EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 8000027/2024

Held in Aberdeen on 9, 10,11 and 12 December 2024

Employment Judge Brewer

Miss A Rezin	**Claimant** **Represented by:** **Mr D Wilson,** **Lay representative**
Robert Gordon University	**Respondents** **Represented by:** **Ms J McLaughlin,** **Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

Judgment having been given orally on 12 December 2024, the claimant has asked for written reasons for the judgment which are set out below.

REASONS

Introduction

1. This case was listed over four days before me in Aberdeen.
2. The claimant was represented by her partner, Mr Wilson and the respondent was represented by Ms McLaughlin Solicitor.
3. I heard evidence from the claimant and her trade union representative Mr Jones. For the respondent I heard evidence from Mr Chalmers, the claimant's line manager, Ms Mellis, HR and Mr Williams who determined the claimant's grievance.

4. I had an agreed bundle of documents running to just over 900 pages.
5. The evidence was concluded at the end of day 2, I deliberated on day three and delivered the judgement orally on day four. Subsequently the claimant has asked for written reasons which I set out below.

Issues

6. the issues in the case are as follows:
    a. did the respondent breach the implied term of trust and confidence,
    b. if so, did the claimant resign as a result?
    c. prior to termination of her employment did the claimant affirm the contract?
    d. if the claimant was dismissed was the dismissal unfair?

Relevant Law

7. I set out below a brief summary of the law.
8. The claimant claimed that she had been constructively dismissed. She resigned following, she says, a series of acts, faults and omissions by the respondent which, she says, amounted to a breach in the implied term of trust and confidence. The relevant law is as follows.

9. The guidance given for deciding if there has been a breach of the implied term of trust and confidence is set out in ***Malik v BCCI*; *Mahmud v BCCI*** 1997 1 IRLR 462 where Lord Steyn said that an 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."*

10. The burden of proving the absence of reasonable and proper cause lies on the party seeking to rely on such absence — **RDF Media Group plc and**

anor v Clements 2008 IRLR 207, QBD. As in that case, this will usually be the employee.

11. In ***Hilton v Shiner Ltd - Builders Merchants*** 2001 IRLR 727, EAT, for example, Mr Recorder Langstaff QC stated in connection with a submission by counsel as to the proper legal test for establishing a breach of the implied term in the context of a case where the employer was alleging that the employee's misconduct had destroyed trust and confidence:

> *"When Mr Prichard identified the formulation of the trust and confidence term upon which he relied, he described it as being an obligation to avoid conduct which was likely seriously to damage or destroy a mutual trust and confidence between employer and employee. So to formulate it, however, omits the vital words with which Lord Steyn in his speech in Malik v Bank of Credit and Commerce International SA (in compulsory liquidation) (above) qualified the test. The employer must not act without reasonable and proper cause… To take an example, any employer who proposes to suspend or discipline an employee for lack of capability or misconduct is doing an act which is capable of seriously damaging or destroying the relationship of trust and confidence between employer and employee, whatever the result of the disciplinary process. Yet it could never be argued that an employer was in breach of the term of trust and confidence if he had reasonable and proper cause for the suspension, or for taking the disciplinary action."*

12. Section 95(1)(c) of the Employment Rights Act 1996 (ERA) states that there is a dismissal when the employee terminates the contract, with or without notice, in circumstances such that he or she is entitled to terminate it without notice by reason of the employer's conduct. That is commonly called constructive dismissal.

13. In the leading case in this area, ***Western Excavating (ECC) Ltd v Sharp*** 1978 ICR 221, CA, the Court of Appeal ruled that, for an employer's conduct to give rise to a constructive dismissal, it must involve a repudiatory breach of contract. As Lord Denning MR put it:

> *'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 the employer's conduct. He is constructively dismissed'.*

14. In order to successfully claim constructive dismissal, the employee must establish that:

    a. there was a fundamental breach of contract on the part of the employer;

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

    c. the employee did not delay too long before resigning, thus affirming the contract and losing the right to claim constructive dismissal.

