EMPLOYMENT TRIBUNALS

Claimant: Mrs L MacGeorge

Respondent: Carewatch Care Services Ltd

Heard at: Manchester **On:** 5 and 12 May 2017

Before: Employment Judge Slater

Representation
Claimant: Mr Jenkins, counsel (5 May only)
Respondent: Ms A Mulholland, solicitor

RESERVED JUDGMENT

1. The complaint of unlawful deduction from wages is dismissed on withdrawal by the claimant.

2. The complaint of unfair dismissal in relation to the dismissal with effect from 9 September 2016 is well founded.

3. The complaint of constructive unfair dismissal is not well founded.

4. The respondent is ordered to pay to the claimant the sum of £11,140.65 as compensation for unfair dismissal. The Recoupment Regulations do not apply to this award.

5. The claimant was not entitled to payment of a statutory redundancy payment.

6. The respondent is ordered to pay costs to the claimant of £1200 in respect of the tribunal issue and hearing fees paid by the claimant.

REASONS

Claims and issues

1. The claimant claimed unfair dismissal and a statutory redundancy pay. In her claim form, the claimant had pleaded constructive unfair dismissal. However, she applied to amend her claim at the hearing to include a complaint of actual unfair dismissal relating to a dismissal on 9 September 2016. The respondent did not object to the application to amend (and had already pleaded a defence to this claim, although the complaint had not been included in the claim form). I allowed the amendment.

2. The claimant had included a complaint of unlawful deduction from wages in respect of a difference in pay between her previous salary as a Field Care Supervisor and her pay as a care worker after 9 September 2016 until her resignation. She withdrew this complaint after leave was given to amend the claim to include the complaint of actual unfair dismissal relating to the 9 September 2016.

3. The respondent accepted that the claimant had been dismissed from her post of Field Care Supervisor on 9 September 2016, but argued that the dismissal was fair and the claimant had lost her entitlement to a statutory redundancy payment.

4. The respondent resisted the claim that the claimant had been constructively dismissed when she resigned from the post of care worker.

5. The issues were agreed to be as follows:

<u>Actual unfair dismissal in relation to dismissal on 9 September 2016</u>

5.1. The respondent accepts that the claimant was dismissed on 9 September 2016 and the claimant accepts that the dismissal was for the potentially fair reason of redundancy.

5.2. Did the respondent act reasonably or unreasonably in all the circumstances in dismissing the claimant for this reason?

<u>Constructive unfair dismissal</u>

5.3. Did the claimant resign because of an act or omission (or series of acts or omissions) by the respondent?

5.4. If so, did the respondent's conduct amount to a fundamental breach of contract? The claimant alleged a breach of the implied duty of mutual trust and confidence. Did the respondent, without reasonable or proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between the parties?

5.5. Did the claimant affirm any breach by conduct?

5.6. If the claimant was constructively dismissed, was the reason for dismissal a potentially fair one?

5.7. If the dismissal was for a potentially fair reason, did the respondent act reasonably or unreasonably in all the circumstances in dismissing the claimant for that reason?

Statutory redundancy payment

5.8. The respondent accepts that the claimant was dismissed on 9 September 2016 and that the dismissal was by reason of redundancy as defined in section 139 Employment Rights Act 1996.

5.9. Did the claimant lose the entitlement to a statutory redundancy payment in accordance with the provisions of sections 138 and 141 Employment Rights Act 1996?

The hearing

6. The final hearing was listed for one day. During that one day, the respondent's witnesses were heard and the claimant's evidence in relation to liability was heard. It emerged late in the day that the claimant had brought along further mitigation documents which had not yet been shown to the respondent, so it was not possible to deal with the claimant's evidence relevant to remedy at the same time as liability, as had been anticipated at the start of the hearing. The hearing was adjourned so that the claimant's evidence on remedy could be heard and the parties make oral submissions on another day. Mr Jenkins, the claimant's counsel, informed me that his retainer had only been for that one day but the claimant would appear in person at the resumed hearing, with the benefit of written submissions which he would prepare for her without further charge. I asked that the respondent also prepare a written skeleton argument. The parties gave to each other their written submissions at the resumed hearing and had an opportunity to read the other party's submissions before making any oral submissions which they wished to make.

Facts

7. The respondent is a health and social care company that delivers domiciliary services in the community.

8. The claimant began working for the respondent on 1 August 2000 as a care worker. She was promoted to the post of Field Care Supervisor (FCS) with effect from 16 February 2015. She was contracted to work 37.5 hours per week. At relevant times, she worked at the respondent's Wirral branch. The claimant's home is in Farndon, Chester, approximately 21 miles from the Wirral office.

9. At relevant times, the claimant was one of four Field Care Supervisors at the Wirral branch.

10. The FCS post was a combined role with field obligations, service user reviews, assessments and sometimes care delivery. Holders received a basic

salary and variable payments for on call duties and care work when they had to cover for absent carers.

11. Prior to June 2016, the respondent decided to replace FCSs with a Quality Officer (QO) role as part of a move to improve the overall quality of the service. This new role was to have a greater emphasis on quality instead of care delivery. Although many of the responsibilities were the same as for the FCS role, there were added areas around audits, safeguarding, medicine administration and record keeping.

