hours. He had discussed the sleep pattern and nightmares in connection

with his ill health retirement application and in consultation with Occupational Health but he had not raised that specifically in December 2022 or January 2023 when this request for change of shift was at issue. The OH reports did not indicate that the claimant would struggle with 12 hour shifts. The report of 26 October 2022 indicated that the shift work would not be a problem.

173. The absence of any information about the reason for changing shifts other than that he found them exhausting was not for the Tribunal sufficient to make a finding that the respondent knew the claimant would likely be put at a substantial disadvantage as compared to those who did not share his disability by application of the requirement to work 12 hour shifts at Keir Hardie.

174. This is not an issue that the respondent knew he was disabled. That is accepted. The issue is whether they knew or ought to have known that working the 12 hour shifts would mean that with interrupted sleep pattern he would find this exhausting. The information to the respondent was that his sleep pattern was improving and there was nothing in the OH report of 26 October 2022 which would suggest that the 12 hour shifts were likely to be a problem because of interrupted sleep pattern.

175. In that respect therefore a requirement of section 20/21 of EA was not met and no duty to make reasonable adjustments would arise.

If the duty arose did the respondent take such steps as was reasonable to have to take to avoid the disadvantage?

176. Even if the duty arose the Tribunal considered that the respondent had taken such steps as it was reasonable to take to avoid the disadvantage. Essentially the claimant was given a move to Blairoak where he could work 7/8 hour shifts and so he was able to *"catch up on his sleep"* and not be exhausted.

177. The Tribunal accepted that working at Blairoak was practical and feasible for the claimant. It was a larger operation and there was more flexibility with shift pattern to allow that adjustment to be made.

178. The claimant was an experienced social worker. The Tribunal accepted the evidence that the claimant with his experience would be able to cope with the vulnerable service users within Blairoak. His contract identified that he could work in homes across Fife. There was no issue that the travel arrangements to Blairoak were somehow inconvenient or any more difficult than work at Keir Hardie.

179. The Tribunal accepted that this was a reasonable adjustment in the event that the duty to make such adjustment arose.

180. Of course the claimant's position was that the reasonable adjustment that should have been put in place was to allow him to work 7/8 hours at Keir Hardie. However there were practical and cost issues which arose in making that adjustment.

181. The EHRC Code advises that the duty to make adjustments requires that the employer to make such steps as it is *"reasonable to have to take"* in all the circumstances of the case in order to make adjustments. There are no particular factors that should be taken into account and what is a reasonable step for an employer to take will depend on all the circumstances of each individual case (para 6.23). The list of factors to be taken into account appears at paragraph 6.28 and includes the practicability of the step and the financial and other costs of making the adjustment and the extent of any disruption caused.

182. In this case the Tribunal accepted from the rotas and other evidence that contrary to the claimant's claim that there was three person day shift working at Keir Hardie that was not the case. There were only two people on day shift and one on night shift. The staff had been consulted and agreed to the 12 hour shifts because they preferred that pattern. To introduce an individual who required to work 7/8 hours would inevitably mean either other staff would require to shorten their shifts to accommodate; or that the claimant would be a supernumerary; which would add to cost.

183. The Tribunal accepted the evidence that the staff had been consulted as to whether or not they would work shorter shift hours and none came forward and that the respondent was advised that if the shift pattern was

shortened to 7/8 hours then staff would leave. The Tribunal accepted that the 12 hour shift pattern suited both staff and service users. The staff had more free time during the week in the 12 hour shift pattern and users found greater continuity in care with longer shifts.

184. In those circumstances the Tribunal considered that in all the circumstances the reasonable adjustment was to find a role for the claimant in Blairoak and by that did not fail in its duty to make reasonable adjustments (in the event the duty arose).

Discrimination arising from disability -s15 of EA

185. Section 15 of EA provides that it will be unlawful for an employer to treat a disabled person unfavourably not because of that person's disability itself but because of something arising from, or in consequence of the person's disability. In the Note following the preliminary hearing the "*something"* was understood to be the claimant's absence from work (J85/86).

186. It was submitted that the unfavourable treatment alleged in this case was not because of the something which arose out of the disability namely the absence. However as was stated in ***Pnaiser v NHS England [2016] IRLR 170*** depending on the facts a Tribunal might ask why the employer treated the claimant in the unfavourable way alleged in order to answer the question whether it was because of *"something arising in consequence of the claimant's disability".* Alternatively, it might ask whether the disability has a particular consequence for a claimant that leads to "*something"* that caused the "*unfavourable treatment".* In this case the Tribunal did consider that a worker who was treated unfavourably as a result of requiring to take a period of disability related absence would have a claim under s15. Accordingly the Tribunal preferred to consider the alleged unfavourable treatment detailed in the issues..

