EMPLOYMENT TRIBUNALS

Claimant: **Miss Claire Rogers**

Respondent: **Motability**

Heard at: **East London Hearing Centre**

On: **9, 10 & 11 October 2024**

Before: **Employment Judge Suzanne Palmer**

Representation

Claimant: Represented by Miss Joanne Laxton, Counsel
Respondent: Represented by Mr Andrew Lyons, Counsel

RESERVED JUDGMENT ON LIABILITY

1. The Claimant's complaint of Unfair (Constructive) Dismissal is not well-founded and is dismissed.

REASONS

Introduction

1. The Claimant was employed by the Respondent from 11 March 2019 until her resignation with immediate effect on 18 April 2023.

2. When first employed the Claimant was a Customer Support Administrator. By the time of her resignation she was a Customer Care Manager. She was one of a team of Customer Care Managers. The Claimant's team was supervised by her line manager, Chelsea Payne.

3. The Claimant's role was to process, consider, investigate and make decisions on applications for funding from members of the public seeking support from the Respondent for their disability needs. For each application an electronic case record was created, into which the Claimant would in due

course type a "Decision Record" explaining the decision she had made and the justification for it. The Decision Record would be updated as a result of further developments in the case, including new information received.

4. In around February 2023 the Respondent carried out a disciplinary investigation into another employee, referred to throughout this judgment as MS. MS was a Complaints Case Manager, working for a different team. His line manager was Warren Smith. Both the Claimant's line manager and MS's line manager reported to Mr Ross Mitchell, Head of Operations.

5. The investigation into MS related to levels of overtime claimed by him. That investigation never reached a formal conclusion because MS resigned. However, one of the recommendations from that investigation was that there should be an investigation into email correspondence between MS and the Claimant which showed that she was sending him tasks to do which fell within her duties, and was receiving emails from him with completed work. In some instances, she was receiving draft Decision Records from MS which were then copied, entirely or largely unaltered, into the Claimant's Decision Records.

6. An investigation was initiated by the Respondent. The investigation meeting was carried out by the Respondent's Learning & Development Manager, Miss Lisa Green. She prepared an investigation report which recommended that the matter proceed to a disciplinary hearing. The disciplinary hearing was conducted by the Head of Operations Mr Ross Mitchell. Both Miss Green and Mr Mitchell were supported by the Operations Department's Human Resources Business Partner, Mrs Paula Calagan.

7. The Claimant resigned shortly after being informed that Mr Mitchell was in a position to hand down his decision following the disciplinary hearing. At the time she had been signed off as unfit for work due to work related stress for a period of 2 weeks. Her resignation letter said that her resignation was "*in view of the way that I have been treated in the preceding weeks including the unfounded allegations against me"*.

8. In her ET1 Claim Form, presented to the Tribunal on 5 June 2023, the Claimant alleges that she was constructively dismissed and that the dismissal was unfair. In a nutshell, she said that the allegations against her were unfounded and that the procedure adopted by the Respondent was unfair, and that these matters amounted to a breach of the implied term of trust and confidence.

9. The Respondent subsequently sent a response form (ET3) to the Tribunal dated 6 July 2023. It denies any breach of the implied term of confidence and asserts that the Claimant resigned and was not constructively dismissed. In the alternative, it asserts that there was a fair dismissal by reason of misconduct.

Claims and Issues

10. There was no case management hearing prior to this hearing. Based on the content of the ET1 and ET3, I prepared a list of what I understood the issues

to be in this case which I sent to counsel for both parties on the first day of the hearing. Having taken instructions, they agreed that this list of issues accurately and comprehensively encapsulated the issues for me to determine.

11. A copy of the list of issues is annexed to this judgment as Annex A.

Documents and evidence

12. An electronic tribunal bundle was provided to me in advance of the hearing. It consisted of 182 pages. In addition, I had an electronic bundle of witness statements consisting of 31 pages. During the course of the hearing I received a further document which had been referred to in evidence by the Human Resources Business Partner Mrs Calagan. This consisted of 5 pages.

13. I heard oral evidence under oath or affirmation from the following witnesses, each of whom had provided a witness statement, with the exception of MS:

    13.1. The Claimant;

    13.2. Mr Keith Clifford-La Ronde, workplace colleague who accompanied the Claimant to the disciplinary hearing, on behalf of the Claimant;

    13.3. MS, Customer Complaints Manager (the colleague whose correspondence with the Claimant gave rise to the investigation), on behalf of the Claimant;

    13.4. Mrs Paula Calagan, Human Resources Business Partner, on behalf of the Respondent;

    13.5. Miss Lisa Green, Learning and Development Manager, on behalf of the Respondent;

    13.6. Mr Stuart Walsh, Head of Human Resources, on behalf of the Respondent;

    13.7. Mr Ross Mitchell, Head of Operations, on behalf of the Respondent.

14. The representatives very helpfully provided me with agreed joint submissions on the applicable principles of law in this case. I have annexed a copy of those submissions to this judgment as Annex B.

15. Both representatives provided written closing skeleton submissions which they supplemented with oral submissions. I am grateful to both counsel for providing these helpful documents.

Fact-finding

16. I make the following findings of fact in this case.

Background – the Respondent's structure and the Claimant's role

17. The Respondent funds and supports the provision of transport to people with disabilities, including operating and overseeing the Motability Scheme and providing charitable grants to help people use it. It has around 290 employees based at its premises in Harlow, Essex. Of those, approximately 150 employees work within the Operations department of the business.

18. The Claimant commenced employment with the Respondent on or around 11 March 2019. She was initially appointed as a Customer Support Administrator. On 14 February 2022 she was promoted to the role of Customer Care Manager, and she remained in that position until her employment ended. She worked at the Respondent's premises in Harlow, Essex.

19. The Claimant had a clear conduct record prior to the events in question. There were no issues with her productivity or the quality of her work. There was no deterioration in her productivity or the quality of her work after MS left the Respondent's employment in around late March 2023.

20. The Claimant's role fell within the Respondent's Operations Department. She was one of a team of around 20 Customer Care Managers, and her line manager was the Team Leader Chelsea Payne. The Claimant's line manager reported to the Head of Operations, Mr Ross Mitchell. He was a number of Heads of Department, each of whom reported to a departmental director (in Mr Mitchell's case, the Director of Charitable Function). The Directors in turn reported to the Chief Executive.

21. Each department had an HR business partner responsible for providing Human Resources support. In the case of the Operations Department that person was Mrs Paula Calagan. She reported to the Head of HR, Mr Stuart Walsh. There was also a Learning & Development Manager, Miss Lisa Green, who was responsible for meeting the training and continuing development needs of the department.

22. Also within the Operations Department was a team of Complaints Case Managers, including MS. His line manager was Martin Billington, Charitable Operations Team Manager. He in turn reported to Warren Smith, Operations Manager, who reported to Mr Mitchell as Head of Operations.

23. Each team within the Operations Department had a coach dedicated to that team, whose role was to advise and support to team members, particularly in complex or unfamiliar cases. The coach would have specialist knowledge.

24. As a Customer Case Manager, the Claimant's role was to provide support to beneficiaries of the Respondent's charitable scheme, by taking responsibility for the end-to-end management of their cases and making decisions based on individual disability needs assessed against the Respondent's "value for money" principles.

25. Each new application received by the Respondent would be allocated to a Case Manager. The Case manager would use basic information from the complaint to create a case record on the Respondent's CRM computer

software. That software included a number of fields with data about the complaint. It also included a blank document space into which the Case Manager would type a "Decision Record". The Decision Record would be pre-populated automatically with basic information from the CRM system, including the details of the beneficiary and the date of the application. The Case Manager would then insert their decision on the application, the amount of any funding award made (up to a limit of £10,000 per application), and the justification for their decision as to whether or not to award funding and how much to award. Once created, the definitive version of the Decision Record would be stored on the Respondent's W Drive. A single Decision Record would be created in respect of each application. Sometimes it would need to be updated to capture further actions or decisions which were taken as more information was provided by the beneficiary, or as a result of research by the Case Manager.

