EMPLOYMENT TRIBUNALS

Claimant: Mrs Z Whitbread **Respondent: Homes2Inspire Ltd**

v

Heard at: VIA CVP **On: 19/20 October 2020**

Before: Employment Judge Milner-Moore

Appearances
For the Claimant: In person
For the Respondent: Mr Lovejoy (Solicitor)

RESERVED JUDGMENT

1. The claim of constructive unfair dismissal succeeds. The claimant was unfairly dismissed by the respondent.

2. Pursuant to section 207A TULRCA 1992, the compensation awarded to the claimant will be increased by 25% to reflect the respondent's unreasonable failure to comply with the ACAS Code of Practice on Disciplinary and Grievance Procedures.

3. The respondent did not refuse to permit the claimant to exercise her rights (under regulation 11 of the Working Time Regulations 1998) to a weekly rest period.

4. The respondent did not make an unauthorised deduction from the claimant's wages.

RESERVED REASONS

Claims and issues and preliminary matters

1. The claims brought and the issues arising for determination were summarised by EJ Vowles in an order made following a case management hearing on 19 October 2019. The order made by EJ Vowles records that the claimant had brought claims of constructive unfair dismissal, unauthorised deduction from wages and failure to allow weekly rest breaks

in contravention of regulation 11 of the Working Time Regulations 1998. The claimant was ordered to provide further information regarding the complaints of unauthorised deduction from wages and failure to allow weekly rest breaks.

2. The claims were heard at a remote hearing which was conducted by video using the CVP platform. The parties raised no objection to the hearing proceeding via CVP. A face-to-face hearing was not held because it was not practicable to do so given the Covid pandemic and because all issues could be determined in a remote hearing. The case had originally been listed for a three-day hearing, but the listing was varied to two days. It proved possible to conclude the liability aspects of the claim in the time available but there was insufficient time for me to make my decision or to deal with issues of remedy.

3. I reviewed the claims being brought and the issues arising for determination with the parties at the start of the hearing. No objections were raised to the following formulation of the claims and issues:

Constructive dismissal

4. *Did the respondent act in fundamental breach of an express or implied term of the contract of employment?* The claim form identifies the following matters as giving rise to the constructive dismissal:

4.1. The claimant was bullied by managers
4.2. The claimant was placed in dangerous situations
4.3. The claimant was subject to humiliating treatment
4.4. The claimant was required to work excessive hours without pay or days off
4.5. The respondent failed to deal appropriately with the claimant's grievance.

5. Such matters engaged the implied term of mutual trust and confidence and so it would be necessary to consider, whether the respondent had reasonable and proper cause for its actions and, if not, whether those actions were likely to or did seriously damage the relationship of trust and confidence. The claimant had set out in an email dated 6 June 2019 the matters that she regarded as bullying. She identified the following matters: a failure to provide supervision and support whilst she worked at Rosendale House, a requirement to work excess hours whilst at Rosendale House, being required to undertake humiliating tasks, Ms Mackenzie throwing the claimant's shoes out of her office, a threatening email sent by Ms Muchatuta regarding her secondary employment, being put in dangerous situations, the

failure to deal appropriately with a grievance raised by the claimant in respect of sexual harassment, breaching confidentiality regarding the reasons for the claimant's absence from work.

6. *Did the claimant resign in response to the breach of contract ?*

7. *Had the claimant affirmed the contract before resigning*?

8. *Should any compensation awarded be increased, or reduced, by 25% to reflect non-compliance with the ACAS Code of Practice on Disciplinary and Grievance Procedures?* The claimant asserts that any compensation should be increased due to the respondent's failure to conduct a proper grievance process. The respondent alleges that any compensation ordered should be decreased as it denies that the claimant pursed a grievance before her resignation.

Unauthorised deduction from wages – s 13 Employment Rights Act 1996 ("ERA")

9. *Did the respondent make an unauthorised deduction by paying the claimant less than the wages properly payable to her?* If so, when did this deduction occur and how much was the underpayment. It appeared that despite the order made by EJ Vowles the claimant had failed to set out the specific amounts said to have been deducted. The only specific sum that the claimant could point to was the fact that deductions had been made from a tax rebate which had been due to be paid to the claimant via the respondent's payroll and from which a deduction had been made. The respondent disputed that a deduction from this sum was a deduction from wages as defined in the ERA.