15. I note that a constructive dismissal is not necessarily an unfair one - ***Savoia v Chiltern Herb Farms Ltd*** 1982 IRLR 166, CA.

16. A course of conduct can cumulatively amount to a fundamental breach of contract entitling an employee to resign and claim constructive dismissal following a 'last straw' incident even though the last straw by itself does not amount to a breach of contract - ***Lewis v Motorworld Garages Ltd*** 1986 ICR 157, CA. However, an employee is not justified in leaving employment and claiming constructive dismissal merely because the employer has acted unreasonably. This was confirmed in ***Bournemouth University Higher Education Corporation v Buckland*** 2010 ICR 908, CA, where the Court upheld the decision of the EAT that the question of whether the employer's conduct fell within the range of reasonable responses is not relevant when determining whether there has been a constructive dismissal.

17. There is no need for there to be 'proximity in time or in nature' between the last straw and the previous act of the employer - ***Logan v Customs and Excise Commissioners*** 2004 ICR 1, CA.

18. In ***Omilaju v Waltham Forest London Borough Council*** 2005 ICR 481, CA, the Court of Appeal explained that the act constituting the last straw does not have to be of the same character as the earlier acts, nor need it constitute unreasonable or blameworthy conduct, although in most cases it will do so. But the last straw must contribute, however slightly, to the breach of the implied term of trust and confidence. An entirely innocuous act on the part of the employer cannot be a final straw, even if the employee genuinely, but mistakenly, interprets the act as hurtful and destructive of his or her trust and confidence in the employer. The test of whether the employee's trust and confidence has been undermined is objective. And while it is not a prerequisite of a last straw case that the employer's act should be unreasonable, it will be an unusual case where conduct which is perfectly reasonable and justifiable satisfies the last straw test. In that context, in ***Chadwick v Sainsbury's Supermarkets Ltd*** EAT 0052/18 the EAT rejected a tribunal's finding that a threat of disciplinary action was 'an entirely innocuous act' that could not constitute a last straw.

19. Where the act that tips the employee into resigning is entirely innocuous it will be necessary to consider whether any earlier breach has been affirmed. In ***Williams v Governing Body of Alderman Davies Church in Wales Primary School*** *EAT 0108/19* a teacher, W, was suspended for an alleged child protection matter. He was also subject to disciplinary proceedings for alleged breach of the school's data protection policy. He was dissatisfied with the process and resigned after several months, stating that the last straw was learning that a colleague, under investigation for a connected data protection breach, had been instructed not to contact him. The tribunal found that this instruction was reasonable in the circumstances and entirely innocuous. It held that, following ***Omilaju***, this act could not contribute to a breach of the implied duty of trust and confidence and was not a last straw entitling W to

treat his employment contract as terminated. On appeal, the EAT held that, where there is conduct by an employer that amounts to a fundamental breach of contract, a constructive dismissal claim can succeed even if there has been more recent conduct by the employer which does not in itself contribute to a breach of the implied term of trust and confidence, but which is what tips the employee into resigning. Crucially, however, the employee must not have affirmed the earlier fundamental breach and must have resigned at least partly in response to it.

20. In terms of causation, that is the reason for the resignation, a tribunal must determine whether the employer's repudiatory breach was 'an' effective cause of the resignation. However, the breach need not be 'the' effective cause - ***Wright v North Ayrshire Council*** 2014 ICR 77, EAT. As Mr Justice Elias, then President of the EAT, stated in ***Abbycars (West Horndon) Ltd v Ford*** EAT 0472/07:

> *"the crucial question is whether the repudiatory breach played a part in the dismissal', and even if the employee leaves for 'a whole host of reasons', he or she can claim constructive dismissal 'if the repudiatory breach is one of the factors relied upon."*

21. Where an employee has mixed reasons for resigning their resignation will constitute a constructive dismissal provided that the repudiatory breach relied on was at least a substantial part of those reasons (see ***Meikle v Nottinghamshire County Council*** [2004] EWCA Civ 859, [2005] ICR 1).

