EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4103197/2022

Held in Glasgow on 13, 14, 15 & 16 May 2024

Employment Judge P O'Donnell

Mrs Amanda Lee	**Claimant** **Represented by:** **Mr B Bokhari -** **Representative**
The Scottish Ambulance Service Board	**Respondent** **Represented by:** **Mr G Fletcher -** **Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Employment Tribunal is that the claim of unfair dismissal is not well-founded and is hereby dismissed.

REASONS

Introduction

1. The Claimant has brought a complaint of unfair dismissal under s94 of the Employment Rights Act 1996 arguing that she resigned in circumstances which amounted to a dismissal as defined in s95(1)(c) of the 1996 Act (constructive dismissal). The respondent resists the claim arguing that there was no dismissal but, if there was a dismissal, any dismissal was fair.

Preliminary/case management issues

2. The Tribunal had to deal with a number of preliminary or case management issues arising from applications made by the respondent during the hearing.

3. First, the respondent made an application at the outset of the hearing to strike-out the claim under Rule 37 on the basis that the claimant's conduct in relation

to the preparation and exchange of witness statements was scandalous relying on the following grounds:

a. There was a reference in all three statements lodged by the claimant to her religion. An application by the claimant to amend her claim to add a claim of discrimination on the grounds of religion/belief had been refused. The references to the claimant's religion in the statements were, therefore, said to not be relevant.

b. The statements were not exchanged at the same time. The respondent provided their statements at 4pm on the day in question but the claimant's statements were not sent until 4.25pm on the day. The claimant was said to have, therefore, had the respondent's statements for 25 minutes with the opportunity to adjust her statements before exchanging them.

c. The claimant's statement contained a third version of how she came to obtain new employment that contradicts earlier explanations provided in response to directions by the Tribunal.

4. In reply, the claimant's representative said the following:

a. The mention of the claimant's religion in the statements could be resolved by removing the words to which the respondent objected. There was no intention to undermine any earlier decision of the Tribunal.

b. The delay in the exchange of witness statements arose from the fact that the agent was delayed when attending prayers during Ramadan and that he logged into his computer as soon as possible to send the statements. Nothing in the respondent's statement was discussed with the claimant prior to sending her statements.

c. The claimant can be cross-examined on any inconsistencies between her statement and previous correspondence with the Tribunal reaching its own view on this.

5. The application for strike-out was refused for the following reasons:

   a. The Tribunal was not persuaded that any of the reasons advanced by the respondent were sufficient, either individually or collectively, to say that a fair trial was no longer possible.

      i. If a witness statement contained evidence which is not relevant to the issues to be determined then the Tribunal is more than capable of disregarding such evidence.

      ii. Similarly, if there are issues with the reliability and credibility of the claimant's evidence (for example, arising from any contradiction between the witness statement and earlier correspondence) then the Tribunal is, again, capable of assessing such matters and taking a view.

   b. In any event, there were alternatives to taking the draconian step of striking out the whole claim:

      i. As suggested by the claimant's agent, the statements can be revised to remove the references to religion to which the respondent objects. It had been explained to parties that, at this stage of the hearing, the Tribunal had not read any of the statements. In the event, revised statements were provided and these were read by the Tribunal.

      ii. The respondent's representative can challenge the claimant on any contradictions in her version of events in cross-examination and make submissions about these.

      iii. Similarly, submissions can be made regarding the late exchange of witness statements and whether the Tribunal should draw an adverse inference from this.

6. The respondent made an application to exclude the two additional witnesses whom the claimant intended to call on the basis that they were not giving

relevant evidence. It was said that they were not witnesses to the facts of the case and their evidence was more of the nature of "character" evidence.

7. This application was initially made at the outset of the hearing when, as noted above, the Tribunal had not read any witness statements or heard any evidence. The Tribunal refused the application at that stage because the Tribunal considered that it was not possible to assess the relevance of those witnesses in a vacuum.

8. The application was renewed once the claimant had concluded her own evidence. The Tribunal was invited to read the statements from the additional witnesses (which were short). Having done so and having a fuller understanding of the case being advanced by the claimant from her own evidence, the Tribunal did consider that the additional witnesses were not being called to give relevant evidence. Nothing in the witness statements went to the question of whether there had been a fundamental breach of contract by the respondent or any other issue to be determined in this case. Rather, it was a description of the claimant's character and very vague descriptions of the claimant stating that she had been subject to issues in the workplace or suffered work-related stress. The Tribunal did not consider that it was in keeping with the Overriding Objective to call witnesses whose evidence was of no relevance.

9. Finally, after the Tribunal had read the claimant's witness statement but before she had been cross-examined, the respondent raised an issue about paragraph 123 onwards setting out events after the claimant had resigned and asking for those paragraphs to be struck out.

10. The Tribunal considered that this matter could and should have been raised earlier before it had read the witness statement. The Tribunal cannot "unread" those paragraphs. What it is capable of deciding is what is and is not relevant to the issues it has to determine. Parties can make submissions regarding such matters. The respondent's agent may have felt a need to cross-examine on these paragraphs but that was a matter for his professional

judgment. He could decide not to do so and simply rely on a submission that this evidence is irrelevant and should be disregarded.