Failure to allow weekly rest breaks – s11 Working Time Regulations 1998 ("WTR")

10. *Did the respondent allow the claimant to take the periods of uninterrupted to which she was entitled under regulation 11 WTR* ? Under that regulation she was allowed to take 24 hours uninterrupted rest in every 7-day period or 48 hours uninterrupted rest in every 14-day period.

11. The claim form also made reference to alleged breaches of GDPR and I explained to the claimant that this was not a matter which falls within the Tribunal's jurisdiction.

12. In advance of the hearing there been a considerable number of exchanges of correspondence between the parties about whether the hearing should proceed and whether further orders should be made by the Tribunal. By the time the hearing took place much of that correspondence had become moot. Two matters remained outstanding. The first was an application on the respondent's part for a witness order in respect of its former employee, Miss Mackenzie. In fact, no order proved necessary as she attended voluntarily. The second matter was an application for disclosure of the claimant's medical records. The claimant had disclosed some medical evidence relating to her mental state at the relevant time. The respondent consider that the medical evidence indicated that there were other stresses in the claimant's life at the relevant time and that it was necessary to see additional medical records. I did not consider that further disclosure of medical records was relevant to the liability issue arising in the constructive dismissal case, given that it was not necessary for the claimant to show that the respondent's actions were the sole or principal cause of her decision to resign. I did not therefore make any further order for disclosure of medical records.

Evidence and submissions

13. The parties had produced an agreed bundle (507 pages) and some additional documents were sent in during the hearing. The bundle included a number of statements from individuals who did not give evidence. Some of these were former colleagues of the claimant, some were from former residents of homes operated by the respondent. Given that these individuals were not present to attest to the truthfulness of their evidence and that the respondent has not had an opportunity to test the evidence through cross examination, it is inappropriate for me to attach any weight to such statements.

14. I heard evidence from the following individuals: the claimant, Ms Manchiocchi and Ms Fiford (former employees of the respondent), Ms Mackenzie (the claimant's line manager for much of the relevant period), Ms Muchatuta (a more senior manager at the respondent) and Ms Skoltock (the investigating officer who investigated complaint made by the claimant regarding her colleague Mr Lloyd). Time did not allow for the parties to make closing submissions orally and so these were sent in writing after the hearing. I have not set out the detail of the submissions but have carefully considered them and addressed the key points in the conclusions which I have reached.

Facts

15. In light of the evidence, I made the following factual findings in relation to the matters of complaint identified in the ET1. The respondent is a company which operates residential care homes at which teenagers are accommodated. The respondent has various policies and procedures applicable to its employees. It has a procedure for conducting investigations where allegations "*of a safeguarding nature*" were made against its employees. It has a grievance policy which states that efforts should be made to resolve grievances informally but, where this is not possible, sets out a process for dealing with grievances formally. The process detailed in the policy is that a line manager and an HR representative would then meet the employee to investigate and discuss the grievance. The employee is entitled to be accompanied at any formal meetings. Grievances are to be dealt with "*in a timely manner with no unreasonable delays*". A written response to the grievance should be provided within a reasonable time after the grievance meeting and should give details of any action taken, where appropriate. Employees have a right of appeal in the event that they are dissatisfied with the outcome of any grievance. All employees are subject to an "*Employee Standards and Values policy"* which states that harassment or bullying will not be tolerated, and that appropriate action will be taken by the respondent in the event that concerns were raised.

16. The claimant was employed as a Senior Youth Support Worker. The claimant began her employment with the respondent on 11 April 2016. The claimant was employed to work 40 hours per week.