12. In most branches, the intention was to have the same number of QOs as there had been FCSs; holders of the FCS post would, with appropriate training, take up the QO posts at those branches. However, at the Wirral branch, the respondent decided to have only three QOs so one of the four FCSs at the Wirral branch would not be able to move into a QO role at that branch. I accept that the respondent intended to try to find alternative work for the "surplus" FCS, to avoid making them redundant. However, prior to August 2016, when one of two FCSs in the Crewe branch left, there were no vacancies for FCSs and, therefore, QOs under the new structure, in branches in the north west.

13. Each branch was provided with a generic toolkit, including letter templates and interview questions but not suggested answers to questions. The tribunal was told that the toolkit included step by step instructions and timescales for implementation. It appears that this toolkit was designed for the situation where there were to be no redundancies but FCSs would be "transitioned" to the role of QO. The material was not adapted for the situation at the Wirral branch where there was clearly a redundancy situation.

14. David Ward, Regional Operations Director for the North, had a meeting with the FCSs at the Wirral branch in early June 2016 to inform them of the plans for restructure. He showed them a presentation about the QO role. This was the same presentation being shown at every branch. A slide entitled "Next Steps" included the following information:

> "At this time, we do not believe there is a need to reduce the numbers of staff fulfilling these roles.
>
> Whilst we are not proposing to make any redundancies, you will be invited to a competency assessment interview. The purpose of this is to,
>
> - Determine where your core skills are in accordance with the requirements of the role of Quality Officer
> - Identify any areas for improvement so that we can plan development support for you accordingly
> - Ensure that we have the necessary skills and behaviours to ensure the success of the role."

15. There is some dispute as to what Mr Ward said to the claimant and the other FCSs but Mr Ward and the claimant agree that he told them that there would be only three QOs at the Wirral branch and that one might be transferred to another branch. The evidence of Sharon Lindley, the branch manager of the Wirral at the time, and the claimant is consistent that Mr Ward informed the FCSs that, if they failed an assessment for the QO role, they would be offered a care worker role

instead (Ms Lindley puts this as failing the assessment and then a reassessment after training).

16. Prior to Mr Ward meeting with the FCSs, Ms Lindley had given the claimant and the other FCSs some information about what was happening. It is clear from an email she sent to them on 27 May 2016 that she had told them that they were to take an exam. She wrote to them, referencing this, and advising them to look at a number of policies which she listed.

17. There was no common understanding amongst the respondent's witnesses as to the purpose of the assessment carried out by Ms Lindley and Tina Taylor, who was taking over from Ms Lindley as branch manager. Mr Ward understood that the assessment had a dual purpose: to assess the person's training needs to become a QO and also, at the Wirral branch, to decide which of the four should be redeployed. Mr Ward's evidence was that the person who scored lowest would be redeployed. Ms Lindley's evidence was that she understood this to be an assessment of training needs only; even if someone failed the assessment, they would be offered the opportunity to be trained and reassessed; the decision as to who would stay at the Wirral and who would have to move to another branch as a QO was to be discussed at a later point after the assessment and training had been completed.

18. The assessors were given a series of competency based questions. The tribunal was not shown the questions or any notes of the marking. It appears, given the contents of the presentation, that the questions would not have been designed for the purpose of redundancy selection but for the purpose of assessing training needs. The assessors did not understand that they were carrying out a redundancy selection exercise. They were given no guidance as to what would constitute a "good" answer and how to carry out the scoring. Ms Lindley and Ms Taylor discussed and agreed between them what answers they thought would be correct answers.

19. On 9 June 2016, Ms Lindley wrote to the claimant, confirming that the role of FCS was to be replaced with that of QO and writing:

> "As part of your transition in to this role, you are required to undergo a competency based interview to allow us to formally identify your strengths and areas identified for improvement in the role of Quality Officer."

20. She informed the claimant that the interview was to take place on 15 June and wrote further:

> "I would like to reassure you that this assessment is to provide us with the tools to support you with this transition. Thank you for your assistance with this change."

21. The letter, which was apparently based on a template supplied to Ms Lindley, made no mention of the redundancy situation and that the interview was a redundancy selection process.

22. The claimant and two other FCSs had their interviews on 15 June. One FCS was on holiday that day and had her interview the following week, after the claimant and the others had had their "feedback" interviews on 16 June.

23. There is some dispute as to what was said in the claimant's feedback interview on 16 June. There are no notes of this interview. It is clear that the claimant was given the message that she had performed poorly and worse than the others who had been assessed up until that time. Ms Lindley agreed in cross examination that she had informed the claimant that she had not passed the competitive interview for the QO role. There was a mention of the possibility of training and reassessment but dispute as to the way this was put to the claimant. The claimant alleges, in effect, that she was discouraged from accessing the training. Ms Lindley denies that she was discouraged. Whatever the intentions of Ms Lindley and Ms Taylor and their exact words, I find, on a balance of probabilities, that the claimant was left with the impression that it would not be worth her while undergoing the training for QO. This is supported by the fact that the claimant was so upset following this interview that she went absent without leave the following day, which she had never done in her previous 16 years' service. The claimant accepts that, when asked whether she wanted the training and to be reassessed, the claimant said "no". She told the tribunal she was not prepared to repeat what she had found to be a humiliating process. Ms Lindley and Ms Taylor did not tell the claimant that there would be a QO job for her if she underwent the training and passed the reassessment. Indeed, at the time, there were no prospective vacancies for a QO in the area if the claimant was not offered a role at the Wirral branch.