Evidence

11. The Tribunal heard evidence from the following witnesses:

    a. The claimant.

    b. Rona Walls (RW) – the former director of Occupational Health and Safety at NHS Greater Glasgow & Clyde (which provided occupational health services to the respondents West & Central division).

    c. Phil McAleer (PMcA) – the respondent's head of service for Lanarkshire

12. Evidence-in-chief was given by way of witness statements which were taken as read.

13. There was an agreed bundle of documents prepared by the parties. A reference to a page number below is a reference to a page in that bundle.

14. This was not a case where the relevant facts were significantly in dispute. The sequence of events leading to the claimant's resignation were, for the most part, not in dispute and were supported by contemporaneous documents.

15. As a result, this is not a case where the credibility and reliability of witnesses has been a particular issue. The Tribunal considers that all witnesses sought to give their honest recollection of events but that these were inevitably affected by the significant passage of time between those events and the hearing. The Tribunal does not consider that any witness was seeking to be deliberately misleading in any way.

16. Much of the dispute between the parties has been about how particular events or decisions should be viewed or interpreted.

17. In this regard, the Tribunal does consider that the claimant had formed a view about what was said in particular documents, especially the Occupational

Health (OH) reports and the documents from Salus (an organisation providing her with counselling arranged via the respondent), which did not always accurately reflect what the documents actually said.

18. For example, at paragraph 50 of the claimant's witness statement she asserts that the Salus report of 12 October 2021 concluded that the claimant was unfit to undertake paramedic duties. However, the report (pp164-168) does not say this in unambiguous terms. What is said is that an alternative role was required for the claimant to return to work but nothing is said as to what is meant by this, specifically whether it means an entirely different job or the same job in a different location. The context is important; the claimant's issues at the time where specifically related to the station at which she worked and people who worked there; the claimant, very shortly after this report, applied to transfer to a different station carrying out the same job which lends itself to suggesting that the issue for her was not the job of paramedic itself but rather the particular circumstances in which the claimant was carrying out that job.

19. Similarly, at paragraph 72 of her witness statement, the claimant asserts that at a meeting with Salus on 22 December 2021, the counsellor concluded that the claimant was being pressured into undertaking paramedic duties. However, it is clear from the report produced from that meeting (pp251-258) that this was not a conclusion by the counsellor but, rather, a note of what the claimant described to the counsellor.

20. This issue is important because it is one of the pillars of the claimant's case that there was absolute medical advice that she could not do any paramedic duties and that, despite this, she was asked in December 2021 to undertake attendant only duties (that is, clinical work but not driving). Further, it is a significant part of the claimant's case that the advice the respondent received from RW that the claimant was fit for clinical duties was wholly inconsistent with all the other medical evidence

21. However, there was nothing in any OH report, Salus report or any other document relied on by the claimant which said that she could not carry out

any paramedic duties. Further, it is not the case that the advice from RW is clearly and obviously inconsistent with the other medical advice.

22. The claimant placed considerable reliance on the content of the OH report updated on 12 November 2021 (pp230-235) but the difficulty for the claimant is that the report does not provide her with the absolute position that she considered it did.

23. This report states that the claimant was not fit to carry out driving. It goes on to state that the claimant was not fit to carry out "full" paramedic duties. In cross-examination, the claimant was unwilling to accept the possibility that the reference to her being unfit for full paramedic duties was a reference to her being unfit to drive rather than being unfit to do all paramedic duties. This is clearly one possible interpretation of what is meant by "full" paramedic duties and would not be inconsistent with RW's advice.

24. In these circumstances, although the Tribunal does not consider that the claimant was seeking to deliberately misrepresent the position, it does consider that the claimant's view of what is said by certain documents is not wholly reliable.

Findings in fact

25. The Tribunal made the following relevant findings in fact.

26. The respondent is the NHS Board that provides ambulance services across the whole of Scotland. The claimant commenced employment with the respondent as a paramedic on 4 May 2015. The role of paramedic involves clinical duties (that is, providing medical assistance to individuals, either at the point where the paramedic attends to the patient or when being transported to hospital in the ambulance) and driving duties which can include driving in emergency situations.

27. In 2019, the claimant had been subject to disciplinary investigation relating to an incident in May 2019 when it was alleged that she had administered CBD oil (which belonged to the claimant) to a patient and that this had not been properly recorded. The process concluded in December 2019 (pp83-87) with

a finding that the claimant had not administered the CBD oil but could have done more to prevent the patient taking the oil themselves. It also found that the claimant had not properly recorded this matter. A first written warning was issued. The claimant was not subject to any further disciplinary process throughout the rest of her employment.

28. During the course of these disciplinary proceedings, the claimant was made aware of an anonymous letter (p69) received by her regulatory body, the Health and Care Professions Council (HCPC), informing them of the investigation and that the claimant was on restricted duties. The claimant believed that, given the information in the letter, it had to have been sent by someone employed by the respondent. The letter contains no identifying information about the sender. She raised the matter with the respondent but no investigation was carried out.

29. In June 2020, the claimant became aware of team leader vacancies and applied for this. She was successful and took up the team leader role from August 2020. The claimant's team leader covered stations at Clydesmill, East Kilbride and Hamilton.

30. The claimant became concerned at the conduct of Richard Burns (RB), one of the paramedics she supervised, towards her. The detail of RB's conduct is not relevant to the issues to be determined in this case and so the Tribunal will not set out the detail of this.