Failure to act sooner in relation to issues with line manager to allow a return to work earlier than November 2022

187. Paragraph 5.7 of EHRC Code advises that "*unfavourable treatment"* means that the disabled person "*must have been put at a disadvantage".*

188. The disadvantage alleged here is that the respondent failed to act "*sooner"* in relation to issues with Karen Dick to allow the claimant to return to work earlier than November 2022.

189. The claimant's explanation as to why he went off sick in March 2022 was that his mental health had dipped and he felt there was a "*lot going on in my life and not coping".* He then went into a *"dark place – felt very poor – lot of Police interviews, statements, gave up KASP (counselling) temporarily"* and the more it went on *"fell into dark pit".* There was no mention that Karen Dick as his line manager was the cause of any absence. The issues related to the historical abuse and the process within the Redress scheme which caused him to recall the very distressing events at that time. It was that which had put him in a "*dark place*" and there was no suggestion of his line manager being responsible for any issues which prolonged his absence from work. Certainly he referred to learning about 11 years' previously that a manager was closely related to one of his abusers and that caused him disquiet and stress but that was not his line manager at the material time of his absence or at any time after that.

190. The Occupational Health reports of 3 May 2022 and 20 June 2022 contain no reference to Karen Dick and refers to his past trauma. The report of 20 June 2022 (J475) advises that the claimant is of the opinion that any connection *"with working for Fife Council only escalated his mental health condition further".* Also, in the notes of the meeting with the claimant of 31 May 2022 the claimant advised that after discussion with his partner he felt in a better frame of mind and hoped to come back to work and was noted as indicating that he had "*no issues with work, staff, Karen etc".*

191. The evidence showed that Karen Dick was in regular contact with the claimant through the period of his application for ill health retirement and beyond (J499/500) and there appeared to be no complaint from the claimant of any actings by Karen Dick. She assisted in his appeal against the refusal of ill health retirement and appeared careful to ensure that all relevant information that he provided was included within that application. Karen Dick attached a document that would be provided to Occupational Health which the claimant described as *"that's perfect*" (J512) on

24 August 2022. It would be inconsistent to consider that he could have returned to work sooner than that appeal being concluded but for any actings of Karen Dick..

192. In the course of the appeal the claimant requested that the OH referral for 8 September 2022 could be a *"return to work"* and on 29 August 2022 (J515) explained that he was finding the position confusing. The same day Karen Dick responded to say that she would take advice from HR as to how best to proceed. The claimant continued to send emails to Karen Dick that day on the issues that he considered arose with a further email of 30 August 2022 (J536). This correspondence appeared to relate to (a) some confusion over who would hear the appeal as initially it seemed that the appeal would be heard by the same consultant who had turned down the application for HR and (b) that the claimant wished to use the referral to OH as a "*return to work"* assessment as well as an appeal.

193. By email of 1 September Karen Dick set out the process that would now be followed (J540) and this appeared a helpful summary of matters. At that time she stated that considering advice from Occupational Health and the claimant's GP she was not in a position to *"support your request to return to work"* but would *"continue to fully support you during your absence…"* with the offer of a referral to the respondent employee counselling service. It is noted at this time that the claimant felt that the process was taking too long and he could not financially afford to be on half pay (J542). In a response to Karen Dick of 2 September 2022 (J543) the claimant appreciated the explanation. The appeal against refusal of ill health retirement was turned down by report of 14 September 2022 by Dr Esan (J545). Up to that point the Tribunal could not detect any issues between the claimant and his line manager which would be unfavourable treatment.

194. On 14 September 2022 the claimant advised Karen Dick that he had sent an email to Caroline Bruce which referred to possible termination of his employment with Fife Council and that if that was not an option then a referral to OH for a fitness to return to work with any recommendations to be put into place. Subsequent notes of discussion reaffirmed a view that the claimant felt he was now fit to return to work and would like to be

referred to Occupational Health. On 20 September 2022 the claimant then asked if he could seek a capability hearing instead of returning to work to which there was a response to the claimant on 23 September. However on 22 September 2022 the claimant sent an email to Leigh Donnelly (J559) stating that *"Karen appears to have stopped communication, sent two emails and two texts with phone calls with no response as yet for a couple of days hence reason I contacted yourself. It's become a regular occurrence now so I'm not sure whom I contact. It's just professional courtesy as I am still presently employed by Fife Council to send a quick two second email to say it's been received and will get back when available. This is quite a regular occurrence now."*

195. From the documents produced and the response times disclosed the Tribunal did not consider this was a justified complaint by the claimant.