24. I accept that Ms Lindley and Ms Taylor understood, following the feedback interview, that the claimant had declined training and was not interested in the QO role and would change to the role of care worker. At the end of the interview, Ms Lindley went to find out the period of notice the claimant was to be given. She returned and told the claimant she was to have 12 weeks' notice and her job would end on 9 September 2016.

25. On 22 June 2016, Ms Lindley wrote to the claimant. She wrote:

> "As you are aware, following the competency based interview, you were not successful for the role of Quality Officer. However, as part of the consultation process, you have secured an alternative role of Care Worker."

26. A contract of employment was apparently enclosed with the letter, which the claimant has described as being a zero hours contract. No copy of the contract was included in the hearing bundle. However, a change of terms form shows that the job of care worker would have been on less favourable terms in a number of respects. The job of FCS had contracted hours of 37.5 per week, Monday to Friday and a salary of £16,000 although, in practice, the claimant worked some weekends "on call". The care worker role was on variable hours, Monday to Sunday, with pay of £7.50 per hour Monday to Friday and £7.80 per hour Saturday and Sunday. The care worker role would have had less status than the job of FCS. The letter sent to the claimant did not explain that she would have the right to a trial period of four weeks in the alternative care worker role and explain that she would be entitled to a statutory redundancy payment if she refused the role or terminated the contract within the trial period, where the refusal was not an unreasonable refusal of suitable alternative employment. Mr Ward accepted in evidence that the role of care worker was not suitable alternative employment.

27. On 24 July 2016, the claimant wrote to Tina Taylor, who was now acting manager at the Wirral branch. She referred to the letter of 22 June and wrote:

> "while I continue to work for the company under protest, and have grievance with both the consultation and competency interviews conducted by management, I cannot accept demotion and loss of income as proposed in your letter."

28. Ms Lindley met with the claimant, in the absence of Ms Taylor, on 26 July 2016, to discuss the claimant's letter. The claimant does not agree that the notes of the meeting are accurate in all respects. However, the following is common ground. The claimant said she was working under protest as she did not want a demotion. The claimant said that she thought she was being put off during the feedback session. The claimant said she had thought she did not want to do the training for the QO role as it would be very expensive for the company and there was no point. The claimant agrees that Ms Lindley said on 26 July she had told the claimant in the feedback meeting that the claimant would be supported with a full training programme, although the claimant does not believe this correctly reported what Ms Lindley said in the feedback interview. The claimant responded that she did not feel it was explained fully. Ms Lindley confirmed that she and Ms Taylor had assessed the claimant as not meeting the QO criteria at the time. She said they had offered that the claimant could complete the training and be reassessed but the claimant declined the offer. The claimant disputes that she told Ms Lindley on 26 July that she intended to stay with the respondent to be a carer.

29. Ms Lindley had a further meeting with the claimant on 4 August 2016. The claimant again said that she was working under protest and did not want demotion and a loss of income. The claimant asserted that Ms Lindley had told her in the feedback interview that management would not be happy if she was put through the training as it was expensive and the claimant was not management material. Ms Lindley disagreed that she had said this. Ms Lindley asked the claimant if she wanted to go on the QO training. The claimant said she could not. She said she intended to work under protest but would follow all the policies of the company.

30. In August, one of the two FCSs at the Crewe branch left. The two FCS positions at Crewe were to be replaced by two QO positions. There was, therefore, a prospective vacancy for a QO.

31. On 18 August 2016, Ms Lindley wrote to the claimant, on instructions from HR and after advice from the respondent's solicitors, offering the claimant the position of QO at the Crewe branch with effect from 1 September 2016. She asked the claimant to sign and return one copy of an enclosed contract within a week of the date of the letter. The claimant says no contract was enclosed. The letter did not refer to the right to a trial period. The claimant asked Sharon Lindley for a trial week at the Crewe branch. In the event, the claimant attended the Crewe office for one day, 25 August 2016. The claimant says that Tina Taylor said she could only spare the claimant for a day; Ms Taylor says the claimant ended the trial after one day because she did not like it.

32. The manager of the Crewe branch at the time, Gordon Taylor, has left the respondent and was not called to give evidence. However, he gave a statement

to the respondent in October 2016. The accounts of the claimant and Mr Taylor of the events of the day the claimant spent at the Crewe branch do not agree in many respects. However, they are consistent to the extent that Mr Taylor informed the claimant that he had previously interviewed for the QO role in Crewe. It appears that Mr Taylor acted without authority in advertising the role. Whatever the exact conversations between the claimant and Mr Taylor, I find that Mr Taylor acted in such a way as to give the claimant the clear impression that he did not want to have her working there. Even on the basis of Mr Taylor's statement, he told the claimant that, although they had already interviewed for the role, he had been told that the claimant had first refusal for the job. I find that Mr Taylor gave the claimant the clear impression that he would rather have his chosen candidate for the role than the claimant.

33. Mr Taylor phoned the claimant on 30 August 2016 to ask if she was taking the job. The claimant gave evidence that she agreed with him that she lived too far away to be of benefit to the branch, especially with regard to the on-call duties covering Stoke and Stafford. Although the Crewe branch office was not much further away from the claimant's home than the Wirral branch, I accept that the claimant was concerned about the distance to some of the areas covered by the Crewe branch and the time it would take to get to them, having regard to the traffic.