31. The issues with RB reached the point that the claimant sent an email to Iain MacLeod (IMcL), who was acting area service manager at the time, on 14 December 2020 (p117) setting out the issues with RB and stating that this was a *"formal complaint".* IMcL forwarded the claimant's email to PMcA (who, at the time, was transitioning into the role of Head of Ambulance Services for the division in which the claimant worked) on 15 December 2020. There was an exchange of emails between them in which PMcA sought further information about whether any steps had been taken to resolve the situation (pp118-122).

32. PMcA directed IMcL to engage the first stage of the respondent's internal process (p124-125). This was an informal stage where early resolution was sought by way of what are described as "supported conversations" between the employees concerned facilitated by managers and/or HR officers.

33. No such early resolution took place in this case. The claimant and IMcL had a meeting on 20 December 2021 in which her complaint was discussed and she was asked if she was prepared to enter into mediation. The claimant indicated that she was prepared to do so although she had particular conditions for this. On or around 20 January 2021, the claimant was informed by IMcL that RB was not interested in mediation and wanted a formal investigation instead. However, nothing was done to start any formal process at this time and RB was then absent from work for approximately 6 months shortly after this date.

34. The Tribunal should at this point deal with the letter which appears in the bundle at pp127-128. This purports to be a letter from IMcL to the claimant dated 19 February 2021 setting out the outcome of the earlier resolution meeting. The Tribunal accepts the evidence of the claimant that this was never sent to her. The Tribunal does not consider that the respondent has sought to mislead anyone with this letter; it is not uncommon for the Tribunal to see correspondence prepared in draft which is never sent but, for some reason, is retained in a personnel file. It is a practice which is unhelpful to parties and the Tribunal but one which persists in many organisations.

35. The claimant sent a letter to David Robertson (DR), the West Region Director for the respondent dated 19 July 2021 raising a grievance against PMcA (pp135-140) relating to complaints she had about the manner in which he was managing her. The detail of the grievance is not relevant for the purposes of the issues to be determined by the Tribunal and so this has not been set out.

36. On 23 July 2021, the claimant was signed off sick by her GP with work related stress. She remained off sick until 26 October 2021.

37. DR passed the claimant's grievance to the Deputy Director, Matt Cooper (MC), to take forward. By letter to MC dated 27 July 2021 (pp143-153), the

claimant raised a grievance against RB, how her complaints about him had been handled, how her complaints about another paramedic, Sharon McElhinney (SMcE), had been handled and repeating her grievances against PMcA. Again, the detail of the grievances are not relevant to the issues to be determined and so will not be set out for reasons of brevity.

38. By letter dated 23 August 2021 (p157), MC acknowledged the claimant's grievances and invited her to an informal meeting on 6 September 2021. The letter states that MC hoped to achieve a resolution. The letter stated that the claimant was entitled to be accompanied by a trade union representative or work colleague. It went to say that the lawyer whom the claimant had instructed at the time could accompany the claimant albeit in a "non-legal capacity". The meeting actually took place on 16 September 2021 and the claimant was accompanied by another team leader.

39. MC wrote to the claimant by letter dated 28 September 2021(pp159-160) after their meeting setting out how he intended to take her complaints forward. In particular, he proposed to hold one supported conversation between the claimant and SMcE as well as another one between the claimant and PMcA. He was also going to ask a manager to review what had happened in relation to the complaint against RB.

40. The letter states that the claimant had agreed to MC's proposed actions but it was her evidence that she had not. In light of how the facts of the case developed subsequently, the Tribunal does not consider that much turns on whether she agreed or not. As will be clear below, what is important is what actually happened and whether the grievance was progressed.

41. On 18 October 2021, the claimant was referred to Occupational Health by her then line manager, Samantha Harrison (SH). A report was prepared in October and updated in November 2021. A copy of the report appears at 230-235 which includes the October and November advice. The report sets out the following relevant matters as at October 2021:

    a. The claimant was unlikely to return to her station and duties until her workplace issues were resolved.

b. In particular, she should not return to driving duties while she is being assessed for possible cardiac symptoms which could impact on her fitness to drive.

c. No date could be given at that time for a return to full paramedic duties.

d. The claimant was seeking a resolution to her workplace issues but if this was not possible then she was requesting support to transfer to another work location.

42. In early November 2021, the claimant informed SH that she was experiencing an irregular heartbeat and so, on 11 November 2021, SH sought advice from OH as to whether the claimant was fit for operational duties. The OH report was updated on 12 November to say that the claimant was not fit for non-emergency and emergency driving duties. It went on to say that the claimant was not fit for *"full paramedic duties"* but was fit for her alternative role being undertaken at the time.

43. By this stage, the claimant had also been referred to an organisation called Salus via the respondent. Salus was providing the claimant with counselling and a number of reports were provided to the claimant setting out what was discussed including recommendations as to how the claimant could cope with or minimise any stress or anxiety (pp192-198, 218-225 & 251-258).

44. At her second meeting with Salus on 26 October 2021, the claimant had discussed a transfer to a different station with the counsellor as a way forward. She, therefore, submitted a transfer register form to the respondent on 28 October 2021 asking to transfer to a team leader role at either Law or Hamilton station. In the event, there were no vacancies for a team leader at either of those stations.

45. The claimant returned to work on 27 October 2021 to alternative duties assisting with interviews and was then attached to the Workforce Planning Unit.