196. Further on 23 September 2022 (J561/562) Karen Dick sent copies of Occupational Health reports as requested and indicated that she was *"sorry to hear that you feel there is a tension between us"* and did try her best to "*maintain regular contact with you and respond to you as quickly as possible"* but if he wished an alternative manager that would be arranged. She also outlined the wording of the referral to OH being to receive advice in relation to the claimant's current health and an assessment of his fitness to return to work and any recommended reasonable adjustments or supports that could be put in place for him. She asked if the claimant agreed to the information being sent within the referral to Occupational Health and for confirmation if he was comfortable with her being the referring manager or if he would prefer an alternative manager to submit the referral or indeed change managers at this point.

197. No response was received to that request regarding alternative manager. Matters then proceeded with the claimant advising on 26 September (J563) that his GP would not be issuing a Statement of Fitness to Work sick line as he is *"happy with the way my medication is working and the effects and benefits these are having on my mental health…."* He indicated that his GP had *"encouraged a capability through my legal rep…"* The following day he asked "*What the next steps are I have not got a clue as to what is going on. Not sure if it's OH referral or capability etc. Sent*

emails and tried calling yesterday." Karen Dick texted the claimant to let him know she was compiling an email for him which she sent later that day and which indicated that the claimant had confirmed he was *"happy for me to continue to support you, agreeing with OH questions and agreeing for me to be the referring manager".* She confirmed that she had completed the OH referral the previous day. She also commented on the capability request and advised on medical redeployment. Thereafter on 30 September 2022 (J571) the claimant advised that he would be making it clear that when he had his appointment with OH he would be stating that he did not want to return to the respondent to resume employment. He indicated he had been ignored and he had been made to feel that he was a nuisance. He stated "*I have explained several times that I do not know when management and HR in meetings or their schedule as I am off sick but to completely ignore my phone calls and emails is unacceptable. You do not do that to anyone whom has the history and also went through the worst episode of mental health. It is cruel and uncalled for. There is completely no need for it. I have now lost all trust and confidence in management and won't be seeking any more help which I will now do through my legal rep. I certainly had lost complete trust and confidence in my line manager and Fife Council."* Again the Tribunal were not able to find why there should have been a loss of confidence and trust by the claimant in his line manager. From the documents produced it was unreasonable to suggest that phone calls and emails had been completely ignored.

198. Also given the confusion apparent in the claimant's emails on whether he sought return to work, capability hearing or no longer wished to be employed by the Council a meeting was arranged with him and Caroline Bruce and Leigh Donnelly on 14 October 2022 (J583/588). At that point the claimant was advised that Karen Dick was off and in any event had 30 other staff and service users to see to and that the claimant "*sending 2-3 emails a day, making calls"* may not be seen as reasonable to which he responded *"Fair dos I'll take that on board".*

199. In any event at this point it appeared that the claimant's SSSC registration had expired and he could not make a return to work. On 14 October 2022

(J595) the claimant confirmed that he had now requested restoration of his SSSC registration which had lapsed. The registration was completed by 9 November 2022 (J656). His normal payments were immediately resumed and arrangements were to be made to return to work the following Monday.

200. The Tribunal saw no evidence to suggest on any reasonable view of matters there were issues with Karen Dick or that the respondent failed to deal with any issues which prevented the claimant returning to work earlier than he did and did not consider there was any unfavourable treatment on this matter.

The number of Occupational Health referrals that were made during the claimant's absence which began in March 2022

201. The Tribunal saw no unfavourable treatment in relation to the referrals which were made through to September 2022. Those referrals were:-

(1) Referral of 12 April 2022. The reason for that referral was to assess the claimant's current fitness for work, when he might return, what effect there might be on abilities to carry out duties, any support that could be provided. That report was received 3 May 2022 advising that the claimant was unfit for work and no timescale predicted for a return.

(2) A further referral was made to Occupational Health on 2 June 2022 following the claimant advising that he would wish to seek ill health retirement by email of 1 June 2022. That referral involved an initial appointment on 20 June 2022 wherein it was stated that the claimant remained unfit for work and so far as IHR was concerned the consultant had *"posted out the relevant consent forms to (the claimant) in order to request a GP report in order to discuss the option of ill health retirement".* On receipt of that report a further telephone conversation would take place.

(3) That resulted in a further referral of 25 July 2022 forwarding the medical report received from the claimant's GP and thereafter a telephone consultation on 28 July 2022 wherein the consultant advised that the claimant remained unfit for work and that he would

then forward the claimant's case *"for consideration of ill health early retirement."* That required to be considered by an independent Occupational Health physician approved by the Pensions Board. That consultation took place on 9 August 2022 wherein it was stated there was insufficient evidence *"to conclude that he is permanently incapable of discharging his own role…"* and so ill health retirement was not appropriate.