34. The claimant gave unchallenged evidence that she spoke to Tina Taylor and told her that the job offer at Crewe was not guaranteed as suggested in Ms Lindley's letter of 18 August as Gordon Taylor had already selected someone local and she had not been given enough time at Crewe to make an informed decision in the circumstances.

35. On 31 August 2016, the claimant wrote to the respondent to say that she was seeking legal advice.

36. On 30 September 2016, the claimant received her pay slip for September and noted that her salary had ended on 9 September 2016. The claimant arranged a meeting with a solicitor who presented a grievance on her behalf on 6 October 2016. The grievance included the allegation that the respondent had unilaterally amended the claimant's job title and pay. It asserted that there was no evidence that the respondent had formally given notice to terminate the claimant's existing contract and that there was an unlawful deduction from wages from 9 September. It noted that the claimant's general day to day duties remained the same as those of a FCS.

37. On 17 October 2016, the claimant notified ACAS of a potential claim.

38. By letter dated 25 October 2016, the claimant was invited to a grievance hearing with Mr Ward on 10 November 2016. The claimant replied on 30 October, writing that she would attend while continuing to work under protest.

39. The claimant attended the grievance hearing on 10 November 2016. The claimant and Mr Ward discussed her grievances. I do not understand the claimant to be making any allegation about the way that this meeting was conducted on which she relies for her constructive unfair dismissal claim. I accept that the claimant did not see the minutes of the grievance hearing until in the

course of these tribunal proceedings. The claimant takes issue with the minutes in a number of respects.

40. I accept that the claimant did not receive an outcome to her grievance before her resignation and that none was sent to her. It is possible that this may have been due to an administrative oversight since there is a draft outcome letter in the tribunal bundle but no copy of a dated letter with the claimant's address inserted. Mr Ward did not give evidence as to when the draft outcome letter was prepared. He gave evidence in his witness statement that he gave it to an HR Business partner to post. In cross examination, he said he would have sent it to admin by email, asking them to insert the address and return it to him for signature. No email to this effect is included in the tribunal bundle. The claimant did not write or telephone Mr Ward asking why she had not received an outcome to her grievance before she resigned. It does not appear that Mr Ward had promised to provide an outcome by any particular date. The respondent's grievance procedure provides that, if reasonably practicable, the manager will make a formal decision, recorded in writing and sent to the employee, within 14 days of the grievance meeting.

41. On 17 November 2016, ACAS issued the early conciliation certificate.

42. On 11 December 2016, the claimant presented her claim to the tribunal. The details in the claim form referred to events up to and including the alleged unilateral amendment of the claimant's job title and pay with effect from 9 September 2016 and the unlawful deduction of salary from 9 September 2016. No reference was made in the claim form to the handling of the claimant's grievance.

43. On 12 December 2016, the claimant resigned her employment with her last working day to be 6 January 2017. The claimant gave unchallenged evidence that she did not want to leave service users and care staff with any inconvenience and hardship over the Christmas and New Year period that might result from her resignation.

44. The claimant did not give any reason for her resignation in her letter of resignation. The claimant did not give evidence to this tribunal as to why she resigned at that particular time. She was asked in cross examination why she continued to work for four more months [after the change in job title and pay] and did not resign and claim constructive dismissal. The claimant replied "Because I'm not a lawyer." She said she waited until her salary was deducted then went to see a solicitor because she did not know what to do. It was put to the claimant that she accepted the position. The claimant disagreed, saying she still expected her grievance to be sorted out impartially.

45. On 15 December 2016, the claimant replied to a letter from the tribunal dated 15 December 2016, informing the tribunal that she had resigned on 12 December and that she was bringing a complaint of constructive unfair dismissal. This was accepted as an amendment to her claim. The claimant did not refer in this letter to any events after 9 September 2016 which caused her to resign on 12 December 2016.

46. The claimant gave unchallenged evidence that, from 10 September 2016 until she left on 6 January 2017, she continued to carry out the same duties as she

had done as a Field Care Supervisor, although she was no longer being paid the salary of an FCS. In addition to 2 days' care work a week, she covered the out of hours duties, and did office work, managing care workers and service users, liaising with relevant agencies, customer reviews, auditing visit reports, financial and medication records.

47. Since the claimant resigned, she has made a few applications for jobs in the care sector, but has not been successful so far. She gave evidence that she had not made more applications because she did not really want to go back into care in the private sector. She did not want to be a carer again and thought it was time for a career change. She accepted that there were likely to be "shed loads" of care jobs available if she looked for them. She was not interested in basic care work but would be willing to do a job of a comparable level to the one she had with the respondent. She was interested in a job with a prison but understood they would not be recruiting until the autumn of 2017.

48. The claimant's husband has a kennels business. He has offered the claimant a job as a manager on a salary of £12000 to start as soon as she has undergone training in micro chipping. The claimant says she would have to pay for this training herself and has not done it yet because she has not got any money; the training would cost £252.