<u>Rosendale House</u>

17. The claimant was recruited to work at Wallis House, but that home had not opened when her employment began. She therefore spent the first few months of her employment working at a home called Rosendale House before moving to Wallis House in August. The claimant says that during this period she was required to work back-to-back shifts which she found difficult because she had a long drive to get to Rosendale House and felt that she had inadequate support and supervision. The claimant says that she raised concerns with her manager, Simon Wall, but that he was unsympathetic. The supervision records between Ms Fiford and the claimant during August 2016 record the claimant's having felt unsupported and insufficiently supervised by previous managers. Ms Mackenzie had no direct knowledge of the shifts that the claimant worked at the time but said that she had spoken to the claimant during the months when she was employed at Rosendale House and that the claimant had raised no complaints regarding her hours of work or lack of support. Her recollection was that during one such conversation the claimant had said that she preferred to work consecutive shifts so that she did less driving back and forth. I find that the

claimant did work back-to-back shifts but accept the respondent's evidence that it is likely that this was because it suited the claimant as otherwise she would have spent more time driving to and from work. However, I also find that there was a lack of support during the period when the claimant worked at Rosendale House but that matters improved in August 2016 when the claimant moved to Wallis House.

Ms Mackenzie's treatment of the claimant

18. There was an office at Wallis House with a desk which staff, including Ms Mackenzie used. The claimant made reference to an occasion in December 2017 when Ms Mackenzie had thrown some new shoes belonging to the claimant out of the room. The claimant wasn't present but was told this by other employees. The claimant's case was that Ms Mackenzie also threw the belongings of other members of staff out of the room and considered that this incident exemplified a bullying culture which Ms Mackenzie perpetrated. Ms Mackenzie admits that she did remove belongings (including the claimant's shoes) from the office desk because there was a clear desk policy. However, she denies that she threw things.

19. In considering this incident and the allegations of a bullying culture, it is relevant to note that the claimant and Ms Mackenzie frequently exchanged text messages outside work. Various messages were produced which were exchanged between the two in the period March to September 2018. The tone of the messages indicates a friendly working relationship. In addition, the claimant had a number of supervisions with Ms Mackenzie. There are records of supervisions from June 2017 to July 2018. There is no indication in the records of these supervisions that the claimant felt bullied by Ms Mackenzie. On the contrary there are references suggesting that the relationship was a positive one. The comments made by Ms Mackenzie in supervisions and appraisal documents make clear that she held the claimant in high regard. Not only is there no evidence of the claimant raising concerns regarding her treatment by Ms Mackenzie on a number of occasions she expressly states that she is content with her working relationship with Ms Mackenzie. In June 2017 the claimant stated that she felt supported by Ms Mackenzie [p365], a supervision in September 2017 records that the claimant was happy and had no concerns and was feeling supported [p370].

20. The claimant explained this by saying that she was simply trying to keep Ms Mackenzie on side as she required her support in connection with a visa application for the claimant's husband. However, I consider that the comments made by the claimant went further than would have been necessary for this purpose and reflected a friendly working relationship between the two individuals and not one in which the claimant was being bullied by Ms Mackenzie. I find that Ms Mackenzie was frustrated at finding

possessions, including the claimant's shoes, on the desk in the office and that she did remove these possessions in an ill-tempered way. However, I do not consider that this amounts to bullying or that the evidence established that Ms Mackenzie bullied the claimant in other ways.

Humiliating treatment

21. The claimant's case was that she had been humiliated by being asked by Ms Mackenzie to clear a drain of cigarette butts. She considered that this fell outside her responsibilities and complained that she was not provided with appropriate PPE. The background to this request was that in June 2018, complaints had been received from the local authority regarding staff and residents smoking outside Wallis House and not disposing appropriately of cigarette butts. Ms Mackenzie sent emails to staff reminding them that people should not be smoking outside the house and that cigarette butts must be properly disposed of. However, problems continued and in mid-June a complaint was received that the street drains had become blocked by cigarette butts. The claimant was asked to remove the cigarette butts using a net. Ms Mackenzie believed that gloves and an apron would have been available amongst the stores held at Wallis House. The claimant disputes this and says that the request was humiliating. However, it is notable that the claimant raised no complaint about being asked to undertake this task at the time. Whilst she sent text messages to Miss Mackenzie which state that she was finding the task difficult because the net she had was too large she did not suggest that the request was unreasonable, or humiliating or that she could not undertake it because of a lack of PPE. I find that it was not a reasonable management instruction for Miss Mackenzie to ask the claimant to undertake the clearance of a street drain because this was not something that fell within her proper responsibilities as a support worker. However, I do not consider that the request was intended to humiliate the claimant, and nor do I consider that the claimant was, in fact, humiliated by it.