(4) The claimant wished to appeal that decision and so a further referral was made to Occupational Health. That report was dated 14 September 2022 advising that the original decision on ill health retirement should stand.

202. The initial referral to OH was standard practice. The subsequent referrals through to September 2022 were due to the claimant stating that he wished to make application for ill health retirement. That necessitated an assessment as to whether or not the application could be supported. The Tribunal saw no unfavourable treatment in that sequence of events to September 2022.

203. The final referral to Occupational Health was the real concern of the claimant. That referral was made on 26 September 2022 and related to the claimant indicating he was fit to return to work. The Tribunal were of the view that there was an inconsistency in his position around this time. He took the view that being refused ill health retirement meant, at least by implication, that he was fit for work as if there was no middle ground namely that he may not be permanently unfit for work but may be unfit at that point. He further relied on his GP advising that he would not be issuing any further Statements of Fitness to Work which would prove that he was fit for work.

204. There was a very short period between the claimant seeking ill health retirement on the basis that he was permanently unfit for work and then indicating he was fit to return to work. The Tribunal saw no concern about seeking a further Occupational Health assessment in those circumstances. The Tribunal were satisfied that the respondent's wish to be reassured about the claimant's fitness for work was genuine and

reasonable and saw no unfavourable treatment of him being required to attend a further OHA. The Tribunal did not agree with the claimant's assessment that seeking a referral meant that the respondent considered he was lying when he indicated he was fit to return. Previous assessment had indicated he was not fit for work and so it was only reasonable to be reassured of the position.

205. In any event he was not able to make a return to work given he had no SSSC registration at that point. That was resolved after he had had the OH referral and the result of that referral. There was no disadvantage caused to him by a further OH referral.

206. A particular issue raised by the claimant was on the referral of 18 October 2022 where it is stated "*Managers have safety concerns regarding a return to working with vulnerable clients".*

207. The claimant's position was that this meant that the respondent had "*serious safety concerns"* about his working with vulnerable users albeit he had never had any difficulty in working with service users over the past 20 years and there had never been any complaint of safety fears.

208. The respondent explained that the reason this question was asked was due to concerns that (i) the claimant had quite consistently indicated the trigger for decline in mental health was connection with the respondent as an institution and on various occasions in his absence indicated he did not wish to work for the respondent (ii) the claimant continued to be on medication which had apparently increased in dosage and it was necessary to ascertain whether that had any effect on his role as a Social Care Worker particularly if he were to be located in a single tenancy property and (iii) there was a short turnaround between him claiming ill health retirement and declaring he was fit for work. The respondent considered that they had a duty of care both to the claimant and to the service users in this respect. The Tribunal considered that a fair reading of this referral was a request for information from the Occupational Health consultant on whether the respondent should be aware of any safety concerns. The claimant himself had made reference to possible risks (J547) of the effects of medication. The Tribunal considered that was a

reasonable approach and considered there was no unfavourable treatment on that issue.

209. The further matter which concerned the claimant was that prior to the consultation of 18 October 2022 there had been a pre-consultation discussion between the OH consultant and Karen Dick. The claimant complained of this in his email of 18 October 2022 (J599). An enquiry was made by Leigh Donnelly as to whether what was stated by the claimant was accurate. That conversation (J617/618) advised there was nothing unusual about that call and that Karen Dick had been "*very professional"* without raising new issues beyond the written terms of the referral which the claimant had been asked to comment on prior to referral being made (J561). Ms Dick had simply reiterated concerns regarding the sudden change by the claimant in stating that he was now fit for work after prolonged absence. Again the Tribunal could see no unfavourable treatment in this respect.

Ignoring the claimant's GP view that he was fit to return to work which the claimant relayed on or around October 2022.

210. The claimant was of the view that the respondent should have accepted that as his GP was not providing any more Statements of Fitness to Work he could make a return to work. The respondent's position was again that they did not ignore that issue but were concerned (i) about the claimant's position on return to work so soon after refusal of ill health retirement on the claim that he was permanently unfit for work (ii) the lack of any positive report from the claimant's GP on the claimant's current position including any recommendations on return (iii) whether the claimant being on increased medication had any impact on his role (iv) whether there was a financial imperative to him wishing to make a return to work.

211. Given the circumstances the Tribunal did not consider there was any unfavourable treatment in seeking an OH assessment on the claimant's ability to make a return to work albeit no further Statements were to be issued. The respondent had received no detailed report from the GP as to what phased return or other adjustments might be made on a return to work. Given the length of the absence and the circumstances it was

appropriate for assessment/recommendation to be made at least on those matters.