26. Each Case Manager received training in the principles they should apply when making decisions on applications, including the criteria for funding eligibility, and the principle that applications should be based on need rather than want. There was also written guidance in relation to these principles and to making and drafting decisions.

27. The length of a Decision Record would depend on the level of detail required for the nature and complexity of the case, and could range from a couple of paragraphs to a couple of pages. Although elements of the Decision Record could be formulaic (for example standard reasons about whether an individual met eligibility requirements), other elements would be case-specific. Some templates were made available through training, but Case Managers would be expected to write specific reasons for each individual case. The term "Decision Record" refers both to a substantive decision on an application and to a decision on any task or activity undertaken before or after a substantive decision.

28. By signing the Decision Record, the individual Case Manager formally acknowledged responsibility for the decision. In a case where the award was for more than £10,000, the decision would be signed off by a manager.

29. Specific "tasks" or "activities" could also be entered into the CRM system, to prompt a Case Manager to make enquiries or gather information, for example by way of a telephone call or email to the beneficiary or a third party. The outcome of a "task" would be entered into the Decision Record by way of an update.

30. If a member of the team of Case Managers was on sick leave, their tasks or assignments could be reallocated to other members of the team. It seems that until about November 2022 this was often done informally between team members, however from around November 2022 staff were told that this needed to be done through the team leader.

The Respondent's policies and documentation

31. The Respondent did not have any specific written policy about the process for allocating or re-allocating applications or activities.

32. The job description for a Case Manager includes under the heading "*Decision Making"* a requirement to "*Take ownership and responsibility for decisions and actions taken".*

33. The Respondent had a non-contractual Disciplinary and Grievance Procedure. This set out, amongst other things, the informal and formal processes to be followed in relation to issues of underperformance and misconduct. It includes the following:

    33.1. A requirement on the part of employees "*To comply with Motability policies, procedures and codes of conduct…"*;

    33.2. Examples of matters which may be regarded as misconduct or gross misconduct;

    33.3. Provisions for conducting investigations and disciplinary hearings, including:

        33.3.1. *"Where a decision is taken to convene a formal disciplinary meeting, you will be notified in writing… You will also be informed in writing of the allegations or other circumstances, together with evidence, which lead to the disciplinary action*";

        33.3.2. *"The meeting will include evidence of relevant materials and documentation. It will also provide you with an opportunity to respond".*

        33.3.3. *"The formal disciplinary procedure has four potential outcomes, known as stages. These are*

            33.3.3.1. *Stage 0: No warning/sanction applied*

            33.3.3.2. *Stage 1: A first written warning… This would be issued in the event of: Misconduct involving minor breaches of policies, procedures or codes of practice…*

            33.3.3.3. *Stage 2: A final written warning… This would be issued in the event of… Serious misconduct involving significant breaches of policies, or codes of practice…*

            33.3.3.4. *Stage 3: Action taken at Stage 3 could result in your dismissal. This action could be taken in the event of: Gross misconduct which includes very serious breaches of policies, procedures or codes of practice; Other circumstances/allegations so serious that they may undermine the whole employment relationship…".*

The February 2023 investigation in relation to MS

34. In around February 2023 the Respondent initiated an investigation into alleged anomalies in the levels of overtime being claimed by MS, who was a Customer Complaints Case Manager, working in a different team from that of the Claimant, but still within the Operations Department. MS had previously been a Case Manager.

35. That investigation was never finally concluded because MS resigned and left the business in late March or early April 2023. From that time onwards he was on garden leave and no disciplinary hearing was ever held.

36. In the course of the investigation in relation to MS, it was identified that there was email correspondence between him and the Claimant. It was recommended within the MS investigation that this email correspondence should be investigated separately. A sample of those emails was investigated by Miss Lisa Green, Learning & Development Manager, in the course of which she identified that:

    36.1. The Claimant sent MS links to activities or tasks allocated to her in her Case Manager role;

    36.2. MS sent the Claimant emails in which he informed her of the outcome of those activities or tasks;

    36.3. MS, on around 66 occasions over a 6 month period, sent the Claimant draft Decision Records in respect of cases allocated to her;

    36.4. On 5 or 6 occasions taken from a sample, the Decision Record subsequently posted by the Claimant on the Respondent's W drive was entirely or nearly identical to the draft sent to her by MS.

37. In the course of the MS investigation, interviews were conducted with MS's managers. In the course of these interviews it was noted that MS would come to his team leader looking for additional work "*such as helping Case Managers"*, and that he would help the team with finance queries and administrative tasks. "*The assumption is he only does this when he has capacity".* It was also noted that "*It's not always clear regarding his capacity, it could be ok and then within two hours three or four complaints come in. You can't always see what is coming, it's the nature of complaints and investigations"*. MS's team leader Mr Billington said that he suspected, but could not prove, that MS was doing work for other Case Managers.

38. The Operations Manager Mr Smith observed that over a 6 month period, 66 decision records being sent was "*a little high"* but, bearing in mind the time period, "*doesn't feel that high"*. He observed that MS had "*a bond with a particular individual and is willing to assist wherever he can, she is a siren, like a mermaid on the rocks, and he is always at her desk helping her out"*. He observed that 2 cases per week "*doesn't sound a lot but it is not standard operating procedure"*, and that Case Managers have managers and coaches they can go to for support. Mr Smith described MS as "*… a self-proclaimed helper"* who would routinely go to help other people. He added

"*He has been asked to pack that in, it's not a bad thing but it is not helpful if he doesn't get his own work done"*, and said that MS was going above his job description.

39. As a result of the emails between the Claimant and MS identified during the MS investigation, the Respondent decided to initiate an investigation into the Claimant.

The investigation into the Claimant

40. On 9 March 2023 Mrs Calagan wrote to the Claimant inviting her to attend an investigation meeting. The letter included the following: "*… Lisa Green… is currently investigating into the email correspondence between yourself and the Complaints Case Manager that relates to Case Manager work/tasks. As part of Lisa's investigation she would like to meet with you to ask you some questions in relation to those emails. Please note this is an investigation meeting, it is not a disciplinary meeting…".*

41. On 16 March 2023 Miss Green held the investigation meeting with the Claimant. Mrs Calagan was present as note-taker and to provide HR support. The meeting included the following:

    41.1. The Claimant was offered the opportunity to ask any questions at the outset of the meeting and said that she had no questions.

    41.2. She was informed that the purpose of the meeting was that Miss Green was investigating "*the emails between yourself and the Complaints Case Manager in relation to Case Manager work//tasks"*. The Claimant said that she was aware of the emails in question, "*… me sending the link to the activity that he would reply to"*.

    41.3. The Claimant explained that there would be times when MS would tell her that he had no complaints work and would ask her whether she needed anything doing. As he had offered to help, she "*thought it was fine"*. She would send him non-urgent tasks two or three times per week. "*He would reply with what he'd done, with a step by step of what to do, it was his habit. I would utilise his knowledge and then decide what to do with it".* She said that the work she sent usually consisted of "*Finance queries, chasing convertors, not decisions, he would only review them".*

    41.4. The Claimant said that she was aware that MS had been told by Mr Smith not to come over to her desk, and comments had been made by other staff members about him doing so, so they had done things by email. She said that the offer of help always came from MS rather than being initiated by her, and that the offer was verbal, often in a video call. She said that she was never struggling with her own workload, but that she and MS were close friends and that the help was offered so she accepted it.

    41.5. The Claimant said that within the team people helped one another with tasks, and that she had made calls for other people: "*I thought it*

was the culture". She said that if members of the team were off work, they would cover for each other: "*… the work is given out by Chelsea Payne. I didn't realise it was a thing".*

41.6. The Claimant acknowledged that MS would provide draft decisions for her. She said that she did not always agree with his decision. She maintained that she would not copy MS's documents into the CRM software system but would open the record and enter her own decision. She said that any decision she submitted was hers.

41.7. The Claimant said that she was not aware of whether MS was helping any other members of staff.

41.8. At the conclusion of the meeting the Claimant asked whether she was in trouble: "*Where we help each other I didn't quite understand why this meeting was happening. I might sound naïve, am I complicit in anything?"*. Miss Green indicated that she was "*investigating to establish that",* and said that following the investigation there could be a review of company processes or practices, or a disciplinary hearing.