Dangerous situations

22. The claimant's case was that the respondent had placed her in a dangerous situation by rostering her to work on shifts with a pregnant colleague, or a colleague who had no training in how to restrain techniques. The claimant alleges that she was placed in danger by this because, had it proved necessary to restrain one of the teenage residents in the home, she would have been the only person able to do so and would be more likely to have sustained injury when doing so.

23. There is no evidence of the claimant raising any such concern at the time. The documents indicate that the claimant had been trained in restraint techniques and that the respondent did give consideration to the risks faced by the claimant in circumstances where she was the sole person able to use restraint techniques. The respondent completed a lone working risk

assessment in respect of the claimant in June 2016. It records as a potential risk to the claimant that residents may become abusive or threatening to staff and it records the steps taken to mitigate these risks, including using restraint as "*a very last option*". The risk assessment was updated on a couple of occasions. A further risk assessment was completed by Dominique Mackenzie in January 2017 after the claimant underwent a Septoplasty. The risk assessment records that the claimant would not be fit to use physical restraint for around a month and that, in the interim, she would be rota'ed on a shift with at least two other staff members who could apply physical restraint. The risk assessment was then updated again in 2018 and included a detailed assessment of the specific risks posed by each of the individual residents. It recorded that "*restraint should be used as a last resort and should be avoided where practicable, unless an immediate risk of significant harm is presented. Emergency services may be contacted if deemed necessary providing all other avenues have been exhausted or if an immediate risk of significant harm is presented*." Given that the claimant had been trained, that risk assessments had been undertaken in relation to the risks faced by the claimant as a lone worker and that the claimant had raised no concerns about these, I did not consider that the respondent had placed the claimant in danger by rota-ing her to work with colleagues who were unable to use restraint techniques.

Excessive hours

24. The claimant asserts that she was pressured to working excessive hours and that the respondent did not allow her to take rest breaks in accordance with regulation 11 of the Working Time Regulations. She suggested that this occurred routinely but made particular reference to October 2016, March 2017 and July 2017 as evidencing the failure to allow rest breaks and the period June to August 2018 as evidencing working excessive hours.

25. The respondent operated a shift working pattern as the homes were required to have 24-hour cover. Staff worked an "early" from 7.30a.m. to 3.30 p.m., a "late" from 2.30 pm to 10.30 p.m. or night shift from 9 pm to 8.00 am. Staff could also combine the early and late shift and work a "double". On some occasions staff working the late shift would also be rota'ed for a subsequent sleep-in shift during which they would remain at the home until the next morning but would not be expected to carry out duties. The claimant was expected to work 40 hours a week and hours in excess of this were either taken as time in lieu (TOIL) or could, subject to budgets, be paid overtime. Overtime was not compulsory. Hours worked as overtime were marked on the rota's in green.

26. The claimant's case was that there was a "group chat" on Whatsapp in which staff were pressured to work additional hours. However, the claimant did not produce any messages which showed her being pressured to work when

she did not wish to do so. As regards the specific periods identified by the claimant. No rota has been produced for March 2017. There is, however, a supervision note of a discussion with Tanya Fiford (then the claimant's manager, in which the claimant reports that "*she often kindly volunteers to cover a shift*" but that staff did not respect this, and she reported feeling pressured by a peer (AN) to cover extra hours. Ms Fiford was supportive. Having looked at the rota for October 2016 and July 2017 it is clear that the claimant worked overtime on a number of occasions and that there were periods when she worked successive days for more than 7 days in a row. However, it does not establish that the claimant was not given breaks in line with regulation 11. I have been unable to identify any periods in the work rotas that I have seen in which the claimant did not receive two 24 hour breaks over a 14-day period. The claimant suggested in evidence that the respondent held log books which would provide further detail of hours of work but those books had not been produced in evidence.