212. Part of this claim would appear to relate to the complaint by the claimant that the respondent could have phoned his GP direct to obtain further information rather than an assessment. However, the respondent relied on OH consultants to make that contact, if necessary, as part of the OH assessment and it would not be part of the duty of a line manager to make that contact. The Tribunal saw no unfavourable treatment in this matter.

Failure to act on the OH recommendation to keep the claimant's stress levels to a minimum to prevent any more relapse of his mental health

213. It was unclear to the Tribunal just what the claimant relied on in this respect. In the document giving some further detail of the various claims of unfavourable treatment (J107) he stated that this could be seen *"per the email communications to Wendy Thomson fully explaining how badly I was being affected by the treatment of the respondent".*

214. The claimant made reference to matters which concerned him in his email to Wendy Thomson of 23 January 2023 (J724) where he suggested that all his concerns seemed to have "*fallen on deaf ears especially the advice from Occupational Health reports".* He advised that he was going to remain off sick as no accommodation could be made regarding the 12 hour shifts at Keir Hardie and the move to Blairoak and being told that it was *"Blairoak or nothing".* Accordingly reference to stress levels appeared to relate to the respondent advising he could not work 7/8 hour shifts at Keir Hardie but could do so at Blairoak..

215. As indicated previously the claimant did express confidence in Blairoak being suitable on 16 January 2022 and then following the shift on 18 January 2022 decided that it was not suitable and left after two hours or so. The Tribunal have considered the issue of the shift change at Keir Hardie and recognised the problems associated with providing the claimant with what he wanted at Keir Hardie. The Tribunal found that it was a reasonable adjustment to arrange a transfer to Blairoak where he would work the 7/8 hour shift which he requested. It was not the respondent that sought to make that move but the claimant's desire not to

work 12 hour shifts. In that respect there was no unfavourable treatment of him.

Failure to make reasonable adjustments to the rota at Keir Hardie

216. This is a matter which has been considered. The Tribunal did not consider there was a failure in the duty to make reasonable adjustments.

A failure to investigate his grievances raised on 27 October 2022 and 30 January 2023.

217. The claimant did not give any evidence about any failure to investigate his grievance of 30 January 2023. In any event at this time there were "without prejudice" discussions with the claimant and a "protected conversation" followed by resignation on 13 February 2023. Given those events in the short time period between grievance and resignation it would not be reasonable to find that there had been a failure to investigate..

218. In respect of the grievance of 27 October 2022 (J641) the claimant's request was for *"internal investigation from a professional whom is completely impartial…"* That email was acknowledged that evening (J644) along with other emails sent that day and the previous day to say a response would come the following week.

219. On 3 November 2022 Ms Bruce responded to say that given the content of his email and the request for independent internal investigation would he wish the complaint dealt with as a formal grievance and if so what resolution he was "*looking for".* In the meantime (unknown to the claimant) steps were being taken to see whether there was an individual within the respondent who could conduct an internal investigation and that did not prove fruitful.

220. Then on 11 November 2022 the claimant was advised that the matter would be dealt with under the respondent's grievance policy and procedure. It was explained that that would mean that there was a formal process to follow in relation to the complaint which had been lodged. It was also confirmed that an individual had been identified within HR who could deal with the grievance.

221. Thereafter there were meetings arranged and the claimant's line manager was changed to Lee Milne as a way of dealing with issues in the interim. The claimant returned to work on 18 November 2022 and raised some issues regarding his return to work before intimating resignation on 21 November 2022 (J678). There was then a discussion with the claimant and the claimant withdrew his notice and indicated on 1 December 2022 that he did not want to pursue his grievance.

222. The Tribunal considered that active steps were taken to deal with the grievance and did not consider in those circumstances there was unfavourable treatment in a failure to investigate his grievance.

223. In any event in relation to this particular allegation of unfavourable treatment the Tribunal did not consider that matter was "*something arising"* in "*consequence of the claimant's disability".* The issue seemed separate from the issue of disability but related to matters which would arise in a grievance process. The Tribunal did not consider that any failure to investigate was as a consequence of the claimant's disability but due to the circumstances which surrounded his request for an internal investigation; the search for somebody suitable; the determination that the matter should be dealt with as a grievance; the claimant's resignation and subsequent withdrawal of that resignation and withdrawal of grievance (***Robinson v Department of Work and Pensions [2020] IRLR 884***).

224. Given that the Tribunal did not consider that there was unfavourable treatment of the claimant under s15(1)(a) of EA it was not necessary to consider whether such treatment was a proportionate means of achieving a legitimate aim under s15(1)(b) of EA.