49. The claimant has made no claim for job seeker's allowance.

50. At the time the claimant ceased to be a FCS, her salary was £1381.25 per month (£16,575 per annum) gross. She received an inconvenience allowance when on call and additional pay for care work (when covering for an absent carer). The amounts received from month to month for the inconvenience allowance and care work varied. I have been shown only 3 pay slips from when the claimant was a FCS: for March, June and August 2016. These show net pay of £1606.55, £1302.91 and £1601.95 for these months. I have been shown pay slips for September 2016 through to January 2017 inclusive. The September pay slip includes some salary since the claimant was paid as a FCS until 9 September 2016. The net pay for these months is as follows:

September: £1386.96
October: £1466.34
November: £1192.02
December: £979.07
January: £707.73.

51. January's pay included a tax rebate of £59.60. However, the claimant has since been informed by HMRC that she did not pay enough tax in the tax year 2016-2017 and owes HMRC £489.40. The document from HMRC indicates that she had paid only £83 in tax on her earnings with the respondent. The gross taxable pay to date on the claimant's final pay slip from the respondent matches the figure on the HMRC calculation i.e. £15220,53. However, the pay slip states tax paid to date as £952.40 rather than £83. I suggested to the claimant that this disparity was a matter which she needed to take up with the respondent's payroll section and with HMRC.

Submissions

52. The parties provided written submissions. The claimant did not add anything to the submissions which had been prepared for her by Mr Jenkins. Ms Mulholland added that it had come out since the written submissions were prepared that the claimant had not really been actively pursuing work in the care sector. She submitted that the claimant should not be awarded any compensation for future loss if she was successful. Ms Mulholland accepted on behalf of the respondent that, if the tribunal found in the claimant's favour, the tribunal fees would be recoverable by the claimant.

The Law

53. The law in relation to unfair dismissal is contained in the Employment Rights Act 1996 (ERA). Section 94(1) of ERA provides that an employee has the right not to be unfairly dismissed by his employer.

54. Fairness or unfairness of the dismissal is determined by application of section 98 of the 1996 Act. Section 98(1) of ERA provides that in determining whether the dismissal of an employee is fair or unfair, it is for the employer to show the reason for dismissal and if more than one, the principal one and that it is a reason falling within section 98(2) of ERA or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held. Redundancy is one of the potentially fair reasons for dismissal.

55. Section 98(4) provides that, where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) depends on whether in the circumstances, including the size and administrative resources of the employer's undertaking, the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee and this shall be determined in accordance with equity and the substantial merits of the case. In considering the reasonableness or unreasonableness of a dismissal, the tribunal must consider whether the decision to dismiss was within the band or range of reasonable responses.

56. *Williams v Compair Maxam Ltd [1982] IRLR 83 EAT* set out various factors to be considered in determining whether a dismissal for reason of redundancy was fair or unfair. These factors included establishing criteria for selection which, so far as possible, can be objectively checked against such things as attendance records, efficiency at the job, experience, or length of service; and the fair selection in accordance with these criteria. The Court of Appeal in *British Aerospace v Green [1995] IRLR 433* said that, for a respondent to be held to have acted reasonably, it was sufficient for the employer to show that he had set up a good system of selection, that it was fairly administered and that ordinarily there was no need for the employer to justify all the assessments on which the selection for redundancy was based.

57. The definition of dismissal includes what is commonly described as constructive dismissal. Section 95(1)(c) ERA provides that an employee is to be regarded as dismissed if "the employee terminates the contract under which he is

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

58. An employee will be entitled to terminate a contract of employment without notice if the respondent is in fundamental breach of that contract and the employee has not waived the breach or affirmed the contract by their conduct.

59. An implied term of an employment contract is the term of mutual trust and confidence. This is to the effect that an employer will not, without reasonable or proper cause, conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between the employer and employee. Browne-Wilkinson J in *Woods v WM Car Services (Peterborough) Limited 1981 ICR 666*, said that the tribunal must "look at the employer's conduct as a whole and determine whether it is such that its effect, judged reasonably and sensibly, is such that the employee cannot be expected to put up with it."

60. 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" is not, by itself, a breach of contract: *Lewis v Motorworld Garages Limited 1986 ICR 157 CA.* The last straw does not have to constitute unreasonable or blameworthy conduct, but it must contribute, however slightly, to the breach of the implied term of trust and confidence: *Omilaju v Waltham Forest London Borough Council 2005 ICR 481 CA.*

61. An employee with at least two years' continuous service at the effective date of termination will be entitled to be paid a statutory redundancy payment if dismissed, actually or constructively, by reason of redundancy as defined in section 139 ERA. Section 138(1) ERA provides that, for the purposes of entitlement to a redundancy payment, there will be no dismissal if the employee's contract is renewed or he is re-engaged under a new contract of employment in pursuance of an offer made before the end of his employment under the previous contract and the renewal or re-engagement takes effect immediately on or after an interval of not more than four weeks after, the end of that employment. Section 138(2) states that subsection (1) does not apply if:

> *"(a) the provisions of the contract as renewed, or of the new contract, as to –*
> *(i) the capacity and place in which the employee is employed, and*
> *(ii) the other terms and conditions of his employment,*
> *differ (wholly or in part) from the corresponding provisions of the previous contract, and*
> *(b) during the period specified in subsection (3) –*
> *(i) the employee (for whatever reason) terminates the renewed or new contract, or gives notice to terminate it and it is in consequence terminated, or*
> *(ii) the employer, for a reason connected with or arising out of any difference between the renewed or new contract and the previous contract, terminates the renewed or new contract, or gives notice to terminate it and it is in consequence terminated."*

62. Section 138(2) defines the "trial period", which is four weeks beginning with the date on which the employee starts work under the new contract (unless an

extension is agreed in accordance with subsection (6) for the purpose of retraining the employee for employment under that contract).