27. The respondent's case is that the claimant was not pressured to undertake overtime. She elected to do so, particularly in the period before her honeymoon in late August 2018. The claimant wished to amass TOIL so that she could add this to her annual leave and take three weeks off. I accepted the respondent's evidence which was consistent with the pattern in the rotas. The rotas show that the claimant worked overtime on a number of occasions in the three months preceding August 2018 and did far more overtime during these months than she had done in any other period. It seems likely that this was indeed because the claimant wished to build up an amount of TOIL. In addition, the note of the claimant's 23 June 2018 supervision which records the claimant saying that she "*currently enjoys spending as much time at work as possible*" as her husband was at that time still in Turkey. I find therefore that the claimant has not established that she was pressured to work overtime by the respondent. The evidence indicated that there were occasions where she volunteered to do so to help out colleagues and there were other occasions where she volunteered to do so in order to amass TOIL.

Grievance

28. On 7 July 2018, the claimant emailed Dominique Mackenzie and another colleague, complaining that a colleague, Mr Lloyd, had been rude to her and reporting, for the first time, that Mr Lloyd had sexually assaulted her in the course of a works night out. (The date was not specified in this email but the incident in question had occurred on 23 July 2017). She also complained that he had made advances to her at work. He had kissed her cheek, pulled her ears, touched her neck, blown in her face and made her feel "*extremely uncomfortable*". She stated that she did not want to follow any "*external procedures*" regarding the sexual assault (i.e. to report to the Police). She also raised concerns regarding Mr Lloyd's professionalism and whether his

relationship with one of the residents was appropriate. The email concluded "*I have always been aware of the support available from both however I have not been able to discuss with you until I was ready to- I have tried to speak out to you both many times but didn't have the courage to do it…….I have been supported fully by you both as I knew I would be since discussing this. Please appreciate that this has taken me a year to be able to come forward and speak to both which I can only apologise for and I am very grateful for your support both inside and outside of working hours*." The claimant's email was forwarded internally to Paul Cook (a Managing Director of the Respondent) and described as "*a grievance that has been submitted to the home's management*".

29. On 9 July 2018, the claimant met Paul Cook and Angela Muchatuta. The note of the meeting [p184-185] records that Mr Cook considered that the complaint raised four concerns: whether Mr Lloyd was guilty of professional misconduct, whether he had an inappropriate relationship with a young person at the home, allegations of harassment of the claimant in the workplace and allegations of a sexual assault outside the workplace. He indicated that the issues would need to be reported to the Local Authority Designated Officer (LADO) (in accordance with the respondent's safeguarding procedures) and that the LADO may decide to report the matter to the Police. The claimant described the incident in greater detail to Ms Muchatuta and said that she had been drunk on the evening in question, that she recalled wanting to use the toilet, that Mr Lloyd had followed her and kissed her, that he taken her trousers down and pulled them up, that she knew something "*not right*" had happened but could not recall the detail. She reiterated that she did not wish to go to the police. Subsequently, the respondent took steps to report to the LADO who in turn reported it to the police. The police considered that no criminal investigative action would be taken if the claimant was not willing to report the matter. Mr Lloyd was at this time on annual leave. On his return he was suspended pending the outcome of the respondent's investigation into these issues.

30. Kate Scoltock was appointed to conduct an internal investigation. She interviewed the claimant on 24 July 2018. The claimant explained what had happened in July 2017 and identified a number of other former members of staff who might be witnesses in relation to the sexual assault. In particular, she said that a colleague (Sheena) had seen Mr Lloyd trying to kiss her whilst she was in the nightclub and had suggested that to her that she (the claimant) should go home as she was drunk. The claimant stated that she had left the club, Mr Lloyd had followed her and the incident had occurred. The claimant said that in the days afterwards both she and Sheena had confronted Mr Lloyd regarding his behaviour and that he said that he felt bad about it. The claimant said that she had avoided him after the incident and everything had gone quiet until February 2018 at which point he had begun to harass her at work. She described the harassment as him playing

with her ears, blowing on her neck, invading her personal space. She stated that she had not encouraged Mr Lloyd's advances and that they were unwanted. She said that she had told Sheena last week that she would be reporting the incident in July 2017.