Time bar

225. It was not necessary to consider whether any of the discrimination claims were time barred on the failure of these claims.

Unfair (constructive) dismissal

226. The claimant claims he has been constructively dismissed as described in section 95(1)(c) of ERA. This states that there is a dismissal where the

employee terminates the contract in circumstances such that he or she is entitled to terminate it without notice by reason of the employer's conduct.

227. The conduct of the employer must be a repudiatory breach of contract namely "*a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the terms of the contract".* It is clear that it is not sufficient that the employer's conduct is merely unreasonable. It must amount to a material breach of contract.

228. The employee must then satisfy the Tribunal that it was this breach that led to the decision to resign and not other factors. If there is delay between the conduct and the resignation the employee may be deemed to have affirmed the contract and lost the right to claim constructive dismissal (***Western Excavating (ECC) Ltd v Sharp [1978] ICR 221***).

229. The term of the contract that the claimant relies on is that commonly called "trust and confidence". This was defined in ***Malik v Bank of Credit and Commerce International SA (in liquidation) [1997] IRLR 462*** where it was said that an employer shall not *"without a 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."* This is an objective test.

Reasons for resignation

230. The resignation emails sent by the claimant on 13 February 2023 (J731/732) contained little detail of the reasons for resignation. In one he indicates that he was *"shocked and appalled by the treatment as per emails I have received from HR and senior management and feel this is unfair especially as I am off sick"* and in separate email states that he is *"appalled at the treatment I have been put through whilst off sick".*

231. In his ET1 (J19) the claimant states that *"after 12 months of appalling treatment, discrimination of my mental health, refusal of mediation, refusal of investigating my grievances I felt I could not take any more".* In the note of preliminary hearing it was decided that the claimant's email of 30 January 2023 (J729/730) should be treated as further and better

particulars of the alleged "*appalling treatment"* to which reference was made in the ET1 and matters of complaint.

232. Essentially that email set out a *"formal grievance for workplace discrimination"* concerning:-

(1) Alleged strained communication issues with Karen Dick.
(2) The referrals to Occupational Health regarding his fitness for work with particular reference to the referral to Occupational Health after his GP had indicated he would not be submitting any more *"fit notes".*
(3) Alleged communication issues with Lee Milne.
(4) That the request for shorter shift hours at Keir Hardie was not approved.
(5) That he was advised *"Blairoak was the only alternative".*

233. In the evidence the claimant advised that the reason for resignation was a "*build up of matters"* and the trigger was the failure to agree to him having shorter shifts at 8 Keir Hardie; and that safety concerns about him returning to work with vulnerable service users had been raised. That latter issue regarding safety concerns was not raised in his email of 30 January 2023.

234. Additionally although again not noted in the email of 30 January 2023 in the course of evidence he claimed the respondent were in breach of policy matters particularly relating to health and safety.

235. Many of these issues have been considered in relation to the discrimination claim made by the claimant and the Tribunal have no wish to rehearse again the evidence in relation to those matters. In brief:-

(1) Communication issues with Karen Dick

236. The Tribunal did not consider that Karen Dick had failed in any duty to communicate effectively and timeously with the claimant. He was in the habit of making calls and sending numerous emails to Karen Dick, many in the course of the same day, and it was not reasonable on an objective view to find that she had "*kept him in the dark"* or had "i*gnored"* the claimant. The Tribunal accepted that it was simply not possible for Karen Dick to be always available on his calls or to respond immediately to any

email received given other duties she required to manage. There was no glaring gap in communication from Karen Dick which would evidence a lack of attentiveness to the claimant's concerns over the period March 2022/January 2023. He certainly made complaint about this matter but there is no breach of the implied term simply because an employee subjectively feels that such a breach has occurred no matter how genuinely that view is held. The respondent reacted to the complaint by arranging for an alternative manager given the claimant's feelings but as indicated the Tribunal did not consider that there had been a failure by Karen Dick in communicating with the claimant.

(2) Referrals to Occupational Health

237. In this matter, raised within the discrimination claims, the Tribunal did not consider there was any overuse of referrals to Occupational Health. The initial referral was simply to identify fitness for work and any support or adjustment that might be made to enable a return to work. Subsequent referrals largely concerned the application for ill health retirement. This possibility was put to the claimant as an option that he might wish to pursue. There was no pressure put on the claimant that he should take that option. He decided he would make the application and that involved referral to Occupational Health for an assessment on whether he was permanently unfit to make a return to work. He set out extensively the reasons why he considered that was the case in support of that application. Initially, it was thought that the application would be successful but on referral to the consultant from the Pensions Board that proved not to be the case. The claimant then wished to have that decision reviewed and again provided extensive material in support of that further application. There was a process that required to be followed in relation to the application for ill health retirement and the referrals to Occupational Health were part of that process. The Tribunal could not consider there was any part of that process which could found any claim of breach of the implied term by the respondent.