46. On 28 October 2021, the claimant contacted Kenny McFadzean, acting deputy director of the West Region (KMcF), by email (pp211-213) as she understood that he was now dealing with the claimant's grievances.

47. The claimant was on annual leave at the start of December 2021 for her wedding.

48. On 20 December 2021, the claimant attended a supported conversation with SMcE. There was no outcome letter issued in respect of this meeting. The claimant considered that the meeting involved no more than an attack on her by SMcE and did nothing to resolve her grievance.

49. By email dated 24 December 2021 (p264), SH contacted RW for advice regarding the claimant's fitness for work. They had had a previous email exchange on 12 November 2021 (p265) about the claimant's fitness for work whilst the issues with her irregular heartbeat were investigated. On 24 December, SH was asking whether the claimant would be fit to do attendant only duties with no driving. The reason she was asking this was because of the demands on the ambulance service during this period of the covid pandemic and the need for as many paramedics to be deployed as possible. RW confirmed to SH that the claimant would be fit to do attendant only work but not driving duties. PMcA subsequently contacted RW with the same query and received the same advice.

50. As a result of this advice, PMcA asked an area service manager (Lindsay Kerr-McLeod) to speak to the claimant and ask her to return to attendant only duties. Mr Kerr-McLeod spoke to the claimant on 24 December 2021 regarding a return to attendant only duties. The claimant was unhappy at this suggestion as she felt this was unsafe given the ongoing medical assessment and her unresolved grievances. She also raised the need for a phased return and refresher training. Mr Kerr-McLeod suggested that the claimant "buddy up" with another crew member and undertake a phased return for as long as necessary. In the event, the claimant did not return to attendant only duties and subsequently went off sick until her resignation.

51. A supported conversation had been arranged for 12 January 2022 between the claimant and PMcA. The claimant had intended to bring her trade union representative to this meeting. The claimant was asked if she would be willing to attend without her trade union representative; PMcA had indicated that if the claimant was bringing her representative then he would also require to have a trade union representative present; it was considered that this would not be conducive to reaching a resolution at the supported conversation. In the event, the supported conversation between the claimant and PMcA did not proceed on 12 January with no proposal as to when it would take place.

52. At the end of January 2022, the claimant identified that she had not received payment for a claim for overtime and unsocial hours she had submitted in December 2021. These claims are approved by PMcA as head of service and he considered that it was unusual for someone on alternative duties to have a claim for overtime. He had asked for it to be checked before approving it. The payment was made subsequently.

53. On 1 February 2022, the claimant met with KMcF to discuss her grievances and the lack of progress with these. The claimant followed this with a letter dated 2 February 2022 to KMcF (pp305-318) setting out her grievances. This repeats the grievances she submitted in July 2021 and adds matters which had occurred since that time.

54. The claimant had, in the past, asked to give up her team leader role and return to being a paramedic. It is not normally the respondent's practice to allow this as the job is a team leader rather than a paramedic with team leader duties added. However, KMcF considered that it was best to allow such requests because someone who did not want to be a team leader may not be effective in the role (p320).

55. By letter dated 3 February 2022 (p323), KMcF confirmed to the claimant that her concerns would be dealt with via the "Once for Scotland" grievance procedure which had formal timeline for meetings, outcomes and appeals. The letter states that the first stage would be dealt with by PMcA although this

was subsequently altered given that part of the claimant's grievance was about him.

56. The claimant was asked to resubmit her grievances using the formal grievance forms and she did so.

57. By email dated 10 February 2022 (p368), KMcF confirmed how the claimant's various grievances would be addressed; the grievance about RB's conduct and the claimant's complaint about how this was handled would be dealt with together by Michael Harmjanz, the head of service for the Dumfries & Galloway region; the grievance about PMcA would be dealt with by Euan Esslemont, Deputy Director for the North Region; a new grievance about an HR officer would be dealt with by the Head of HR.

58. The claimant was contacted by Mr Harmjanz by email dated 16 February 2022 and they made arrangements to speak the next day (pp377-378). A formal Stage 1 grievance meeting was arranged to take place on 24 March 2022. There was no outcome issued by the time the claimant resigned on 30 March 2022 (the outcome was issued by letter dated 31 March 2022, pp442-443).

59. In the meantime, by letter dated 22 February 2022 (pp380-381), the claimant was invited to an investigation meeting on 8 March 2022 regarding her grievance against PMcA. There was a delay to this meeting as the investigator, Mr Esslemont, was changing roles and so was handing the investigation over to the acting Deputy Director for the North Region, Andrew Fuller. The meeting was re-arranged to 31 March 2022.

60. On 7 March 2022, the claimant received notification from the recruitment agency Indeed.com about a job with Lanarkshire Medical Group (LMG). The claimant had not applied for this job; she had registered with the agency's website in order to apply for different roles within the respondent and elsewhere in the NHS. The website provides notification of any jobs which match the parameters set up by users. The claimant replied to the notification that she was interested in the job.

61. The claimant was asked to attend an informal meeting with LMG on 9 March 2022 to discuss the job. On the same date, the claimant submitted a transfer request to the respondent looking to move to Livingston station (p385).

62. On 11 March 2022, the claimant received a formal job offer from LMG (pp395-396). The claimant accepted the offer on or around 14 March 2022.