63. Section 141 ERA removes the entitlement to a statutory redundancy payment where the employee unreasonably refuses an offer of suitable alternative employment or unreasonably terminates the contract during the trial period.

64. Section 118 ERA provides that an award of compensation for unfair dismissal shall consist of a basic award and a compensatory award calculated in accordance with the relevant provisions.

65. Section 119 ERA sets out how a basic award is to be calculated. The same statutory formula applies as for the calculation of a statutory redundancy payment.

66. Section 123 ERA provides:

> "(1) Subject to the provisions of this section and sections 124, 124A and 126, the amount of the compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer.
>
> (2) The loss referred to in subsection (1) shall be taken to include –
>
> (a) any expenses reasonably incurred by the complainant in consequence of the dismissal, and
>
> (b) subject to subsection (3), loss of any benefit which he might reasonably be expected to have had but for the dismissal.
>
> (4) In ascertaining the loss referred to in subsection (1) the tribunal shall apply the same rule concerning the duty of a person to mitigate his loss as applies to damages recoverable under the common law of England and Wales or (as the case may be) Scotland.
>
> (6) Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding."

67. In accordance with principles set out by the House of Lords in *Polkey v AE Dayton Services Limited [1988] ICR 142***,** a tribunal may reduce a compensatory award for unfair dismissal by up to 100% if there is evidence to suggest the claimant might have been fairly dismissed, either at the time the claimant was dismissed or at some later date.

68. The EAT in *Software 2000 Limited v Andrews [2007[ICR 825* said at paragraph 53 in relation to applying the *Polkey* principle, "The question is not whether the tribunal can predict with confidence all that would have occurred; rather it is whether it can make any assessment with sufficient confidence about what is likely to have happened, using its common sense, experience and sense

of justice. It summarised the principles relating to the assessment of compensation as follows;

> *"Summary.*
>
> 54. The following principles emerge from these cases:
>
> (1) In assessing compensation the task of the Tribunal is to assess the loss flowing from the dismissal, using its common sense, experience and sense of justice. In the normal case that requires it to assess for how long the employee would have been employed but for the dismissal.
>
> (2) If the employer seeks to contend that the employee would or might have ceased to be employed in any event had fair procedures been followed, or alternatively would not have continued in employment indefinitely, it is for him to adduce any relevant evidence on which he wishes to rely. However, the Tribunal must have regard to all the evidence when making that assessment, including any evidence from the employee himself. (He might, for example, have given evidence that he had intended to retire in the near future).

Conclusions

The 9 September 2016 actual dismissal

69. The respondent accepts that they dismissed the claimant from her role of FCS with effect from 9 September 2016. The claimant was given notice by Ms Lindley at the feedback meeting on 16 June 2016. The parties agree that the claimant was dismissed by reason of redundancy; the respondent needed one fewer person to do the work of the FCS role, which was being replaced by the QO role. The respondent has shown a potentially fair reason for the 9 September 2016 dismissal, being redundancy.

70. I conclude that the redundancy process did not fall within the range of a reasonable procedure. There was no proper consultation; the only meeting prior to the assessment was the meeting where Mr Ward gave a presentation, which did not fit the circumstances at the Wirral branch, and informed the FCSs that there would be only 3 QO posts compared with four FCS posts. There was no positive attempt to engage in an exchange of views with the employees.

71. The assessment used to select the claimant for redundancy had not been designed with the purpose of selection for redundancy in mind. Those carrying out the assessment did not understand that they were carrying out a redundancy selection exercise. A fair process required that the employees in the pool for selection i.e. the four FCSs, be informed about the criteria to be used for selection. They were told only that there was to be a competency assessment. They were told initially that there was to be an exam, then this changed to an interview.

72. Neither the managers nor the claimant properly understood the process that was being used.

73. The tribunal was given little information about the assessment; the questions were not provided. The evidence was that the respondent did not give any guidance to the managers as to what constituted a good or poor answer. On the information available, it is not possible to be satisfied as to what the criteria for selection were, let alone whether they met the *Williams v Compair Maxam* standard of being, so far as possible, ones which can be objectively checked against such things as attendance records, efficiency at the job, experience, or length of service. On the information available, it is not possible to be satisfied that a fair selection was carried out in accordance with these criteria.

74. The respondent ultimately offered the claimant a position at Crewe, albeit offered in a rather grudging way by Mr Taylor. Potentially, this might have constituted suitable alternative employment, depending on what the requirements were for the claimant to travel within the region covered by that office and how practicable that was for her. The respondent failed to explain to the claimant her entitlement to a trial period of four weeks, starting with the end of the previous contract. The period arranged prior to the ending of her employment as an FCS, even if the respondent was willing for this to be a week, rather than the day which the claimant says was all that was on offer, did not comply with the statutory requirements.