238. In so far as final referral to OH was concerned after the claimant had declared himself fit for work and his GP was not to issue any further Statements of Fitness to Work the Tribunal did not consider that was

unreasonable. There was confusion in the chain of emails at that time as to the claimant's intentions. There was a claim made that he was fit to return to work; a claim that he wished to proceed to a capability hearing rather than a return to work; a claim that he would not return to work; all in a short period of time (J556-J571). The Tribunal considered it was reasonable to refer the claimant to Occupational Health for an assessment on his fitness to return to work subsequent to his intimation that he was fit to return.

(3) Safety concerns

239. Although not mentioned in the email of 30 January 2023 (being accepted as the further particulars of claim) there was considerable stress by the claimant placed on the respondent making reference to safety concerns in the claimant making a return to work. As was pointed out in submission the respondent did communicate with the claimant that they had concerns about him returning to work so far as carrying out his role was concerned in an email from Karen Dick on 30 September 2022 (J573/574). There it was explained that the report from OH of 14 September 2022 advised that the claimant's GP reported the claimant's *"work environment seemed to make your health condition worse and is likely to exacerbate it if you return to it"* and also raised the issue that the claimant while suggesting he was fit to return to work had also expressed a preference to progress to a capability hearing and that in the recent months in his application for IHR had been adamant he was not fit to return to work in any capacity.

240. It was stated by Ms Dick that:

> *"As your employer we have an obligation to ensure you were fit to work, we must be able to ensure your health and safety at work and ensure your mental health needs are met. Therefore considering the above information, previous discussions with you and OH advice I have legitimate concerns regarding what your current abilities are in relation to your role and an OH assessment will provide an objective review of your fitness for work with specific recommendations as to the types of reasonable adjustments and supports that are likely to enable a return."*

241. Effectively, the respondent wished reassurance on that matter and once the report from OH was received they made arrangements for the claimant's return to work. The Tribunal viewed that the stress placed on this by the claimant was an overreaction by him and not objectively justified and did not breach the implied term.

(4) Communication issues with Lee Milne

242. This issue was not raised in the discrimination claims.

243. As referred to in the facts Lee Milne became the line manager for the claimant in November 2022. That came about as a result of the claimant complaining about the line management of Karen Dick. He was asked by Caroline Bruce to take that position when the claimant was to return to work. The claimant had complaint on the terms of the note following the "*return to work"* interview held with him but the Tribunal found that the note of that meeting was an accurate account of the conversation.

244. The various concerns raised by the claimant were outlined in his emails over 18 November 2022 through to 23 November 2022 (J669/J680). Caroline Bruce by email of 24 November 2022 (J682/683) set out bulletpoints of the matters which concerned the claimant on his return to work (J682/684) and sought comment from Lee Mine who did so by return (J685/J687).

245. At this time the claimant had advised that he was going to take advice and "*go for constructive dismissal"* (J675) and advised Caroline Bruce (J676) that he wanted time off to attend an appointment with his lawyer to discuss options and his next steps regarding "*my disappointment of the welcome back to work report and the complete inaccurate information that's been documented that I'm supposed to have said which I am so angry about".* Caroline Bruce advised that time off for an appointment required to be requested through Oracle and either taken off as TOIL, annual leave or a shift swap (J676). The claimant decided to cancel the appointment and on 21 November 2022 (J678) gave four weeks' notice to terminate his employment for constructive dismissal as he had "*had enough".* He indicated that he had never been "*so sickened by what I read on my return*

to work report and the complete inaccurate information that's been detailed about me along with years and years of trying to get support etc."

246. Part of the complaint on return to work was that Lee Milne had made no effort to make contact with him apart from the "*odd hello are you okay"* and given files to read.(J679)

247. Mr Milne responded to the points made in his note to Caroline Bruce (J685/687) and refuted the various allegations made. He advised that he had met with the claimant initially for approximately one and a half hours and had then gone into "*the kitchen on numerous occasions to ask if (the claimant) was okay*". He also advised that Karen Dick had a few conversations with the claimant and the staff that day. He advised that rather than given files to read with no updates he had explained to the claimant the new guidelines regarding eating and drinking and also the new SALT guidelines. He also asked that the claimant read the October/November staff handover booklets so that he was aware of what had been happening recently. He could not verbally update him on this because the claimant was to work in number 8 Keir Hardie and he managed number 9. He was also advised that the claimant would be shadowing the current staff team and he was "*happy with this".*