63. On 14 March 2022, the claimant received a text message from IMcL (p398) confirming that the claimant would reduce to half pay that day. The claimant had expected such a reduction but was not aware of the exact date when it would occur. She had asked IMcL why she had not been told earlier and he stated that he did not know but that she should have received a letter about it two to three weeks in advance.

64. On 25 March 2022, the claimant attended the grievance investigation meeting with Mr Harmjanz.

65. On 28 March 2022, the claimant applied for an injury allowance to increase her pay to 85%. This application was not decided before the claimant's resignation.

66. The claimant resigned by letter dated 30 March 2022 (pp431-437). The letter states that the last straw triggering her resignation was that her grievances remained unresolved. The letter goes on to set out various issues about which the claimant is aggrieved. The letter particularly focuses on what the claimant perceives are breaches of confidentiality or data protection relating to the discussion that managers had with occupational health.

67. The claimant commenced work with LMG on 1 April 2022.

Submissions

68. Both agents produced written submissions and supplemented these orally. For the sake of brevity, the Tribunal does not intend to set out the submissions in details. These have been noted and the Tribunal will refer to any point raised that requires to be specifically addressed in its decision below.

Relevant Law

69. Section 94 of the Employment Rights Act 1996 makes it unlawful for an employer to unfairly dismiss an employee.

70. Section 95(1) of the 1996 Act states that dismissal can arise where:

"the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct."

71. The circumstances in which an employee is entitled to terminate their contract by reason of the employer's conduct is set out in the case of *Western Excavating v Sharp [1978] ICR 221*. The Court of Appeal held that there required to be more than simply unreasonable conduct by the employer and that had to be a repudiation of the contract by the employer. They laid down a three stage test:

a. There must be a fundamental breach of contract by the employer;

b. The employer's breach caused the employee to resign; and

c. The employee did not delay too long before resigning thus affirming the contract.

72. A breach of contract can arise from an express term of the contract or an implied term. For the purposes of this case, the relevant term was the implied term of mutual trust and confidence.

73. The test for a breach of the duty of trust and confidence has been set in a number of cases but the authoritative definition was given by the House of Lords in *Malik v Bank of Credit and Commerce International SA* [1997] IRLR 462 that an employer would not, without reasonable or proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between employer and employee.

74. The "last straw" principle has been set out in a range cases with perhaps the leading case being *Lewis v Motorworld Garages Ltd [1985] IRLR 465.* The

principle is that the conduct which is said to breach trust and confidence may consist of a series of acts or incidents, even if those individual incidents are quite trivial, which taken together amount to a repudiatory breach of the implied term of trust and confidence.

75. The "last straw" itself had to contribute something to the breach even if that is relatively minor or insignificant (*Kaur v Leeds Teaching Hospitals NHS Trust* [2018] IRLR 833).

76. The *Kaur* case also set out practical guidance for the Employment Tribunal in addressing the issue of whether a claimant had affirmed the contract in the context of a "last straw" case:

> *"(1) What was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, his or her resignation?*
>
> *(2) Has he or she affirmed the contract since that act?*
>
> *(3) If not, was that act (or omission) by itself a repudiatory breach of contract?*
>
> *(4) If not, was it nevertheless a part (applying the approach explained in Omilaju v Waltham Forest LBC [2005] IRLR 35) of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a (repudiatory) breach of the Malik term? (If it was, there is no need for any separate consideration of a possible previous affirmation ….)*
>
> *(5) Did the employee resign in response (or partly in response) to that breach?"*

77. The test for unfair dismissal can be found in s98 of the Employment Rights Act 1996 (ERA). The initial burden of proof in such a claim is placed on the respondent under s98(1) to show that there is a potentially fair reason for dismissal. There are 5 reasons listed in s98 and, for the purposes of the present case, the relevant reason is **[insert].**

78. In a constructive dismissal case, the reason for dismissal is the reason for the breach of contract by the employer (*Berriman v Delabole Slate Ltd* [1985] ICR 546, CA).

79. The test then turns to the requirements of s98(4) for the Tribunal to consider whether dismissal was fair in all the circumstances of the case. There is a neutral burden of proof in relation to this part of the test.

80. In considering s98(4), the Tribunal should take into account all relevant factors such as the size and administrative resources of the employer. There are two matters which have generated considerable case law and which are worth highlighting

81. First, there is the question of whether an employer has followed a fair procedure in dismissing the employee. The well-known case of *Polkey v AE Dayton Services Ltd* [1987] IRLR 503 it was held that a failure to follow a fair procedure was sufficient to render a dismissal unfair in itself (although the compensation to be awarded in such cases may fall to be reduce to reflect the degree to which the employee would have been fairly dismissed if the procedural errors had not been made – the so-called "Polkey" reduction).

82. Second, the Tribunal needs to consider whether the dismissal was a fair sanction applying the "band of reasonable responses" test. The Tribunal must not substitute its own decision as to what sanction it would have applied and, rather, it must assess whether the sanction applied by the employer fell within a reasonable band of options available to the employer.

Decision

83. The crux of this case is whether or not the claimant was dismissed as defined in s95(1)(c) ERA and so the Tribunal has to determine whether the respondent acted in a manner which amounts to a fundamental breach of contract, whether the claimant resigned as a result of that breach and whether she had resigned as soon as reasonably practicable.