22. Thus, where an employee leaves a job as a result of a number of actions by the employer, not all of which amounted to a breach of contract, they can nevertheless claim constructive dismissal provided the resignation is partly in response to a fundamental breach.

23. If the employee waits too long after the employer's breach of contract before resigning, he or she may be taken to have affirmed the contract resulting in

the loss of the right to claim constructive dismissal. In the words of Lord Denning MR in ***Western Excavating (ECC) Ltd v Sharp*** 1978 ICR 221, CA, the employee:

> *"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."*

24. This was emphasised again by the Court of Appeal in ***Bournemouth University Higher Education Corporation v Buckland*** 2010 ICR 908, CA, although Lord Justice Jacob did point out that, given the pressure on the employee in these circumstances, the law looks very carefully at the facts before deciding whether there really has been an affirmation. An employee's absence from work during the time he or she was alleged to have affirmed the contract may be a pointer against a genuine affirmation.

25. The Court of Appeal in ***Kaur v Leeds Teaching Hospitals NHS Trust*** 2019 ICR 1, CA, held that, in last straw cases, if the last straw incident is part of a course of conduct that cumulatively amounts to a breach of the implied term of trust and confidence, it does not matter that the employee had affirmed the contract by continuing to work after previous incidents which formed part of the same course of conduct. The effect of the last straw is to revive the employee's right to resign.

26. If one party commits a repudiatory breach of the contract, the other party can elect to either affirm the contract and insist on its further performance or accept the repudiation, in which case the contract is at an end. The innocent party must at some stage elect between these two possible courses. If they affirm the contract, even once, they will have waived their right to accept the repudiation.

27. As to any delay in making such a decision, the employee must make up their mind soon after the conduct of which they complain. Tribunals must take a '*reasonably robust*' approach to waiver; a wronged employee cannot

ordinarily expect to continue with the contract for very long without losing the option of termination (see, e.g., ***Buckland v Bournemouth University Higher Education Corporation*** [2010] EWCA Civ 121, [44], per Sedley LJ).

28. An employee's absence from work during the time he or she was alleged to have affirmed the contract may be a pointer against a genuine affirmation. For example, in ***Hoch v Thor Atkinson Steel Fabrications Ltd*** ET Case No.2411086/18 H resigned nearly three weeks after receiving an email accusing him of not doing his job properly, which was the last straw following several incidents of harassment on the grounds of race and sexual orientation. The tribunal found that he could not be said to have affirmed his contract by not resigning earlier as he had been on holiday. That said, affirmation can be implied by prolonged delay and/or if the innocent party calls on the guilty party for further performance of the contract by, for example, claiming sick pay.

29. In relation to whether the contract has been affirmed, or the breach waived by the claimant, the Court of Appeal in ***Kaur*** (above) offered guidance to tribunals, listing the questions that it will normally be sufficient to ask in order to decide whether an employee was constructively dismissed:

a. 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?

b. has he or she affirmed the contract since that act?

c. if not, was that act (or omission) by itself a repudiatory breach of contract?

d. if not, was it nevertheless a part of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a repudiatory breach of trust and confidence?

e. did the employee resign in response (or partly in response) to that breach?

Findings in fact

30. I make the following findings in fact.

31. The claimant started her employment in October 2014. She was employed as a cleaning supervisor responsible principally for cleaning two buildings. At the material times she supervised around 26 staff.

32. At the end of 2022, at a Christmas party, two of the employees supervised by the claimant, Ingrid Taylor and Maria Pato, approached Mr Dave Milton, another supervisor, and raised concerns about the claimant's behaviour. Mr Chalmers, the claimant's line manager, was not present at the Christmas party as he was unwell and so a few days later Mr Milton spoke to Mr Chalmers as he felt that the concerns which were brought to his attention were serious.

33. Nothing occurred during the Christmas break because staff were away and Mr Chalmers could not speak to the relevant members of staff until their return.

34. After the Christmas break Mr Chalmers spoke to the two members of staff who had approached Mr Milton, he then spoke to HR who advised him to undertake a broader informal investigation.