42. After her meeting with the Claimant, Miss Green asked Chelsea Payne a number of questions by email, which Ms Payne answered. Her answers included that she would find it unacceptable for a member of her team to have someone else create a Decision Record on their behalf or contact a beneficiary on their behalf. She said that she was confident that all Case Managers knew that they had to create their own Decision Records and that managers were the only people responsible for reassigning tasks.

43. Miss Green also sought internal clarification of whether there was any formal written policy in relation to the allocation or re-assignment of applications and activities. She was informed that there was not.

44. Miss Green did not interview MS. I accept her evidence that this was because she believed that MS had left the organisation by that time. I note that she highlighted in her investigation report that she had not been able to confirm or deny the Claimant's assertion that it was MS who instigated the sending of work in separate verbal communications.

45. The minutes from the investigation meeting were sent to the Claimant on 17 March 2023, and were subsequently agreed by her with one minor amendment.

46. On 24 March 2023 Miss Green completed her investigation. She provided a written report. In that report:

46.1. Miss Green set out the evidence she had seen or gathered, including the minutes from the meetings with MS's managers during the MS investigation;

46.2. She explained that no policy existed detailing the team manager responsibilities regarding the allocation or reallocation of Case Managers' workload.

46.3. She set out the findings of her investigation, "facts established" and "facts that could not be established". These included that:

46.3.1. The level of email activity between the Claimant and MS "*exceeded the expected support from outside the team which is zero without prior [Team Manager] authorisation";*

46.3.2. *"22 out of the sample of 38 emails … were instigated by [the Claimant]. However could not establish if previous conversations via other mediums … happened pre [the Claimant] sending the work over to [MS]";*

46.3.3. *"The final version of five decision records were created by [MS] and not [the Claimant]",* in the sense that they "matched" the version on the W drive*;*

46.3.4. There is no written policy/process for allocation of Case Manager workload;

46.3.5. Chelsea Payne had not given permission for any member of her team to reach out to MS to complete activities, contact beneficiaries or draft Decision Records on their behalf;

46.3.6. Performance measurement supported the Claimant's assertion that her performance had not deteriorated since MS left the organisation.

46.4. Miss Green recommended:

46.4.1. the creation of a policy which clearly states that only the Team Leader can reallocate applications or activities;

46.4.2. that the Claimant be invited to a disciplinary hearing "*as there is a reasonable belief that her actions breached her responsibilities as a [Case Manager] and that the volume of email support from [MS] exceeded what was expected by her Line Manager, who had not given permission"*:

47. On 29 March 2023 Mrs Calagan emailed the Claimant inviting her to a disciplinary hearing "*to discuss your conduct in relation to the nature and content of the email correspondence and case management ownership"*. The letter advised the Claimant that the possible consequences of the meeting might be "*no further action, a first written warning, a final written warning or dismissal".* The covering email invited the Claimant to contact Mrs Calagan if she had any questions.

48. Along with the letter, the Claimant was sent a copy of the Respondent's disciplinary policy and a copy of Miss Green's investigation report. She was

not sent a copy of the material referred to within that investigation report, and therefore was not sent the minutes of the meetings with MS's managers, or the emails received by Miss Green in response to her enquiries.

49. The Claimant subsequently advised Mrs Calagan that she would be accompanied at the disciplinary hearing by a work colleague, Mr Keith Clifford-La Ronde.

50. The disciplinary hearing panel opened on 6 April 2023. It was chaired by Mr Ross Mitchell, Head of Operations. Mrs Calagan was present to provide HR support and take notes and the Claimant was accompanied by Mr Clifford-La Ronde.

51. At the outset of the disciplinary hearing it was reiterated that the purpose of the meeting was "*to discuss the nature and content of the email correspondence between [the Claimant] and MS relating to Case Manager work/tasks as well as case management ownership".*

52. There was an opportunity for the Claimant to raise any questions at the outset. She clarified that she took issues with two of the matters listed as "Facts established" in the Investigation Report. She said that any Decision Record she entered was her decision, even she had received a draft decision from MS to review. She reiterated that she did not instigate the emails from MS and that these would arise from earlier conversations via zoom. The Claimant did not raise any other preliminary issues. She did not ask for clarification of the allegations against her or for the provision of any further information.

53. The discussion which followed during the hearing included the following:

    53.1. The Claimant indicated that she was aware of the emails being discussed;

    53.2. She acknowledged that she had responsibility for and ownership of the decision made on any cases allocated to her for consideration of awarding a grant;

    53.3. She said that it was a collaborative team and that "*we use each other's knowledge";*

    53.4. She said that she had never approached MS for help but that he was the "*go to person"* and that he helped others across the floor. She said that she and MS would discuss matters over Zoom;

    53.5. She said that she was not asking for support or help and was confident in her role so had no need to seek support from a coach or team leader;

    53.6. When it was put to her of the Decision Records sampled, 90% of the words were provided by MS, she said that "*They are my DR. I would ask questions, ask for recommendations but it was my*

decision, his was a draft. In terms of him typing up the DR, it is not different to allocating activities". She said that not all the Decision Records MS drafted were funding decisions, and that she took ownership of the decisions and had discussed them with MS*;*

53.7. She said that it felt as though Mr Mitchell was trying to trip her up, which he denied;

53.8. She said that she had not raised the fact that MS was offering help in any one-to-one meeting with her team leader because "*I didn't think I was doing anything wrong… It is the culture, to support… I didn't think he couldn't [ask for work]"*. The only reason she sent work to MS, she said, was because he asked her to. She said that MS told her that it was part of his role to provide help across the floor. She said that MS was known for seeking out work. She said that other team members had used his knowledge;

53.9. Mr Mitchell expressed concern that he was unable to say whether the work produced by the Claimant was hers or was done for her by MS. He said that the issue was not one of productivity or of C's abilities, but of "integrity and trust". He also expressed concern about customer data being shared over email and Zoom;

53.10. When the Claimant was asked whether she accepted that someone else had done her work, she accepted that she had had support, and said "*I appreciate how it looks, the question is subjective… I have not given someone ownership of my work, conversations have been had";*

53.11. She accepted that she had copied and pasted decisions drafted by MS into a decision record, but said that she "*never uploaded something I didn't agree with"*;

53.12. At the conclusion of the meeting on 6 April 2024, the Claimant was asked whether she thought there had been a fair process and replied "*I have been treated fairly"*.

54. The meeting on 6 April concluded with Mr Mitchell saying that he needed time to reflect on what had been said. He advised of the four potential outcomes set out in the letter inviting the Claimant to the hearing. He adjourned the meeting until the following week so that he could advise the Claimant of his decision.

55. The disciplinary hearing reconvened on 13 April 2023 with the same parties present. At the reconvened meeting:

55.1. An opportunity was provided at the outset for questions to be raised and none were raised;

55.2. The Claimant was asked for any further thoughts or reflections since the last meeting. She responded that "*… all I would say is that I have been honest, if I was ever aware that I thought I was doing something*

I shouldn't have done, I wouldn't have done it… there was no intent. In hindsight I wouldn't have accepted as much support as I did". She reiterated that there was no policy or guidance in place*;*

55.3. Mr Mitchell said that he remained "*uncomfortable with what happened. It is not something that is common sense"*. He said that he had interviewed a colleague mentioned by the Claimant, and they had denied receiving support from MS;

55.4. Mr Mitchell indicated that he was still taking advice, and would be seeking legal advice. He added that "*I have decided that based on the severity of case, there will be some formal action, but I need to decide which way that will go. It will not be a case of no further action"*. He said that he would be in a position to deliver his decision the following week;

55.5. There was then the following exchange:

55.5.1. Claimant: "*What is the accusation? You first mentioned capability, he was just helping me. I am just unclear on what the accusation is."*

55.5.2. Mr Mitchell: "*The accusation is that you are not accountable for your own work and you have not done your own work."*

55.5.3. Claimant: "*As I previously said, I liaised with him."*

55.5.4. Mr Mitchell: "*Based on the evidence, it is not your work."*

55.5.5. Claimant: "*I can defend that, inputting a DR, I would agree with the wording."*

55.5.6. Mr Mitchell: "*But it is their work… This is not common practice".*

55.6. The Claimant said that by her calculation, she had completed around 2,700 Decision Records and the small number provided by MS amounted to 5%. She reiterated that her productivity had not changed since MS left. She reiterated that in hindsight she would not have sent work to MS.