248. These notes in response to the issues raised by the claimant were forwarded to Ms Bruce on 24 November 2022. She telephoned the claimant as she wanted to discuss why he had given notice as she was aware that he may react too quickly and in the course of that conversation the claimant indicated that he wished to retract his notice and focus on service users and put the past behind him. She advised that she would be happy for him to retract his notice but he would need to put that in an email which he did that night stating that he confirmed he would be in for work on 27 November 2022 and shifts thereafter and wanted to put the *"past behind me and concentrate on settling myself back in to Keir Hardie".* Ms Bruce thanked the claimant for his email and looked "*forward to your returning on Sunday".*

249. Thereafter Ms Bruce asked whether the claimant wished to continue with his grievance intimated 27 October 2022. She also noted that the claimant

had raised "*other points in your emails about your initial to return to work"* and asked if these should be addressed either informally or within the grievance. The claimant responded to say he wished to *"end any further complaints, grievance etc."*

250. Accordingly, the issues regarding the complaints on return to work proceeded no further.

251. From the evidence of the claimant and Mr Milne and the documentation on this issue the Tribunal were of the view that along with the note of meeting produced by Mr Milne being accurate there had been time spent with the claimant to reintroduce him to working at Keir Hardie. In any event the claimant had sought to bring that matter to an end and the Tribunal did not consider there was a breach of trust and confidence arising out of these circumstances.

(5) Alteration of shifts at Keir Hardie

252. This matter has been explored within the claim for reasonable adjustments under sections 20/21 of EA. The Tribunal did not consider that there was a breach of trust and confidence arising from the request for change of shift hours not being accommodated in Keir Hardie. In essence, all the staff there worked 12 hour shifts; that had been agreed with the staff who wished that to continue; there were good practical reasons why it should continue both for staff and users; staff were asked if anyone wished to work shorter hours which might have led to an accommodation for the claimant but none did; staff would likely leave were the position to be altered mandatorily; and the claimant had been offered shorter shifts at Blairoak which the Tribunal considered was a reasonable alternative. The Tribunal saw no issue with that being a breach of contract or adding to a claim of loss of trust and confidence on an objective view. Neither did the Tribunal consider that Blairoak was unsuitable for the claimant. There was no evidence to suggest that the users there were beyond the capabilities of the claimant as an experienced social worker. The Tribunal did consider that there was a rather abrupt cessation of the claimant's involvement at Blairoak. It did not seem he had given it any fair trial. Neither did the Tribunal consider that "*Blairoak or nothing"* was a fair

description of the situation. Had he not resigned the Tribunal accepted that there would have been steps taken to try and accommodate him within another home.

(6) Health and safety and alleged Policy breaches

253. In so far as Health and Safety issues were concerned the claimant's concern was that no risk assessment had been put in place. However the Tribunal considered that the referral date to Occupational Health was that form of enquiry. Those referrals were to establish what support or adjustments might be put in place for the claimant on a return to work. Other than a phased return no other recommendations were made. In any event, this was not an issue that the claimant raised prior to resignation and the Tribunal did not consider it formed part of his reason for resignation but that was a matter which had arisen after the event. The Tribunal did not consider that the resignation was a response to a lack of risk assessment.

254. On the additional alleged breaches of Policies the Tribunal did not consider that any of the other alleged breaches formed part of the reason for resignation but were also matters which were being raised after the event and so could not found a breach of the implied term as not being in the mind of the claimant at the relevant time.

255. Even if that was not the case the Tribunal did not find there had been a breach of policy. In short, the claimant made no application under the Flexi Hours Policy and therefore there was nothing that the respondent required to consider in that respect; on the Attendance Management Policy there was a wealth of communication with the claimant; on the Supporting Mental Wellbeing at Work Policy his line manager had kept in touch; he had been offered a phased return and shadowing when he made a return to work; he had been offered shorter shifts at his request; it had been reasonable to ascertain his fitness to return to work in October 2022 and be reassured there was no safety issue; on the Occupational Health Policy there had been referrals made to OH either to make assessment of fitness to return or ascertain any adjustments/supports that could be offered or because the claimant wished to proceed with ill health

retirement; on the Grievance Policy his grievance had been taken seriously and there was no undue delay.

256. In short, the Tribunal did not consider that any of the matters founded upon by the claimant on their own or in combination with any other matter breached the implied term of trust and confidence and so the claim for constructive dismissal does not succeed.

J Young

Employment Judge

21 February 2024

Date of judgment

Date sent to parties