35. In the circumstances Mr Chalmers decided that he would have to escalate the concerns to his manager, Brian Strachan.

36. Following that, Mr Chalmers and Mr Strachan met with the claimant on 20 January 2023. At that meeting they simply told her that a number of serious concerns had been raised but did not provide any detail.

37. Following that meeting Mr Chalmers did a wider informal investigation. He spoke to a number of other staff supervised by the claimant, and it became clear to him that there were a number of staff with similar concerns to those raised by Ms Taylor and Ms Pato. As a result of that, and following Mr Strachan taking advice from HR, it was determined by Mr Strachan that a

formal disciplinary investigation was warranted. At this point Mr Chalmers stepped back from any further involvement in the process other than as a witness. He was not involved in any decisions in relation to the disciplinary matter or the claimant's grievance.

38. On 13 February 2023 there was a further meeting with the claimant attended by Mr Chalmers and Mr Strachan. The purpose of the meeting was to update the claimant although again she was given no details of the allegations against her.

39. On 14 February 2023 the claimant went off sick and she did not return to work before she resigned.

40. A disciplinary investigation under the respondent's disciplinary procedure was started on 9 February 2023. The investigating officer was Denise Hunter, Contracts Manager.

41. During her investigation Ms Hunter met Mr Chalmers three times and met with six other members of staff. She also met with the claimant and her union representative. Meetings with staff were completed by 23 February 2023 but completion of the investigation was delayed because there was a delay in meeting with the claimant. A meeting had been scheduled for 28 February 2023, but this was cancelled by the claimant because she was too unwell to attend.

42. It was not possible to schedule a further meeting until 11 April 2023 although that meeting was then cancelled because the claimant's union representative was unable to attend.

43. In the event the meeting was delayed until 27 April 2023. By any measure this was a detailed meeting lasting over 4 hours.

44. Following each meeting with the witnesses and the claimant, written statements were drafted and sent out to each of the interviewees to agree.

45. The investigation process was completed by early May 2023.

46. Ms Hunter then drafted what by any standards is a comprehensive and detailed investigation report running to 29 pages. That report was completed on 29 June 2023 and took around 7 weeks to prepare.

47. On 3 July 2023 the claimant raised a grievance. Part of that grievance concerned a claim by the claimant that unspecified staff swore at her. The claimant also complained about Mr Chalmers and Mr Strachan.

48. Because there was a connection between the grievance and the disciplinary proceedings, and in accordance with the respondent's disciplinary policy, the disciplinary process was paused pending inclusion of the claimant's grievance.

49. Mr Williams was charged with dealing with the grievance and he acknowledged receipt of it on 11 July 2023. He told the claimant that he was about to go on two weeks annual leave returning on 31 July. Mr Williams said that given the concerns the claimant had raised about her line manager Mr Chalmers, he had arranged for Craig Thompson to be the claimant's main point of contact going forward. He also advised the claimant about support available to her through the respondent's employee assistance programme known as Lifeworks.

50. On 14 July 2023 the claimant was sent an invitation to a grievance meeting with Mr Williams to take place on 2 August 2023. That meeting went ahead as planned.

51. At the grievance meeting the claimant was asked to set out details of her grievance which she did. She raised some 28 concerns which Mr Williams listened to and noted. After the meeting he carried out his grievance investigation.

52. Mr Williams produced a detailed grievance outcome letter covering all 28 complaints on 2 October 2023.

53. Following conclusion of the grievance, the disciplinary process re-commenced and on 5 October 2023 the claimant was sent an e-mail with a letter inviting her to a disciplinary hearing to take place on 12 October 2023 although subsequently the claimant asked for a postponement of the hearing.

54. A disciplinary pack was sent to the claimant by post which she received on 7 October 2023 and her evidence was that she read it, although not all at once.

55. On 13 October 2023 the claimant appealed against the outcome of her grievance.

56. On 19 October 2023 the claimant attended an occupational health appointment in the morning and just after 2:00 pm she emailed a letter of resignation to the respondent.

57. In her letter of resignation, the claimant states that her reasons for resigning are long term stress, the bullying she had received over many months and what she refers to as fundamental failures in the disciplinary process.