55.7. When Mrs Calagan interrupted to say that the conversation was covering the same ground as the discussion the previous week Mr Mitchell said that his concern was that the Claimant "*doesn't see the severity of the situation"*.

55.8. Mr Mitchell said that he still proposed to seek legal advice and said "*Reading the disciplinary policy, this inferences to misconduct and gross misconduct… As I have said, I have not officially made a decision but it does lead me to formal outcome"*.

55.9. The Claimant again asked "*What is the accusation?"*. Mr Mitchell replied that "*Case Managers are accountable for their own work, someone else has done that work for you… not 60 odd over 60*

months, it has got to be your own work… As you know, my other concern is you putting customer information in Zoom… It's about trust and integrity, you need to be accountable for your own work… I question the trust in you in the role going forward, your integrity. Can you say they are my decisions, I don't think you can do that".

55.10. The Claimant answered "*… There is not a guideline as to who can support with that… At the time, if I agreed with the wording, I would say we collaborated on it. I have not done anything wrong, they have assisted with drafting it, the typing up of it. How he would word it, I would type it, it's no different to someone typing it and you own it…"*.

55.11. The meeting on 13 April concluded with Mr Mitchell saying that he would reconvene once he had received advice.

55.12. The Claimant then said that the proceedings were having a terrible effect on her mental health. Mr Mitchell said that he appreciated this but was not yet in a position to make his decision. He said that the Claimant could talk to the Respondent's Mental Health First Aiders. He also encouraged her to speak to her Team Leader.

55.13. The Claimant asked whether MS could be questioned. She said that he would be able to back up her account regarding the support he gave to others. Mr Mitchell replied that there was no guarantee that MS would be prepared to comment as he no longer worked for the Respondent, but that he would try to speak to him, and to anyone else the Claimant wanted him to speak to, as soon as possible.

56. On 14 April 2023 the Claimant sent Mrs Calagan a Statement of Fitness for Work signed by her GP, indicating that she was unfit for work for 2 weeks due to work-related stress.

57. In the same email the Claimant asked for the minutes from the two disciplinary meetings which had taken place. She was advised that it was hoped that these would be sent to her by Monday 17 April 2023.

58. On 17 April 2023 Mrs Calagan wrote to the Claimant indicating that she hoped to be able to provide the minutes the following day. She referred to the Claimant's request to interview MS and asked her to "*confirm what you feel [MS] will be able to clarify for us"*. The Claimant was also asked to indicate whether she would like Mr Mitchell's decision to be communicated during her absence or whether she would prefer to wait until her return to work.

59. On 18 April 2023 Mrs Calagan wrote to the Claimant saying that Mr Mitchell was now in a position to be able to deliver the disciplinary outcome, and asking again whether the Claimant would prefer this to be communicated to her during her absence or to await her return to work.

60. On 18 April 2023 the Claimant sent an email with the subject "Resignation". This said "*In view of the way that I have been treated in the preceding weeks including the unfounded allegations against me, I hereby resign with immediate effect".*

61. With the Claimant's agreement via email, Mr Stuart Walsh, Head of HR, telephoned the Claimant on 18 April 2023. He said during his call, and confirmed by email afterwards, that "*the disciplinary sanction you would be facing is not on the serious scale. This would include dismissal and final written warning. [Mr Mitchell] has highlighted that he does see a way forward for you and you are a valued member of the team"*. He offered to speak to the Claimant again.

62. No further communication having been received from the Claimant, Mrs Calagan wrote to her on 26 April 2023 acknowledging and accepting her resignation with effect from 18 April 2023. The disciplinary hearing minutes were attached to the email, and the Claimant was advised that given she had resigned she would not have the opportunity to suggest amendments.

63. The outcome of the disciplinary hearing was not, in the end, communicated to the Claimant. Mr Mitchell indicated during his evidence to this Tribunal that his decision was to issue a first written warning.

Law

64. The agreed joint statement summarising the applicable law which the parties provided to me is a comprehensive summary of the relevant principles, to which I do not need to add. I have annexed that document to this judgment and therefore to not propose to set out the law again here. I have taken the document into account and applied it when reaching my conclusions in this case.

Discussion and Conclusions

65. I remind myself of the list of issues identified at the outset of the hearing. I will start by considering each of the alleged acts on the part of the Respondent set out at 1.1.1 of the list of issues, and setting out my findings as to whether they then occurred. For any which I consider did occur, I will then move on to consider whether those matters, individually or cumulatively, amounted to a breach of the implied term of trust and confidence.

Did the Respondent do the following things?

66. Send an email on 9 March 2023 convening an investigation without properly setting out the allegations (1.1.1.1).

    66.1. It is clear that Mrs Calagan, on behalf of the Respondent, did send an email on 9 March 2023 convening an investigation hearing. The critical issue for me to determine is whether she did so "*without properly setting out the allegations".*

66.2. I bear in mind that the purpose of an investigation is to establish the facts in order to consider whether there is a disciplinary case to answer. The nature of such a meeting inevitably means that the precise nature of any allegations of wrongdoing will not and often cannot have crystallised fully in the mind of the decision makers.

66.3. In this case, at the time the investigation commenced, the Respondent had only the information gathered during the MS investigation. That suggested that there was unusual email correspondence between MS and the Claimant in which it appeared she was sending him work which she was supposed to be doing, and he was completing that work and sending her the outcomes. This did not appear to follow common practice and appeared to suggest that the nature and level of support which was being provided to the Claimant in her role by MS was not what would be expected by those managing the Claimant.

66.4. In the circumstances, I consider that there was no duty on the Respondent to provide any more information about the remit of the investigation than was provided in the letter of 9 March. Arguably, to do so would be prejudging what the investigation might reveal. In theory, the Claimant might have come up with a complete answer (such as express authorisation to send the work to MS) which could mean that no allegations would be appropriate.

66.5. In terms of fairness at this early stage, what the Respondent told the Claimant was that Miss Green was investigating the email correspondence between the Claimant and MS "*that relates to Case Manager work/tasks"*. In my judgment that was sufficient to put the Claimant on notice about what she was being asked about, in general terms, so that she could understand it sufficiently to explain the content and context of that correspondence.

66.6. That view appears to be supported by what the Claimant said to Miss Green at the investigation meeting itself. She said that she was aware of the emails which were being referred to. She did not ask any questions when invited to do so at the outset of the meeting. She was able to answer open questions about the emails during the investigation meeting to provide an overview of her explanation for sending them.

66.7. It is clear that the Claimant was concerned as to whether she was "in trouble" or not as she expressly asked that at the meeting. However it is equally clear that the Respondent had not by that stage taken a view as to whether there was a disciplinary case to answer: Miss Green informed the Claimant that she needed to conclude her investigation into the emails in order to consider whether or not the matter required a referral to a disciplinary hearing.

66.8. I therefore find in relation to this issue that the Respondent did not fail to set out the allegations properly in the invitation to the investigation meeting.

67. Send a letter on 29 March 2023 inviting the Claimant to a disciplinary hearing (1.1.1.2).

68. Subject the Claimant to a disciplinary hearing without foundation or evidence, for matters not amounting to misconduct or gross misconduct (1.1.1.3).

69. I will take the issues set out at 1.1.1.2 and 1.1.1.3 together. It is not in dispute that on 29 March 2023 the Respondent wrote to the Claimant inviting her to a disciplinary hearing. The crucial issue for me, it seems, is whether by doing so it was subjecting the Claimant to "*a disciplinary hearing without foundation or evidence, for matters not amounting to misconduct or gross misconduct".*

69.1. Miss Laxton submits on behalf of the Claimant that it was not made clear to the Claimant what she was accused of, in particular which policy or rule was said to be breached. I will therefore turn to the issue of what was explained to the Claimant about the disciplinary hearing.