31. Ms Scoltock then interviewed three people; the teenage resident (about whom the claimant had expressed concerns) Kate Doody (one of the managers at the home) and Mr Lloyd. The resident denied that Mr Lloyd had behaved inappropriately towards her. Ms Doody was asked about Mr Lloyd's conduct towards the resident and said that there were some criticism of his professionalism but nothing that would be categorised as a safeguarding concern. Mr Lloyd admitted having been outside a club with the claimant, he said that she taken her jeans down to urinate, he had helped her pull her jeans up afterwards and had kissed her. He said that he had apologised about the incident the next day. He denied any harassment of the claimant in the workplace. He said that he was someone that hugged his colleagues but not if they made clear that they did not want him to. Ms Scoltock did not interview any former members of staff who had been present at the night out and did not ask Ms Doody or any other members of staff about whether they had observed Mr Lloyd behaving in a harassing way toward the claimant in the workplace.

32. Ms Scoltock produced an investigation report on 10 August 2018 which concluded that "*There were no members of staff still employed within H2i who were present on the night of the alleged incident….and so no one to corroborate the allegations of ZW. There are parallels in both their recollections of events ; however there is no evidence to substantiate either. …..KL is by his own admission a tactile person who will routinely hug colleagues. This may be judged by some to be inappropriate; however, one would expect staff to make it clear if they were uncomfortable with this level of familiarity. There is no evidence to suggest that ZW at any point indicated to KL that she was uncomfortable with this at the time. He admits that he kissed her on the cheek although he denies that he "blew in her ear"."* Ms Scoltock recommended that Mr Lloyd be transferred to a different home and to be notified of expectations and professional standards and that the claimant should be offered counselling and supported should she choose to pursue criminal charges.

33. Ms Doody's recommendation that Mr Lloyd should be moved to a different home was not acted on because Mr Lloyd was a night worker and because there was no vacancy at any other home. Instead, Mr Lloyd received a final written warning for his conduct relating to failure to adhere to appropriate professional standards. However, once his suspension was lifted he did not

immediately return to Wallis House and worked at a different home operated by the respondent pending his return to Wallis House.

34. Ms Muchatuta met the claimant on 21 August 2018 to inform her that the investigation had concluded. She did not go into any detail about what the investigative findings were. She refused to tell the claimant what disciplinary outcome had arisen in relation to Mr Lloyd. She did not inform the claimant that the respondent intended Mr Lloyd to return to Wallis House. Ms Muchatuta was about to depart on annual leave and so told the claimant that there would be "*no changes*" until 19 September 2018 when Ms Muchatuta was due to be returning from annual leave. The claimant then went on annual leave herself on 23 August and was away until 11 September. She was due to return and work a night shift on 14 September 2020.

35. On 13 September 2018 the claimant heard a rumour that Mr Lloyd would be returning to Wallis House and texted Miss Mackenzie. She asked whether he was returning and stated "*I just want to confirm as I am not willing to work alongside him and will need to look for work if this is the case. I've not taken it as gospel until its confirmed either way from you x*". Ms Mackenzie replied by text the next day to say that she would call later. The claimant heard nothing further that day and was seen by her GP that afternoon and signed off with work related stress until 7 October. She texted Ms Mackenzie to inform her of this saying that she was "*not in a good way*".

36. Ms Mackenzie and Ms Muchatuta met the claimant on 17 September 2018 at which point the claimant made additional allegations of misconduct on the part of Mr Lloyd. On 21 September 2018, Ms Muchatuta wrote to confirm what she understood the allegations to be and to advise that Ms Scoltock would investigate these additional matters and that the investigation would consider the implications of the claimant's having failed to report such matters at the time. The claimant wrote on 27 September 2018 asking to see the investigation report into her initial complaint. Ms Muchatuta said that she would establish what the claimant could be provided with. The claimant replied that same day stating that she had put in a grievance in July and had "*no idea what's going on and it's now 27th September*". She explained that this was causing her anxiety and stress.

37. At around this time the respondent referred the claimant to its own OH provider. The referral, which was completed by Miss Mackenzie records that, at the meeting on 17 September the claimant "*presented as highly emotional and distressed when informed of his [Mr Lloyd's] return. She stated that she could not be in a room with him and could not be responsible*

for her actions" it also stated that concerns had been raised regarding her "*emotional well-being and physical state*". On 5 October 20218 the claimant was seen by her GP and signed off for a further month.