58. The claimant's evidence at the hearing was that she took the decision to resign on 19 October 2023 which is the effective date of termination of the employment.

59. The claimant started early conciliation on 20 October 2023.

60. The early conciliation certificate was issued on 30 October 2023.

61. The claim was presented on 7 January 2024.

Decision

62. To summarise, the claimant's reasons for resigning as set out in her oral evidence were:

    a. that the disciplinary procedure took too long,
    b. that the grievance procedure took too long, and
    c. that she was upset by the content of Mr Chalmers' statement given to Diane Hunter.

63. Although it took some time to get the claimant to confirm this, she said that the last straw was the things she read in Mr Chalmers' statement to Diane Hunter. Although Mr Chalmers gave three statements to Ms Hunter, the claimant confirmed that it was what was set out in his first statement which caused her upset.

64. That therefore begs the question what is it that the respondent did, and whether what it did or failed to do breached the term of trust and confidence?

65. in short:

    a. the respondent had received apparently serious concerns about the claimant's conduct during and after the Christmas party in 2022,
    b. an informal investigation was carried out by Mr Chalmers into the concerns. That would seem to me to have been a reasonable and

proper step for him to have taken. Indeed, to have ignored the concerns would in my judgment have been unreasonable and improper,

c. having carried out that initial investigation Mr Chalmers concluded that the matters he had been told about were potentially serious and that he should therefore speak to HR. He was advised to do a wider informal investigation, which he did. That was again a reasonable and proper course of action for the respondent to take,

d. the claimant was informed that there were concerns, although was not given details of them, in January 2023 and after further investigation by Mr Chalmers she was informed in February 2023 that there would be a formal disciplinary investigation,

e. it was not Mr Chalmers' decision to make the concerns a formal disciplinary matter. That was a decision taken by Mr Strachan on the advice of HR. There was no suggestion that HR was anything other than impartial and given the apparent seriousness of the concerns raised with Mr Chalmers it seems to me that it was reasonable and proper for the respondent to deal with the matters formally,

f. there has been no suggestion that Diane Hunter was anything other than impartial. It was reasonable to appoint her to undertake the disciplinary investigation,

g. Ms Hunters' investigation was detailed and thorough and the length of the investigation report reflects this. The claimant raised no concerns about the investigation or the report itself other than the length of time taken,

h. the investigation was concluded relatively quickly, substantially by the end of February 2023 save for meeting with the claimant. The delay in meeting with the claimant was not the fault of the respondent, it was caused by initially the claimant being ill and subsequently her union representative being unavailable,

i. the investigation was completed by the end of April 2023 and although several weeks may seem like a long time to produce an investigation report, that time included typing up witness statements from those who

were met by Ms Hunter, sending them out, waiting for them to be returned, amending them having compared what was received back from the witnesses against the original notes of the meetings with them (which included decisions being made about whether any changes should be included in the final version of any witness statement or whether for example two versions might need to be prepared).

66. Throughout the investigation process the claimant had support from her union, she had regular contact with the respondent, and she had available access to Lifeworks and in my judgment there was no lack of support for the claimant.

67. Given all of that, and given the detailed report produced by Ms Hunter the delay was not inordinate although I accept it must have been an uncomfortable and stressful time for the claimant.

68. So, in summary, the detailed investigation was concluded in around 7 weeks but without the delay in meeting with the claimant it would have been concluded in around 4 weeks which in the circumstances was not unreasonable.

69. Whilst the writing up of the report did take several weeks, given its scope and the need to hear from each witness as I have set out above, that period was not unreasonable.

70. Turning to the grievance, Mr Williams acknowledged the grievance quickly and although there was a short delay for a pre-booked holiday, the grievance meeting with the claimant was held almost immediately upon his return and so the period from the submission of the grievance to the grievance meeting was around 4 weeks which in the circumstances was not unreasonable.