69.2. In the letter inviting her to the disciplinary hearing, the Claimant was told that the meeting related to the email correspondence with MS which had already been discussed with her at the investigation, relating to Case Manager work/tasks. She was told that the disciplinary hearing was to discuss her conduct "*in relation to the nature and content of the email correspondence and case management ownership".* That explanation was repeated at the outset of the disciplinary hearing.

69.3. I note that both in the letter inviting her to the hearing, and at the outset of the hearing itself, the Claimant was expressly given the opportunity to raise any questions she had, and she did not say that she did not understand what the hearing was about or what would be discussed. Viewed objectively, it seems to me that it could reasonably be understood, based on what the Claimant was told, that the Respondent considered that it was potentially inappropriate for her to have engaged in that correspondence with MS about work/tasks which were her responsibility. She was therefore, in my judgment, made aware of the actions on her part which the Respondent considered to have been wrong.

69.4. There is perhaps a separate issue which was less clear, namely precisely what rules or policies this was said to have broken – in other words, **why** the Respondent considered it to be wrong. However the Claimant had been sent a copy of the investigation report. The conclusion and recommendation from that report was that by sending emails containing work for MS to do, the Claimant may have "*breached her responsibilities as a Case Manager"*, and that the volume of support she received exceeded what was expected by her

line manager, who had not given permission. That, viewed objectively, appears to me to be sufficiently clear for the Claimant to understand the nature of the Respondent's concerns.

69.5. It is right to say that the Claimant was not told that this was in breach of any express policy or procedure. That is because, as the investigation report makes clear, there is no written policy or procedure which expressly prohibits someone from sending work which they have been given to do to somebody else who will do it for them. It was noted within the "facts that could not be established" that the absence of such a policy "*could support [the Claimant's] version of events that she was unaware it wasn't allowed"*.

69.6. However the investigation report "facts established" set out in terms the view of Miss Green, to be considered at a disciplinary hearing in light of any explanation advanced by the Claimant, that:

69.6.1. There was evidence of the Claimant sending work to MS;

69.6.2. There was evidence of Decision Records submitted by her being the same as draft decision records sent to her by MS, and it therefore appeared to be untrue when the Claimant said that she always drafted her own Decision Records;

69.6.3. The Claimant's line manager had not given permission for anyone in the team to ask MS to complete activities, contact beneficiaries or create decision records;

69.6.4. The Respondent's (albeit unwritten) policy was that applications or activities assigned to a Case Manager could only be reassigned by a team leader.

69.7. In my judgment, the Claimant therefore had, objectively speaking, received sufficient information for her to understand the factual allegation against her, and what the Respondent relied on as demonstrating, on the face of it, that what she had done could be regarded as improper conduct on her part.

69.8. It is right to say that at the disciplinary hearing, although not until it was reconvened on 13 April 2023, the Claimant said on two occasions "what am I accused of?". However, Mr Mitchell answered that question, and it is clear that the Claimant was able to give a full account of herself during the disciplinary hearing. She explained in detail the nature of the working relationship with MS, the reasons why she sent him the work, the fact that this was instigated by him and that she did not need the support, and why she did not consider that this impacted on her ownership of the decisions she ultimately took in relation to the cases allocated to her. That suggests that she understood the allegations against her, but simply did not agree that this was wrong, or if it was wrong, that it was as serious as Mr Mitchell suggested or that it warranted disciplinary action against her.

69.9. When the Claimant raised queries about why the Respondent said her conduct was wrong, Mr Mitchell provided an explanation of what his concerns were so that the Claimant could answer them. He said that it led to him having concerns about whether he could trust the Claimant if she was taking credit for work which had been done by someone else. He said that it led to him having concerns about inappropriate sharing of client information by Zoom or email. The Claimant appears to have understood those points: she said expressly that she understood "how it looks". She was able to answer them. She made it clear that with hindsight, she should not have sent the work to MS, but at the time she did not realise that it was wrong to do so. Again, that suggests that she understood why Mr Mitchell regarded these matters as potentially serious.

69.10. Miss Laxton also suggests, on the Claimant's behalf, that the investigation was incomplete when the Claimant was invited to a disciplinary hearing, and that there was therefore no foundation or evidence for the hearing.

69.11. Based on the evidence gathered during the investigation, I find that there was sufficient evidence for the Respondent to consider that there was a disciplinary case to answer, and to give the Claimant an opportunity to explain her actions at a disciplinary hearing. I accept that Miss Green conceded that she had not asked the Claimant's line manager the express question whether the Claimant had been told that she was not permitted to reassign her own work, or whether the Claimant had been expressly told about the expected level of support. However those are not matters which, it appears to me, go to whether or not there was sufficient evidence to justify holding a disciplinary hearing. If and to the extent that the Claimant said at the disciplinary hearing that she had not been told this, it would be a matter for the person with conduct of the disciplinary hearing to consider that explanation, and conduct any further enquiries he thought appropriate. There was evidence that the Claimant's team leader considered that all members of her team were aware that only she could reassign work.

69.12. I also accept that Miss Green had not interviewed MS. However she had highlighted in her report that she had been unable to confirm or deny the Claimant's account of MS having instigated work being sent to him. Again, it would be a matter for the person conducting the disciplinary hearing to consider, in light of the explanation advanced by the Claimant, whether he needed to conduct further investigation to resolve the issues before him. That does not go to whether or not there was sufficient evidence to warrant a disciplinary hearing at all.

69.13. For the reasons I have set out, I do not accept that the Claimant was "*in the dark about the allegations being raised*" as is alleged on her behalf. There were matters which could have been expressed more clearly in advance, such as the precise concerns Mr Mitchell

had (particularly in relation to trust and integrity) about why these matters were potentially serious. However, I have to view these matters in the round and objectively. In my judgment, there was sufficient evidence available to the Respondent for it to conclude that there was a case to answer in respect of misconduct, and the Respondent's concerns were made sufficiently clear for the Claimant to understand the misconduct which was being alleged and to answer the allegations during the disciplinary hearing. I therefore consider that the disciplinary hearing was not convened "without foundation or evidence" or "for matters not amounting to misconduct or gross misconduct".

70. The next issue is whether the Respondent failed to send evidence (interview transcripts) so that the Claimant could defend herself 1.1.1.4).

70.1. I do consider that there was a flaw in the procedure adopted by the Respondent in that the Claimant was not provided with the evidence gathered by Miss Green during her investigation. She was sent a copy of the Investigation Report, but not the evidence which underpinned it. I am mindful that the ACAS Code of Practice on Disciplinary and Grievance Procedures says that it would normally be appropriate to send witness statements and that ACAS guidance suggests that relevant documents should be provided in advance of the disciplinary hearing.

70.2. The Investigation Report does refer to the minutes of interviews with MS's managers, so the Claimant would (or should) have been aware of the existence of those minutes. I note that at no point did she ask to be provided with copies of those, or indeed of the emails sent by various managers in response to questions from Miss Green. However they ought to have been provided regardless of any request so that the Claimant was aware of the extent of the evidence against her. There were somewhat broad and sweeping references to some of that evidence during the disciplinary hearing, when Mr Mitchell made comments such as "it has been established that…", but the Claimant was not in a position to challenge that evidence if she did not know what it was.

70.3. I do note, however, that the nature of the responses provided by Ms Payne, Mr Smith and Mr Mitchell to Miss Green's email questions was summarised within the investigation report, so the Claimant would have been aware of those in broad terms. What she would not have known from the investigation report was the content of the minutes from the MS investigation, suggesting that MS's managers knew or suspected that MS was offering help to other members of staff, in particular the Claimant, despite being instructed not to do so. It is not clear how much knowledge of that information would have advanced the Claimant's case beyond potentially corroborating her assertion that MS instigated the offer of help. However Mr Mitchell's concerns as discussed at the disciplinary hearing related more to the Claimant effectively passing off work as her own when it had, without her manager's authority, been done by somebody else. In those

circumstances, the minutes seem likely to have been of limited, if any, assistance.