84. The claimant relies on an alleged breach of the implied duty of trust and confidence and so the Tribunal is applying the test set out in *Malik* (above) as

adjusted by subsequent decisions. The Tribunal should be clear that there was no evidence before it at all that suggested that anything done by the respondent was intended to destroy or undermine the employment relationship. The Tribunal has, therefore, focussed on the "likely" element of the *Malik* test rather than the "calculated" element.

85. There are twenty matters which the claimant says amount to a fundamental breach of contract. These were specified during the case management process in advance of the final hearing and appear at pp54-68 of the joint productions.

86. Looking at this extensive list, it is difficult to resist the conclusion that, rather than focussing on what it was that specifically caused her resignation, the claimant has sought to throw everything at the case in the hope that something sticks. The events described cover a three year period with many of the earlier matters having no apparent connection with the events immediately prior to the claimant's resignation.

87. For example, the second alleged breach relates to disciplinary action against the claimant in 2019. None of the people involved in that process are involved in the later events and the disciplinary process has no bearing on those later events (indeed, once it is concluded it is never mentioned again by the respondent).

88. In any event, an employer is entitled to engage in a disciplinary process where there is a concern about the conduct of one of their employees. There is no inherent breach of contract in such a process being engaged. In the present case, the Tribunal considers that the respondent had reasonable and proper cause to engage the disciplinary process; there was a genuine issue as to whether the claimant had administered or permitted a patient to take an unsanctioned substance (CBD oil) and that this had not been properly recorded. The respondent was perfectly entitled to investigate such matters and there was no evidence presented to suggest that the conclusions of the disciplinary panel was unreasonable.

89. Similarly, the first alleged breach also involves people unconnected with the later events and has no connection to those events.

90. There are also a number of alleged breaches which are not actions of the respondent. For example, the fourth alleged breach is described as a diagnosis of the claimant as having anxiety and asthma. This is not an action of the respondent at all, let alone something which amounts or contributes to a breach of contract by the respondent. Similarly, the eighth alleged breach is described as the claimant enquiring about whether another employee has carried out particular training and being told that he has not. The enquiry by the claimant is not an action of the respondent and it is difficult to see how being given a truthful response is something which amounts or contributes to a breach of contract.

91. There were circumstances where an alleged breach involved actions by others and not by the respondent. The third alleged breach, for example, related to an anonymous letter (p69) sent to the claimant's regulator which she believed could only have come from another employee of the respondent. The letter in itself is not an action by the respondent but the claimant alleges that the respondent did not investigate who sent the letter and this is something which is conduct by the respondent. However, it is very difficult to see what investigation the respondent could have carried out in respect of an anonymous letter sent to a third party containing no information that could be used to identify the sender. It is noteworthy that the claimant gave no evidence as to what she says should have been done and simply asserted that no investigation was done.

92. The Tribunal considers that real core of the claimant's case as to whether there was a fundamental breach is that, over a period of time in 2021 and 2022, she sought to raise formal complaints about the conduct of other employees towards her (both employees she supervised and someone who managed her) and nothing was done. There were other actions by the respondent during this period which, although not directly part of her attempts to have her complaints resolved, the claimant considers contributed to her decision to resign.

93. It is these matters on which the Tribunal has concentrated in reaching its decision. It has not wholly disregarded the earlier events but has treated them more as background material setting out the broader factual matrix of the claimant's employment.

94. In the Tribunal's view, there is no question that the respondent did not, until much later, adequately deal with the complaints by the claimant about the conduct of other staff towards her. The relevant sequence of events starts in 14 December 2020 when the claimant submitted an email to her line manager about the behaviour of RB which she described as a *"formal complaint"* (p117). In July 2021, the claimant writes to David Robertson, the West Region Director, expressly stating she wishes to raise a grievance against PMcA and goes on to set a grievance which includes the complaints about the conduct of RB and SMcE (pp135-140). On 28 October 2021, the claimant emails KMcF (pp212-213) asking to meet with him to discuss her grievances and stating that she does not seem to be getting anywhere with her management.

95. The Tribunal has highlighted these three particular milestones in the claimant's efforts to progress her complaints. There were other meetings and discussions between the claimant and managers during this period and it was not the case that there was silence between these dates.

96. Despite this, no formal grievance process was commenced until February 2022. The Tribunal appreciates that it is not the case that the respondent did nothing at all to try to resolve the claimant's complaints; they sought to engage the early resolution stages of their grievance process and hold supported conversations between the claimant and those about whom she complained. However, none of those steps had resulted in any actual progress, let alone a resolution of the claimant's complaints. In particular, the attempts at early resolution were clearly not going to resolve the issues; RB had indicated, very early on, that he did not wish to engage in this and the supported conversation with PMcA had been cancelled with no indication that it was to be rearranged. It would have been clear to a reasonable employer, particularly one with the size and resources of the respondent, that the claimant's grievance had not been progressed and more needed to be done.

97. The Tribunal also appreciates that there were matters beyond the control of the respondent had impacted on their ability to progress matters such as RB and the claimant being on sick leave. Further, these matters arose during the covid pandemic when the respondent's resources were being stretched to breaking point. However, there was no evidence that, at the time, the respondent had raised these issues with the claimant and sought any agreement or acceptance from the claimant that these issues would mean that the process took longer than normal.