75. Mr Ward accepts that the position of care worker was not suitable alternative employment and I agree with him; the terms and conditions were inferior to that of the FCS position and the status lower. It was reasonable of the respondent to offer this as an alternative to redundancy but, again, the respondent should have explained the statutory trial period. The claimant was never given information about her potential entitlement to a statutory redundancy payment if she did not remain with the respondent.

76. I conclude that the dismissal with effect from 9 September 2016 was unfair.

The claim for a statutory redundancy payment

77. The claimant was dismissed from her post as FCS with effect from 9 September 2016. The respondent needed three QOs compared to four FCSsThere was clearly a redundancy situation; this is agreed by both parties. The claimant was, therefore, entitled to a statutory redundancy payment unless the provisions of section 138 and/or 141 ERA remove that entitlement.

78. I conclude that, in accordance with the provisions of section 138 ERA, there was no dismissal for the purposes of the Part II of Chapter XIV of ERA dealing with entitlement to a statutory redundancy payment. The claimant was re-engaged under a new contract of employment with the respondent, for the position of care worker. The offer of this new contract was made before the ending of the claimant's employment under her previous contract, for the position of FCS. The re-engagement took effect immediately on the end of her employment as FCS. Although the respondent had not informed the claimant that she was entitled to a four week trial period in the new role, the claimant had such a right. Had the claimant terminated her employment within the four week trial period, the provisions of s.138(2) would have meant that the dismissal did not "disappear" in accordance with the provisions of s.138(1). However, since the claimant continued to work for more than four weeks in the new contract,

s.138(1) applied and the claimant is not regarded as having been dismissed by the respondent by reason of the ending of her employment under the previous contract. Since the claimant is not regarded as having been dismissed for the purposes of the Part of the ERA dealing with entitlement to a statutory redundancy payment, the requirement that the claimant be dismissed for the purposes of such an entitlement is not met. In summary, the claimant lost the entitlement to a statutory redundancy payment because she worked for more than four weeks in the care worker role after her contract as FCS was terminated. The claimant was not entitled to be paid a statutory redundancy payment.

The complaint of constructive unfair dismissal

79. In the written submissions prepared on behalf of the claimant, the only matter relied upon after 9 September 2016 is the respondent's failure to provide a grievance outcome. It is submitted for the claimant that this was both a last straw and a fundamental breach in and of itself and one that the claimant clearly resigned in relation to. I conclude that the evidence does not support this submission. The claimant has not given evidence as to why she resigned when she did. I have considered whether it is implicit that the respondent's failure to provide her with an outcome to her grievance by 12 December 2016 motivated the claimant to resign when she did, being the "last straw". I am not satisfied, on the evidence, that this is the case. The claimant makes no mention of the failure to respond to her grievance in the details in the claim form presented on 11 December 2016, in her resignation letter of 12 December or in the letter to the tribunal dated 15 December 2016, which was accepted as an amendment to the claim, adding a complaint of constructive unfair dismissal. The claimant had not made any enquiries as to why she had not yet received an outcome to her grievance when she resigned. She resigned just over a month after the grievance hearing. Although, in line with the respondent's grievance procedure, there would have been an expectation that, if practicable, an outcome would be provided within 2 weeks, this was not a deadline. There does not appear to be anything which would have led the claimant to understand that Mr Ward was not intending to provide an outcome to her grievance. The timing of the claimant's resignation remains unexplained by the evidence. I am not satisfied, on a balance of probabilities, that the delay in providing a grievance outcome was a material factor in the claimant's decision to resign when she did.

80. The other matters relied upon as together constituting an alleged breach of the implied duty of mutual trust and confidence are alleged failures on the part of the respondent up to and including 9 September 2016 and, arguably, up to receipt of the claimant's pay slip at the end of September from which the claimant could see that the respondent had acted in accordance with its expressed intention and ended her payment as FCS on 9 September 2016. The claimant made it clear to the respondent that she was working under protest from the time when the respondent informed her that her FCS role would end on 9 September. Had the claimant not been actually dismissed on 9 September from the FCS role, the claimant could still have relied on these matters, together with any later matters, as arguably constituting, together, a breach of the implied duty of mutual trust and confidence. Since the claimant was actually dismissed on 9 September 2016, I conclude that the claimant cannot rely on matters prior to this dismissal to found a complaint of constructive dismissal with effect from a later date. As noted above, there were no matters after 9 September which I can find, on the evidence, contributed to the claimant's decision to resign.

81. I conclude, therefore, that the complaint of constructive unfair dismissal is not well founded.

Compensation for unfair dismissal

82. The claimant is entitled to a basic award calculated in accordance with the statutory formula. The claimant had 16 years' service. She was aged 54 at the effective date of termination. The weekly pay for use in the formula is her gross weekly pay in the role of FCS. Unfortunately, the evidence about the claimant's pay does not allow for a precise calculation of a week's pay in accordance with the provisions of Chapter II of part XIV of ERA. The claimant has provided pay slips for March, June, August and September 2016 but the pay slip for July is missing. The claimant put a monthly before tax figure for pay on the claim form of £1333. The respondent failed to complete the section on the response as to whether they agreed with the figure provided by the claimant. In the claimant's schedule of loss, the claimant gave a weekly gross figure of £456.61 but the claimant was unable to explain how any of the figures in her schedule of loss had been calculated, since she said it was prepared by her solicitor.