71. Fail to interview MS during the investigation and/or disciplinary process (1.1.1.5)

71.1. Turning to the next alleged act relied on by the Claimant, it is not in dispute that the Respondent did not interview MS during the investigation and/or disciplinary process. I have indicated that I accept Miss Green's explanation for this at the investigation stage. When it came to the disciplinary hearing, the Claimant did request at the end of the reconvened hearing on 13 April 2023 that MS be interviewed. Mr Mitchell agreed to do so if MS was willing to speak to him.

71.2. It is not entirely clear why that was not done. The Claimant said on 13 April 2023 that she considered that MS would be able to corroborate her account that MS had also provided support to other members of staff. On 17 April 2023 day Mrs Calagan sent an email asking the Claimant to confirm what points she thought MS would be able to clarify. I do not understand why that request was necessary given what the Claimant had said on 13 April 2024, or why steps had not already been taken.

71.3. Unfortunately, the Claimant did not respond to the email of 17 April 2024, perhaps not surprising given that she was signed off work for stress. However less than 24 hours later Mrs Calagan sent a further email to the Claimant indicating that Mr Mitchell was in a position to deliver the outcome of the disciplinary hearing. It therefore appears that no steps were ever taken to follow up the request to the Claimant made on 17 April, or to contact MS, before Mr Mitchell reached his decision.

71.4. It appears to me that interviewing MS was unlikely to make a significant difference to the outcome of the case. Miss Green had already made it clear in the investigation report that the Respondent was unable to prove or disprove whether MS had, as the Claimant suggested, "volunteered" for the work (thereby instigating the emails) during earlier conversations. Assuming that MS corroborated this account, that would not answer the concerns expressed by Mr Mitchell that this was done without the team leader's knowledge or permission, and resulted in the Claimant submitting work that had been done by someone else. At best, it was corroborative evidence which might provide some mitigation, but would not exonerate the Claimant altogether.

72. Conduct the disciplinary hearing in an aggressive manner and attack the Claimant's honesty and integrity (1.1.1.6).

72.1. In the course of cross-examination, the Claimant accepted that Mr Mitchell had not raised his voice during the hearing. She explained that by "aggressive manner", what she meant was that she

considered that Mr Mitchell had asked her the same questions repeatedly and she felt under pressure to answer a certain way. She also said that she had answered his questions honestly but had felt that he disbelieved her but did not explain why. She considered that this was unprofessional. She acknowledged that she had said at the conclusion of the first meeting that she had been treated fairly, and told me that at that point, she felt it was a fair process.

72.2. The Claimant also accepted in cross-examination that Mr Mitchell was entitled to ask her questions about the emails. Having had sight of the minutes of the disciplinary hearing, which do not appear to be significantly in dispute, I do not consider that they show the interview being conducted in an aggressive manner. At one point in the reconvened hearing there was intervention from Ms Calagan, but that was only to stop the discussion going over old ground which had already been covered.

72.3. I do not find that asking the series of questions he did amounted to aggression on the part of Mr Mitchell, when viewed objectively. I accept that the Claimant may have felt under pressure to answer in a particular way, and that she had not previously been involved in a hearing of this kind, and that she may have perceived the process as intimidating. However I do not consider that this is enough to be able to characterise the conduct of the hearing as "aggressive" in manner or tone.

72.4. Similarly, Mr Mitchell was entitled to put to the Claimant the concerns which her conduct raised in his mind about potential issues of honesty and integrity, particularly when the Claimant was asking what it was that was wrong about her conduct. I note that, having done so, he thanked her for her honesty with him and said in terms "I am not saying you are lying". I do not consider that he "attacked" the Claimant's honesty and integrity by asking her questions about what she had done based on his concern that she appeared to have been seeking to pass off as hers work which had in fact been done by somebody else. Again, I acknowledge how uncomfortable those questions must have been for the Claimant, but that is not the same thing as them amounting to an "attack" or being inappropriate questions to ask.

72.5. I note that Mrs Calagan, who was present at the meeting in an HR capacity, says that Mr Mitchell was in her view "assertive", but not aggressive. I further note that Mr Clifford-La Ronde, who was the Claimant's representative, makes no mention of aggression in his witness statement. Both of those individuals appear in my view more likely to be objective, and in the case of Mrs Calagan to have prior experience of similar meetings, than the Claimant.

73. Give an indication of an unfair outcome (that the matter would be at the higher end of the scale of misconduct and sanction) (1.1.1.7).

73.1. Near the conclusion of the reconvened disciplinary hearing, Mr Mitchell is recorded as saying, "*Reading the disciplinary policy, this inferences to misconduct and gross misconduct… I have not officially made a decision but it does lead me to a formal outcome".*

73.2. Whilst not entirely easy to understand, I consider that this comment is consistent with that made at the outset of the reconvened hearing, which is that "*… based on the severity of the case, there will be some formal action but I need to decide which way that will go. It will not be a case of no further action".*

73.3. At the conclusion of the original hearing, Mr Mitchell had said that the possible outcomes could be "*no further action, a first or final written warning or dismissal"*, which of course accords with stages 0 to 3 of the Respondent's disciplinary policy.

73.4. The Claimant has said that the minutes are not accurate, and that at the conclusion of the meeting Mr Mitchell indicated that the outcome would be at the "higher end" of the scale of disciplinary action. In my judgment the Claimant is likely to be mistaken in her recollection about that.

73.5. In reaching that conclusion, I do not attach any weight to the point made by the Respondent that the Claimant did not challenge the minutes. I acknowledge that these had not been sent to the Claimant by the time she resigned, and that when they were sent she was informed that she could not challenge them because she had resigned. However I accept the evidence from Mrs Calagan and Mr Mitchell that the minutes are an accurate record of what was said. I consider it inherently unlikely that an experienced member of the HR team would mis-record a point of such significance. Mr Clifford-La Ronde conceded in cross-examination the minutes were more likely to provide an accurate record of what was said than his recollection.

73.6. Mr Clifford-La Ronde confirmed that following the meeting he took the Claimant for a walk because she was upset, and that they discussed that Mr Mitchell had said that the sanction would be at the higher end. He said that the Claimant had then, for the purpose of this tribunal hearing, asked him to confirm that that was what was said. He did not accept that the words had been put into his mouth. It seems to me to be likely, however, that the Claimant, in her upset, had misconstrued the words said by Mr Mitchell, and that this may have become settled in her mind when she discussed it with Mr Clifford-La Ronde during their walk after the meeting.

73.7. Therefore, while I accept that the Claimant genuinely believes that is she was told that the sanction would be at the higher end of the scale, she is mistaken in her belief, and that she either mis-heard or misunderstood, in her distressed and anxious state, what Mr Mitchell told her because she feared the worst outcome,

73.8. I also note that the reference to the matter "inferencing" misconduct or gross misconduct appears to suggest that stages 1 to 3 of the Respondent's policy would still be available sanctions, depending on the final view Mr Mitchell took of the severity of the misconduct – in other words, first written warning, final written warning or dismissal. The words he used towards the end of the reconvened hearing suggest that he was saying that all three of those options were still possible outcomes, but that he had now ruled out taking no action. In my judgment it is likely that that is what he told the Claimant.

73.9. Finally, I note that this is corroborated by the evidence from Mr Mitchell, supported by a contemporaneous email from Mr Walsh to the Claimant, that on 18 April 2023 Mr Mitchell concluded that the sanction was "*not on the serious scale. This would include dismissal and final written warning"*. On 18 April 2023 Mr Walsh was asking the Claimant to reconsider her resignation on the basis that "*[Mr Mitchell] has highlighted that he does see a way forward for you and you are a valued member of the team"*. I have attached less weight to this evidence because it relates to a decision taken after the Claimant had already tendered her resignation, and therefore has the potential to be self-serving. However I see no reason why Mr Mitchell would (through Mr Walsh) seek to persuade the Claimant to change her mind if he considered that the matter was at the higher end of the scale of seriousness.