98. In these circumstances, the Tribunal does consider that the respondent's handling of the claimant's complaints and grievance fell below what could be expected of an employer of the respondent's size and resources. If the same state of affairs had existed when the claimant resigned then the Tribunal may well have been prepared to find that this was conduct likely to undermine the trust and confidence between the claimant and the respondent.

99. However, the difficulty for the claimant is that by the time she resigned the situation had changed and a formal grievance process had been engaged. The four strands of her grievance had been separated into three investigations with managers appointed to deal with them. There had been meetings held or arranged in respect of two of the strands (the third investigation had not commenced by the time of the claimant's resignation) and the claimant had engaged with those processes.

100. Further, on her evidence, she was looking for alternative roles with the respondent in March 2022 including seeking a transfer to Livingston station. This does not indicate that the claimant had lost trust and confidence in the respondent at that time and, if anything, she was looking to continue her employment with the respondent. The claimant was also making an application for injury allowance as late as 28 March 2022 which indicates an intention to continue with the employment relationship.

101. In the Tribunal's view, if there had been any breach of the duty of trust and confidence arising from the earlier failure to properly deal with the claimant's grievances then the claimant cannot rely on this as she had affirmed the

contract by choosing to engage in the formal grievance procedure that commenced from February 2022 onwards, seeking a transfer to another station and applying for injury allowance. The test for constructive dismissal imposes something of a stark choice on claimants in terms of whether or not to resign at any particular point of time. There can be no criticism of any employee, such as the claimant, who seeks to resolve matters with their employer but there are consequences to such a choice; where an employee chooses to continue with the contract rather than resign then they will affirm the contract losing the opportunity to claim constructive dismissal (assuming there is no further breach). The Tribunal considers that this is what has happened in this case.

102. The claimant does rely on other matters which occurred during the same period and the Tribunal will address those in turn.

103. First, there was the fact that PMcA did not approve a claim for overtime/unsocial hours in December 2021. The Tribunal accepts the evidence of PMcA that he asked for this to be checked before approving it as it was unusual for someone on alternative duties (as the claimant was at the time) to accrue such additional payments. The claimant did not seek to challenge this and the Tribunal considers that, on the face of it, an employer is entitled to check whether such a claim is valid where there is a reason to do so. There was, therefore, proper and reasonable cause for a check to be carried out before the payment was approved.

104. Further, the claimant was aware of the issue in January 2022 and did not resign until March 2022.

105. Second, there is the request for the claimant in December 2021 to return to attendant only paramedic duties. The Tribunal will deal with the issue of managers (SH and PMcA) contacting RW for advice about this and the fact that advice was given (including the content of that advice) together. The Tribunal considers that these matters are interconnected to such a degree that they cannot be dealt with as separate matters.

106. The Tribunal considers that the respondent had reasonable and proper cause to investigate what duties the claimant was fit to carry out. In ordinary circumstances, an employer would be entitled to investigate such matters but the respondent found itself in the exceptional circumstances of a pandemic with its resources stretched thin. This clearly gave them reasonable and proper cause to investigate whether the claimant could return to some form of paramedic duty.

107. Such investigations would inevitably include asking for clarification from their medical advisers as to what the claimant was fit to do and so the contact made with RW by both SH and PMcA also had reasonable and proper cause.

108. The claimant's complaint about that contact was that it was done without first asking her. The Tribunal has not been directed toward any legal principle which states that an employer is not entitled to make such contact (either at all or only once discussing it with the employee in question) nor is it aware of any such principle. There may be an issue about what can be disclosed to the employer by the adviser but that is a different thing. To put it another way, there is nothing wrong in the employer asking the question but there may be something wrong in the adviser giving the answer (although that would not then be something done by the employer).

109. The Tribunal should be clear that it is not saying that there was anything wrong in RW giving the answer which she did. That is not a matter which falls within the jurisdiction of this Tribunal and it is not expressing any view or conclusion on the matter.

110. Similarly, having received advice that the claimant was fit for attendant only duties, the respondent had reasonable and proper cause to ask the claimant to carry out such duties. There was a clear need for the respondent to have access to all the resources available to it to cope with the demands on the service and the respondent had advice that the claimant was fit to do the duties being asked of her.

111. The Tribunal does consider that, contrary to the claimant's assertions, she was being asked to return to duty rather than being told (in the sense that this

was a mandatory requirement). Even on her evidence, there was no suggestion of any form of sanction or disciplinary action being applied if she did not return and, in the event, she did not return and remained absent on sick leave until the end of her employment.

112. The claimant's real issue with the request to return to work was that she did not agree with the advice from RW and/or that RW had acted unlawfully in giving the advice.

113. As set out above, the claimant had formed the very firm view that there was absolute medical advice that she was not fit to carry out any paramedic duties. As discussed, there is a degree of ambiguity about what the previous advice said. However, in any event, the Tribunal is not determining whether the advice from RW was correct and, even if it were not, this would not be something done by the employer so as to amount or contribute to a breach of contract.

114. Similarly, as the Tribunal has already stated, whether RW should have given the advice at all is not a matter for this Tribunal to determine. In any event, the actions of RW are not an action of the respondent.

115. The question for the Tribunal is whether the respondent had reasonable and proper cause to ask the claimant to return to some paramedic duties. For the reasons already set out, the Tribunal does consider that the respondent did have such cause.