83. The maximum week's pay for the purposes of the calculation of the basic award at the relevant time was £479.

84. Doing the best I can with the evidence available, I have decided to calculate the gross weekly pay as an average of the pay in the 3 complete months for which the claimant was a FCS for the whole month and for which I have pay slips i.e. March, June and August 2016, which is 13 weeks. In March, the gross pay was £1967.28; in June, 1506.64; in August, 1951.61. The three figures added together total £5425.53. The total divided by 13 is £417.35.

85. The calculation of the basic award is 22.5 x 417.35 = £9390.38.

86. The claimant was unfairly dismissed with effect from 9 September 2016. She mitigated her loss by taking the care worker role with the respondent but resigned from this role with effect from 6 January 2017.

87. I conclude that the whole dismissal process was so flawed, that this is not a situation where I can make any sensible assessment of whether the claimant would have been fairly selected for redundancy if the respondent had gone about matters in the correct way. Therefore, I make no reduction in the compensatory award under the *Polkey* principle.

88. I consider that the claimant would have acted reasonably in seeking to mitigate her loss if she had held out for some time to try to get a comparable level job in the care work field as her FCS job. Such jobs are not as plentiful as care worker roles but it appears, from adverts produced by the respondent, that there are some such roles available. I conclude that the claimant has not secured one because she has chosen to leave the care work field out of a desire for a change of career. Loss of earnings because of deciding to make a change in career is not loss attributable to action taken by the respondent.

89. I need to consider, therefore, what the claimant's loss would have been if she had acted reasonably in mitigating her loss. I consider that, by 6 January 2017,

the claimant would have been able to obtain comparable employment in the care sector to her FCS role if she had been looking for such work from the date of her dismissal.

90. In the period 9 September 2016 to 6 January 2017, the claimant mitigated her loss by working as a care worker for the respondent.

91. I conclude that the claimant is entitled to compensation for the difference in net pay between the FCS and the care worker roles for the period 9 September 2016 to 6 January 2017 but not for any loss of earnings beyond 6 January 2017.

92. As with the information about gross pay, the evidence about net pay as a FCS is limited to selected pay slips. I calculate the weekly net pay using the totals from the March, June and August 2016 pay slips i.e.(1606.55 + 1302.91 + 1601.95)/13 = £347.03.

93. There are 17 weeks in the period 9 September 2016 to 6 January 2017.

94. In September 2016, the claimant worked until 9 September as a FCS and thereafter as a care worker. Some of the care work which was paid for in September would have been done when the claimant was still a FCS. I estimate, from the figures, that approximately half of the gross pay for September was attributable to work as a FCS and half to that of a care worker. I, therefore, use half of the net pay for September in calculating the extent to which the claimant mitigated her loss in the period beginning 9 September.

95. The net figures to be used in calculating the extent to which the claimant mitigated her loss are as follows:

September	1386.96/2 =	£693.48
October		£1466.34
November		£1192.02
December		£979.07
January		£707.73
Total		£5038.64

96. I consider that this total needs to be adjusted since, from HMRC documentation, too little tax was deducted, so the total overstates the amount by which the claimant has been able to mitigate her loss. The claimant, who only had earnings from the respondent in the tax year 2016/2017, is required to pay an additional £489.40 tax for the year. This needs to be deducted from the total to arrive at what will be the claimant's correct net earnings - £5038.64 - £489.40 = £4549.24.

97. The claimant's loss in the period 9 September 2016 to 6 January 2017 is:

(17 x 347.03) – 4549.24 = 5899.51 – 4549.24 = £1350.27.

98. I conclude that it would be appropriate to award £400 for loss of statutory rights.

99. The total compensatory award is £1750.27.

100. The total award of compensation for unfair dismissal is £9390.38 + £1750.27 = £11,140.65.

Costs – tribunal fees

101. Since the claimant has won her unfair dismissal complaint, I consider it appropriate that the respondent be ordered to pay the full amount of the tribunal issue and hearing fees paid by the claimant, a total of £1200.

Employment Judge Slater

Date: 15 May 2017

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

18 May 2017

FOR EMPLOYMENT TRIBUNALS

NOTICE

THE EMPLOYMENT TRIBUNALS (INTEREST) ORDER 1990

Tribunal case number(s): 2405400/2016

Name of case(s): Mrs L MacGeorge v Carewatch Care Services Ltd

The Employment Tribunals (Interest) Order 1990 provides that sums of money payable as a result of a judgment of an Employment Tribunal (excluding sums representing costs or expenses), shall carry interest where the full amount is not paid within 14 days after the day that the document containing the tribunal's written judgment is recorded as having been sent to parties. That day is known as "*the relevant decision day*". The date from which interest starts to accrue is called "*the calculation day*" and is the day immediately following the relevant decision day.

The rate of interest payable is that specified in section 17 of the Judgments Act 1838 on the relevant decision day. This is known as "the stipulated rate of interest" and the rate applicable in your case is set out below.

The following information in respect of this case is provided by the Secretary of the Tribunals in accordance with the requirements of Article 12 of the Order:-

"the relevant decision day" is: 18 May 2017

"the calculation day" is: **19 May 2017**

"the stipulated rate of interest" is: 8%

MISS K MCDONAGH
For the Employment Tribunal Office