74. Fail to offer proper to support after the Claimant disclosed that she was experiencing mental health issues due to the stress of the process.

74.1. The minutes record Mr Mitchell saying "*I get that, I am not trying to make it worse… In terms of your mental health, you can talk to us, Mental Health First Aiders. I appreciate this is not nice but I am not yet in position to make decision… I do appreciate it is stressful, it is hard. I would encourage you to talk to [Ms Payne] about how you are feeling"*.

74.2. I note that following this meeting (the next day) the Claimant was certified unfit by her GP for a period of 2 weeks on the grounds of stress at work. In those circumstances it is not clear to me what "proper support" the Claimant is suggesting should have been offered by the Respondent: that would no doubt be a matter for consideration when she was in a position to return to work.

74.3. In my judgment the steps suggested by Mr Mitchell, namely the Claimant talking to her line manager or one of the Respondent's Mental Health first aiders, were reasonable and proper advice to offer to someone who reported mental health difficulties associated with work.

74.4. I further note that during the Claimant's absence, Mrs Calagan offered her the option of having the disciplinary decision communicated to her or waiting until her return to work. Moreover, when she tendered her resignation, the Respondent did not take it at

face value but contacted her immediately (within about an hour) through Mr Walsh, the head of HR, to seek to offer her reassurance and give her the opportunity to change her mind.

74.5. In all the circumstances I find that the Respondent did not fail to offer proper support.

75. It follows from the above discussion that the only alleged breaches I find proved as a matter of fact are:

75.1. (1.1.1.4) Fail to send evidence (interview transcripts) so that the Claimant could defend herself; and

75.2. (1.1.1.5) Fail to interview MS during the investigation and/or disciplinary process.

Did those matters, individually or cumulatively, breach the implied term of trust and confidence?

76. I am mindful that the test I have to apply is whether, looked at objectively, the conduct in question is calculated or likely to destroy or seriously damage the degree of trust and confidence the employee is reasonably entitled to have in his employer. The authorities to which I have properly been referred by the parties remind me that unreasonable conduct alone is not enough to amount to a constructive dismissal.

77. I have borne in mind that the two failures I identified are procedural flaws in the investigation which might or not be capable of rendering the disciplinary process unfair (in the sense of falling outside the range of reasonable responses open to a reasonable employer). Even if they were unreasonable in that sense, that would not in itself be enough on its own to meet the higher bar of something which, objectively viewed, breached the implied term of trust and confidence.

78. I have discussed these two failings extensively above, and do not propose to repeat that discussion here. In summary, however, I consider that both failings went to an absence of potential mitigation evidence rather than exculpatory evidence, in the sense that:

78.1. The interviews from the MS investigation had the potential to establish that MS's managers were aware that he was probably offering assistance to Case Managers including the Claimant on a regular basis;

78.2. An interview with MS might have corroborated the Claimant's account that the offer of help came from him voluntarily rather than being suggested by her.

79. However, the investigation report from Miss Green, which the Claimant had seen, acknowledged the absence of evidence on those issues, particularly the latter. In that sense, the potential mitigation was already available to be

taken into account by Mr Mitchell, along with other points identified such as the absence of any formal written policy about the reallocation of work.

80. In my judgment, the absence of this material did not, viewed objectively significantly hamper the Claimant in her ability to understand and answer the allegations against her. She always acknowledged that she had passed work to MS to do and made use of the completed work he sent her when submitting her formal Decision Records. At the investigation and disciplinary hearings, she was able to give a full account of the circumstances and reasons why she did so, including explaining that she did not think she was doing anything wrong.

81. Because the Claimant pre-empted the disciplinary decision by resigning, it has never been clear what Mr Mitchell's final view of the mitigation evidence was. All that is known is that he ultimately concluded that the matter warranted a first written warning which, according to the Respondent's disciplinary policy, is appropriate for cases involving minor breaches of policy and procedure. It may well be that this included giving the Claimant the benefit of the doubt on disputed factual matters which had not been confirmed one way or the other, but that is a matter of mere speculation on which it would not be appropriate for me to reach a finding.

82. However, because the resignation came before the disciplinary outcome was delivered, it would be difficult to conclude that these two procedural flaws, viewed in the context of the disciplinary process as a whole, were unreasonable, still less to the extent which could properly be characterised as a breach of the implied term of trust and confidence.

83. Having considered the Claimant's other allegations of defects in the procedure very carefully, I have not upheld them for reasons I have set out above. Viewed in the round, it appears to me that the disciplinary procedure taken as a whole was conducted in a manner which was fair and reasonable. In the circumstances, I cannot consider that two isolated procedural flaws, whether viewed individually or cumulatively, were sufficient to meet the threshold for constructive dismissal.

84. I therefore conclude that the two matters I have found proved did not, individually or cumulatively, breach the implied term of trust and confidence, still less to the extent that the Claimant would have been entitled to treat the contract as being at an end.

85. Having reached that finding, I do not need to go on to consider the remainder of the issues set out in the list of issues.

86. Having found that the Claimant has not established the matters she would need to establish in order to prove a case of constructive dismissal, my conclusion is that she resigned and was not dismissed by the Respondent, whether fairly or otherwise.

Conclusion

87. For the reasons I have given, I find that the Claimant was not dismissed by the Respondent. The Claimant's complaint of unfair (constructive) dismissal is dismissed.

Employment Judge Suzanne Palmer
7 November 2024

ANNEX A – List of Issues

1. Unfair dismissal

1.1 Was the Claimant dismissed?

[Constructive dismissal]

1.1.1 Did the Respondent do the following things:

1.1.1.1 Send an email on 9 March 2023 convening an investigation without properly setting out the allegations;

1.1.1.2 Send a letter on 29 March 2023 inviting the Claimant to a disciplinary hearing;

1.1.1.3 Subject the Claimant to a disciplinary hearing without foundation or evidence, for matters not amounting to misconduct or gross misconduct;

1.1.1.4 Fail to send evidence (interview transcripts) so that the Claimant could defend herself;

1.1.1.5 Fail to interview MS during the investigation and/or disciplinary process;

1.1.1.6 Conduct the disciplinary hearing in an aggressive manner and attack the Claimant's honesty and integrity;

1.1.1.7 Give an indication of an unfair outcome (that the matter would be at the higher end of the scale of misconduct and sanction);

1.1.1.8 Fail to offer proper support after the Claimant disclosed that she was experiencing mental health issues due to the stress of the process.

1.1.2 Did those matters, individually or cumulatively, breach the implied term of trust and confidence? The Tribunal will need to decide:

1.1.2.1 whether the Respondent behaved in a way that was calculated or likely to destroy or seriously damage the trust and confidence between the Claimant and the Respondent; and

1.1.2.2 whether it had reasonable and proper cause for doing so.

1.1.3 Was the breach a fundamental one? The Tribunal will need to decide whether the breach was so serious that the Claimant was entitled to treat the contract as being at an end.

1.1.4 Did the Claimant resign in response to the breach? The Tribunal will need to decide whether the breach of contract was a reason for the Claimant's resignation.

1.1.5 Did the Claimant affirm the contract before resigning? The Tribunal will need to decide whether the Claimant's words or actions showed that they chose to keep the contract alive even after the breach.

[General]

1.2 [If the Claimant was dismissed,] what was the reason or principal reason for dismissal [*constructive dismissal only* - i.e. what was the reason for the breach of contract]?

1.3 Was it a potentially fair reason?

1.4 Did the Respondent act reasonably or unreasonably in all the circumstances, including the Respondent's size and administrative resources, in treating that reason as a sufficient reason to dismiss the Claimant?

1.5 The Tribunal's determination whether the dismissal was fair or unfair must be in accordance with equity and the substantial merits of the case.

[Misconduct dismissals]

1.6 What was the reason or principal reason for dismissal? The Respondent says the reason was conduct. The Tribunal will need to decide whether the Respondent genuinely believed the Claimant had committed misconduct.