71. At the grievance meeting the claimant considerably increased the number of complaints from those set out in her grievance letter and she ended up with around 28 complaints all of which had to be investigated by Mr Williams which inevitably that took some time, in total around 7 weeks. Mr Williams was not cross examined on why the particular time period was taken but his evidence in chief, which I accept, was that given the scope and breadth of the complaints, including some complaints going back a number of years, and

given the detailed response and recommendations by him, the time taken was not unreasonable.

72. I turn now to the last straw.

73. It was quite clear from the hearing that the claimant was very upset by some things she read in Mr Chalmers' first statement given to Ms Hunter. Having spent some time on this matter I remain unclear as to why she found the particular comments she referred to at the hearing so problematic.

74. The statement is around 7 pages long. Much of it deals with how Mr Chalmers became aware of the concerns of the employees supervised by the claimant, it sets out what he did by way of an informal investigation, and he confirms that he did not witness the behaviours which the staff say they were subjected to by the claimant. He makes no complaint about the claimant at all.

75. Mr Chalmers goes on to answer questions put to him about the claimant being subject to a performance improvement programme in 2019 and he says, in terms, that after this staff had reported positive changes in the claimant's behaviour.

76. So at this point in the witness statement, it is clear that all that had happened was that the investigating officer Ms Hunter had put questions to Mr Chalmers which he has answered. It is clear in the statement that the concerns which were the subject of the disciplinary investigation were not the concerns of Mr Chalmers.

77. Mr Chalmers does say in the statement that he was "appalled" by what he was told, but there is no suggestion that he blindly accepted it. On any reasonable reading of the statement, he was simply saying that if what was reported was true it would have been appalling, but that is not a criticism of the claimant, it is merely a comment on the types of behaviour being complained of.

78. The claimant takes particular issue with two specific comments in the statement.

79. The first of those comments is that there should be "zero tolerance", that the claimant "should be gone" and that was the case, he "wouldn't lose sleep".

80. The second was Mr Chalmers' comment that he fully expected the claimant to go off sick and to utilise her union.

81. As to the second point it was not clear why the claimant was upset by this because by the time she read Mr Chalmers' statement that is exactly what had happened - she had gone off sick and she had been in contact with her union. There was no criticism of the claimant for that it was simply something with which Mr Chalmers thought would occur, and he was right. The claimant could not explain why she found this so upsetting.

82. As to the first comment it is fair to say that Mr Chalmers was blunt, but what do his comments amount to?

83. It seems to me that on any ordinary reading of the statement Mr Chalmers was simply saying that if the concerns raised about the claimant's conduct were true, it would be better if the claimant was "gone". But in making that comment he was responding to a specific question which was essentially how he saw the complaints being resolved. The reference to "gone" was not necessarily a reference to the claimant's employment being terminated but it reflected the seriousness of the complaints and in effect how it would be very difficult for the claimant to supervise those staff again if the concerns were true. He was not saying they were true.

84. As to the comment that he would not lose any sleep if the claimant did go, I accept Mr Chalmers' evidence that all he meant was that the team had been managing without the claimant since she went off sick on 14 August and therefore in that context if she did not return the team would continue to cope.

85. Even if the claimant was upset by these comments, and I accept her evidence that she was, that is a very long way from those comments in and of themselves amounting to a fundamental breach of contract and to be fair to the claimant that is not her case.

86. What then does all this amount to?

87. The implied term of trust and confidence as set out above includes that the respondent must not have reasonable and proper cause to do whatever it is, is said to amount to a breach of the implied term. In this case the time taken to deal with the disciplinary investigation and to conclude the grievance was not excessive and any delays there were, were reasonable and proper in the circumstances and for the reasons I have set out above.

88. The comments made by Mr Chalmers simply reflected the reality of the position when he was speaking to Ms Hunter at his first meeting with her, that is to say if the concerns raised by staff were true it would be better if the claimant no longer supervised them and that if she was no longer in the team he would not lose any sleep over it because he was managing without her in any event. In the circumstances his comments were reasonable and proper.

89. The course of conduct set out by the claimant which she says amounted to a fundamental breach of contract was no such thing. The respondent did not, without reasonable and proper cause act in a way which was calculated or likely to destroy or seriously damage trust and confidence and therefore this claim fails.