116. The claimant also had a concern about what would happen when she returned, in particular whether there would be a phased return with an opportunity for her to get back up to speed given her absence from paramedic duties for some time. On the face of the evidence, there was a disconnect between what PMcA had instructed should happen and what was being communicated to the claimant. The evidence from both parties was not particularly satisfactory on this point (bearing in mind that the burden of proof is on the claimant). In the event, the claimant did not return to any paramedic duties and there was no evidential basis on which the Tribunal could make any reasonable speculation as to what might have happened if she had (that

is, if the claimant had agreed to return whether a proper phased return could have been put in place).

117. Again, the request for the claimant to return to work occurred in December 2021 and the claimant did not resign for a further three months. The issue of a return to operational duties was not repeated and no action was taken against the claimant.

118. Third, and finally, there was the fact that the claimant went on to half pay in March 2022. It was not in dispute that this is a term of the sick pay provisions in the claimant's contract which applies as a matter of course to all of the respondent's employees who are absent for more than the relevant period of time. It was the claimant's evidence that she knew of this provision and was expecting it to happen in March 2022 (although she was not sure of the precise date until she was informed of the reduction).

119. It is this matter which was relied on as the last straw at the hearing. The Tribunal accepts that the last straw does not need to be a breach of contract in itself but simply that it has to contribute something towards the breach. However, it is very difficult to see how something which is lawfully permitted by the contract of employment can, in any way, contribute to the respondent's actions destroying or undermining the employment relationship.

120. There is no suggestion that the claimant was being treated any differently from any other employee in the same circumstances or being singled out in some way. The submissions made on behalf of the claimant make reference to the respondent having discretion to extend full sick pay but there is no suggestion that the relevant policy applied in this case. In particular,

121. In these circumstances, the Tribunal does not consider that the reduction to half pay is capable of amounting or contributing to any fundamental breach of contract.

122. For all the reasons outline above, the Tribunal is not persuaded that the conduct of the respondent, taken as a whole, was likely to destroy or undermine the employment relationship with the claimant. The matters relied

on by the claimant are either too remote (in terms of time, those involved or the nature of the events) from the claimant's resignation, were not matters which amounted to conduct by the respondent or were matters for which there was proper and reasonable cause.

123. The only matter which the Tribunal considered was potentially capable of satisfying the Malik test was the respondent's failure to properly progress the claimant's grievance prior to February 2022. However, by the time she had resigned, the claimant had waived any such breach and affirmed the contract by engaging in the grievance process that had been put into motion from February 2022 onwards and by engaging in the other actions set out above.

124. The Tribunal is also not satisfied that, had there been a fundamental breach that had not been waived by the time the claimant resigned, that the claimant had resigned because of any such breach.

125. The claimant's case as to why she resigned when she did is not wholly consistent. In her resignation letter (pp432-437), she states that the last straw was the fact that her grievances were still not resolved. However, the case advanced at the hearing was that the last straw was the reduction to half pay.

126. There are difficulties for the claimant regardless of which she says was what prompted her resignation. If the former then there are the issues set out above regarding affirmation and the fact that the formal grievance process (which she had been seeking and with which she had engaged) was ongoing. If the latter then this was a lawful action by the respondent and something which was not unexpected by the claimant.

127. In addition to any inconsistency there is the fact of the claimant's alternative job. She had applied for this and secured it before the reduction in pay was to take place or before the claimant was informed when this would be. On the face of the evidence about when the claimant had secured her new job, the Tribunal considers that she had decided to leave before the last straw she seeks to rely on it.

128. There was no evidence by the claimant that the alternative job was sought because she had come to a view at an earlier date that the employment relationship had been destroyed and sought an alternative role before resigning in order to minimise the financial loss to her. This is something which often happens in cases involving constructive dismissal; there is caselaw which says that a claimant in such circumstances does not fail to satisfy the test for constructive dismissal simply because they delayed their resignation until they secured a new job (assuming they do not do something else which affirms the contract). However, that is not the case here.

129. Neither was there any suggestion by the claimant that she had secured the alternative job as some form of "back-up plan" in the event that her grievances were not progressed or resolved. Indeed, the sequence of events does not suggest such an intention as the claimant resigned before any of the grievance outcomes (one of which was issued the day after her resignation).

130. The reason why the claimant resigned when she did is, at best, confused. The claimant's own case is inconsistent. Regardless of which matter the claimant says was the last straw, there are difficulties for the claimant. She is either relying on matters which occurred some months before her resignation in circumstances where she continued to engage with the contract or she is relying on the lawful application of a term of the contract.

131. Added to these difficulties, there is certainly an evidential basis from which the Tribunal could infer that the claimant resigned to take up her new role. She had secured this some weeks before her resignation and started working in her new job on 1 April 2022.

132. Bearing in mind that the burden of proof lies on the claimant, the Tribunal is not persuaded that, had there been a fundamental breach of contract that had not been waived at the time of the claimant's resignation, it would have been prepared to conclude that the claimant resigned because of such a breach.

133. In these circumstances, the Tribunal does not consider that the claimant was dismissed as defined in s95(1)(c) of the Employment Rights Act 1996. For

this reason, the claim of unfair dismissal is not well-founded and is hereby dismissed.

Employment Judge: **P O'Donnell**
Date of Judgment: **24 May 2024**
Entered in register: **24 May 2024**
and copied to parties