1.7 If the reason was misconduct, did the Respondent act reasonably or unreasonably in all the circumstances, including the Respondent's size and administrative resources, in treating that as a sufficient reason to dismiss the Claimant? The Tribunal's determination whether the dismissal was fair or unfair must be in accordance with equity and the substantial merits of the case. It will usually decide, in particular, whether:

1.7.1 there were reasonable grounds for that belief;
1.7.2 at the time the belief was formed the Respondent had carried out a reasonable investigation;
1.7.3 the Respondent otherwise acted in a procedurally fair manner;
1.7.4 dismissal was within the range of reasonable responses.

2. Remedy for unfair dismissal

2.1 If there is a compensatory award, how much should it be? The Tribunal will decide:

2.1.1 What financial losses has the dismissal caused the Claimant?

2.1.2 Has the Claimant taken reasonable steps to replace their lost earnings, for example by looking for another job?

2.1.3 If not, for what period of loss should the Claimant be compensated?

2.1.4 Is there a chance that the Claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason?

2.1.5 If so, should the Claimant's compensation be reduced? By how much?

2.1.6 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?

2.1.7 Did the Respondent or the Claimant unreasonably fail to comply with it?

2.1.8 If so is it just and equitable to increase or decrease any award payable to the claimant? By what proportion, up to 25%?

2.1.9 If the Claimant was unfairly dismissed, did they cause or contribute to dismissal by blameworthy conduct?

2.1.10 If so, would it be just and equitable to reduce the Claimant's compensatory award? By what proportion?

2.1.11 Does the statutory cap apply?

2.2 What basic award is payable to the Claimant, if any?

2.3 Would it be just and equitable to reduce the basic award because of any conduct of the Claimant before the dismissal? If so, to what extent?

ANNEX B – Representatives' agreed summary of the law

The parties agree that the following represents a fair summary of the law as to constructive dismissal. The parties do not intend to bring copies of the authorities as the legal principles are fully expressed below:

1. Where the claim is that the worker was constructively unfair dismissed, the Tribunal must first determine whether the claimant was constructively dismissed, applying the established principles, and if so, identify what conduct breached the implied term of trust and confidence..

2. The best-known summary of the applicable test for a claim of constructive unfair dismissal was provided by Lord Denning MR in Western Excavating (ECC) Limited v Sharp [1978] IRLR 27:

> *"If the employer is guilty of conduct which is 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 essential terms of the contract; then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of his employer's conduct. He is constructively dismissed. The employee is entitled in these circumstances to leave at the instant without giving any notice at all or, alternatively, he may give notice and say he is leaving at the end of notice. But the conduct must in either case be sufficiently serious to entitle him to leave at once. Moreover, he must make up his mind soon after the conduct of which he complains: for, if he continues for any length of time without leaving, he will lose his right to treat himself as discharged. He will be regarded as having elected to affirm the contract."*

3. In Tullett Prebon PLC and Ors v BGC Brokers LP and Ors Maurice Kay LJ endorsed the following legal test at paragraph 20:

> *"... whether, looking at all the circumstances objectively, that is from the perspective of a reasonable person in the position of the innocent party, the contract breaker has clearly shown an intention to abandon and altogether refuse to perform the contract."*

4. In Courtaulds Northern Spinning Ltd v Sibson it was held that reasonable behaviour on the part of the employer can point evidentially to an absence of significant breach of a fundamental term of the contract. However, if there is such a breach, it is clear from Nottingham County Council v Meikle [2005] ICR 1 CA; Abbey Cars (West Horndon) Ltd v Ford EAT 0472/07; and Wright v North Ayrshire Council [2014] IRLR 4 EAT, that the crucial question is whether the repudiatory breach "played a part in the dismissal" and was "an" effective cause of resignation, rather than being "the" effective cause. In need not be the predominant, principal, major or main cause for the resignation.

5. With regard to trust and confidence cases, Dyson LJ summarised the position thus in Omilaju v Waltham Forest London Borough Council [2005] IRLR 35 CA: The following basic propositions of law can be derived from the authorities: 1. The

test for constructive dismissal is whether the employer's actions or conduct amounted to a repudiatory breach of the contract of employment: Western Excavating (ECC) Limited v Sharp [1978] 1 QB 761. 2. It is an implied term of any contract of employment that the employer shall not without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee: see, for example Malik v Bank of Credit and Commerce International SA [1998] AC 20, 34H – 35D (Lord Nicholls) and 45C – 46E (Lord Steyn). I shall refer to this as "the implied term of trust and confidence". 3. Any breach of the implied term of trust and confidence will amount to a repudiation of the contract, see, for example, per Browne-Wilkinson J in Woods v WM Car Services (Peterborough) Ltd [1981] ICR 666 CA, at 672A; the very essence of the breach of the implied term is that it is calculated or likely to destroy or seriously damage the relationship. 4. The test of whether there has been a breach of the implied term of trust and confidence is objective. As Lord Nicholls said in Malik at page 35C, the conduct relied on as constituting the breach must: "impinge on the relationship in the sense that, looked at objectively, it is likely to destroy or seriously damage the degree of trust and confidence the employee is reasonably entitled to have in his employer".

6. This [has] been reaffirmed in Buckland v Bournemouth University Higher Education Corporation [2010] IRLR 445 CA.

7. The same authorities also repeat that unreasonable conduct alone is not enough to amount to a constructive dismissal (Claridge v Daler Rowney [2008] IRLR 672); and that if an employee is relying on a series of acts then the tribunal must be satisfied that the series of acts taken together cumulatively amount to a breach of the implied term (Lewis v Motorworld Garages Ltd [1985] IRLR 465). In addition, if relying on a series of acts the claimant must point to the final act which must be shown to have contributed or added something to the earlier series of acts which is said, taken as a whole, to have broken the contract of employment (Omilaju v Waltham Forest London Borough Council [2005] IRLR 35 CA).

8. The judgment of Dyson LJ in Omilaju was endorsed by Underhill LJ in Kaur v Leeds Teaching Hospital NHS Trust [2018] IRLR 833 CA. Having reviewed the case law on the "last straw" doctrine, the Court concluded that an employee who is the victim of a continuing cumulative breach of contract is entitled to rely on the totality of the employer's acts notwithstanding a prior affirmation by the employee.

9. If the suggested last straw was entirely innocuous, further guidance was given in Williams v The Governing Body of Alderman Davies Church in Wales Primary School UKEAT/0108/19/LA at paragraph 33.

> *"If the most recent conduct was not capable of contributing something to a breach of the Malik term, then the Tribunal may need to go on to consider whether the earlier conduct itself entailed a breach of the Malik term, has not since been affirmed, and contributed to the decision to resign."*

10. In addition, it is clear from Leeds Dental Team v Rose [2014] IRLR 8 EAT, that whether or not behaviour is said to be calculated or likely to destroy or seriously damage the trust and confidence between the parties is to be objectively assessed, and does not turn on the subjective view of the employee. In addition, it is also clear from Hilton v Shiner Ltd - Builders Merchants [2001] IRLR 727 EAT, that even where there is conduct which objectively could be said to be calculated or likely to destroy or seriously damage the trust and confidence between the parties, if there is reasonable and proper cause for the same then there is no fundamental breach of contract.

11. The Claimant relies on the EATs decision in Working Men's Club and Institute Union Ltd v Balls UKEAT/0119/11/LA, which in turn references the principles set out in Gogay v Hertfordshire County Council [2000] IRLR 703. These authorities reinforce that initiating disciplinary proceedings and making allegations of gross misconduct without adequate basis, not articulating clearly the nature of the charges (and giving a misleading impression of their gravity) and the conduct of the investigation itself entitled the tribunal to make a finding of constructive dismissal (see para 40 in particular).

12. A claimant cannot rely upon a breach of contract which he/she has been taken to have affirmed. Affirmation can, of course, have been express, but it can also be implied by inaction and delay, although simple delay is rarely enough. In Chindove-v-Morrisons UKEAT/0201/13/BA, Langstaff J said this (paragraph 26);

> *"[the claimant] may affirm a continuation of the contract in other ways: by what he says, by what he does, by communications which show that he intends the contract to continue. But the issue is essentially one of conduct and not of time..... It all depends upon the context and not upon any strict time test."*