90. I would add that even if I was wrong about that, and I do not consider that I am, the claimant has a fundamental difficulty because of affirmation which I discussed with the parties in some detail during the course of the hearing. Affirmation occurs when the employee claiming breach of contract does something after the alleged date of the breach which affirms the contract.

91. It is the claimant's grievance appeal which causes the difficulty. The grievance was not about the disciplinary process. The connection between the grievance and the disciplinary process was Mr Chalmers who was cited in both.

92. But in her grievance the claimant's concerns about her treatment by employees was about employees other than those who had complained about her in the disciplinary process.

93. So here the claimant was saying both that the respondent breached trust and confidence in delaying the grievance and disciplinary processes and in what Mr Chalmers told the investigating officer, and that therefore at a point in time she had no trust and confidence to such a degree that she could no longer return to work for the respondent, but subsequent to that, she asks the respondent to revisit, on appeal, the grievance outcome which in my judgment is fundamentally inconsistent with the allegation that she had no trust and confidence in the respondent and which therefore I consider to amount to affirmation.

94. On her evidence the claimant formed the view that she could no longer work for the respondent on or by the 13 October 2023.

95. If on or before this date the claimant felt that her employer behaved so badly that she had lost all trust and confidence in them, then that must have included her having no trust or confidence in the grievance process, yet she trusted the respondent sufficiently to presume they would undertake a fair grievance appeal which in my judgment is fundamentally inconsistent was saying that she had lost all trust and confidence in her employer, so even if there had been a fundamental breach of contract, which I stress there had not, and although I do not say that every grievance appeal is in and of itself an affirmation of contract, in my judgment in this case, in the circumstances, such an appeal did amount to affirmation and therefore the claim would fail for that reason.

96. for those reasons the claim of constructive unfair dismissal fails and is dismissed.

Expenses claim

97. The claim for expenses is in two parts.

98. The first part relates to the expenses incurred attending a hearing on the question of disability.

99. The second relates to expenses for the remainder of the case.

100. I have to decide whether the claimant's conduct in pursuing the claim fell within what was at the time rule 76(1)(a) of the Tribunal Rules 2013 and if it does, whether it is appropriate to award expenses and if so, how much.

101. Considering the first part of the application I have taken into account that a clear, reasoned costs warning was given by the respondent to the claimant, the evidence available at the relevant time and the fact that legal advice had been taken by the claimant.

102. I heard submissions from both representatives during which Mr Wilson confirmed that legal advice had been taken. I reminded Mr Wilson that any legal advice was privileged that he was not obliged to say what advice had been received.

103. In essence Mr Wilson's submission amounted to little more than saying that the claimant believed that she was disabled when she made the claim. I asked and he gave details of the claimant's means. The claimant is now working although on a salary which has been reduced by around £6,000 per annum.

104. The respondent's submission in relation to the disability point is in essence that from the case management hearing it should have been clear to the claimant that she would struggle to show that she was disabled and having provided such evidence as was available to her she was warned that the claim would fail and if it did, she would face an a application for expenses given that her claim to be disabled was fundamentally weak both in terms of the medical information. In my view the claimant should reasonably have been aware of the case law suggesting that it would be difficult to show that an adverse reaction to workplace stress which could be resolved by resolution of the issue causing the stress amounted to a disability within the meaning of the Equality Act 2010. At a public preliminary hearing on 11 June 2024 Judge Hosie determined the claimant was not disabled and in the circumstances expenses incurred for the cost of that hearing are sought and in my view given all of the matters set out above, the claimant's conduct in pursuing the matter to a preliminary hearing did amount to unreasonable conduct and it is reasonable for me to make an award of the expenses sought by the respondent.

105. However, in relation to the second part of the claim, which is for the expenses incurred for the remainder of the claim, I do not consider that the continuation of the constructive unfair dismissal claim came close to amounting to unreasonable conduct and therefore reject that part of the application.

Employment Judge: M Brewer
Date of Judgment: 14 January 2025
Date Sent to Parties: 15 January 2025