38. On 8 October 2018, Ms Muchatuta replied to say that the July email had not been treated as a grievance "*as they were seen to be serious allegations and dealt with as such*". She confirmed that all the claimant could see was record of her interview with the investigator.

Breach of confidentiality regarding health

39. After the claimant had been signed off Ms Manciocchi saw one of the teenage residents from Wallis House. From the conversation that followed it was clear that the resident was aware that the claimant was signed off with stress and that they said that "Dom" (i.e. Miss Mackenzie) had told them this. Miss Mackenzie denied having informed anyone of the reasons for the claimant's absence. I consider it unlikely that Miss Mackenzie would have informed a resident of the home that the claimant was off sick with stress and so deliberately breached confidentiality. However, it is clear that the residents of the home had become aware of the reason for the claimant's absence and I find that it is likely that there had been an inadvertent breach of confidentiality.

Threatening email

40. Ms Muchatuta had been informed by someone that the claimant had been working for another organisation whilst signed off sick. On 9 October 2018 Ms Muchatuta sent an email internally recording that "*HFT rang me today to say ZW is on their bank but not able to say if she has covered shifts – they have also informed her of the call"*. On 10 October 2018, Ms Muchatuta wrote to the claimant to say that she had been made aware that the claimant had been working for another organisation. "*This allegation is extremely concerning, as if proven to be accurate, you would be working for a secondary organisation without advising us of your additional employment. As you are currently off sick from your primary employment with Homes2inspire limited, due to a diagnosed illness, then working whilst covered by a sick note which enables you to receive sickness pay, would be deemed as receiving payment on false pretences. This may also be perceived as a criminal act, which would be reportable to the Police for investigation*." She asked the claimant to comment on the allegation.

Claimant's pursuit of her grievance and appeal

41. The claimant replied to this letter by an email dated 17 October 2018 to say that the respondent had been made aware of her secondary employment when she joined the respondent. She also stated that HFT had informed

her that Ms Muchatuta had suggested that there were safeguarding concerns about the claimant. She asked what these concerns were. She stated that she regarded Ms Machutata's letter as a threatening one. She complained that her July email had not been treated as a grievance and that she had been caused anxiety by the failure to deal properly with the grievance and to inform her about Mr Lloyd's proposed return to work. She also asserted that the respondent had failed to observe confidentiality regarding her sickness absence. She stated that she wished to appeal regarding her grievance as it had not been dealt with properly. Ms Muchatuta forwarded the email internally, commenting "*I do not think that I should respondent to this lady – because I am becoming a target*". At the same time the claimant was also corresponding with Ms Mackenzie asking to be paid for any outstanding TOIL and requesting to be sent a copy of her TOIL sheet. Ms Mackenzie said that she would arrange for this but did not provide the information required.

The claimant's resignation

42. The respondent did not reply to the claimant's email at all. On 31 October 2018, the claimant emailed to announce that she was resigning and giving as the grounds for her resignation, a catalogue of complaints including a lack of management support, a requirement to work excess hours, a bullying culture in the home perpetrated by Ms Mackenzie, the failure to deal with her grievance or to acknowledge her appeal, the making of unfounded allegations regarding her secondary employment, the failure to pay her for TOIL and a breach of confidentiality regarding her sickness absence. I find that the email set out the claimant's genuine reasons for resigning but that the particular trigger for was the respondent's failure to reply to her email of 17 October 2018.

Claimant's contact with her GP and application for new employment.

43. There are references in the claimant's medical records which detail her state of mind over the last few months of her employment. These make reference to her intention to find new employment. On 14 September 2018, the claimant saw her GP and the notes record that "*colleague recently admitted to sexual harassment against her – he has been off and now come back to work, zoe has been off for 3w on holiday and just found out he has returned and MX at work have not returned her calls at all – can't face going back at this stage – getting worked up and anxious – has already interviewed and due to change jobs – due operation on nose in September*." The claimant was issued with a fit note for work related stress until 7 October 2018. She saw her GP again on 5 October and the notes record "*remains unable to work due to intense anxiety on approaching work. Due to change jobs shortly*" and she was signed off until 19 October 2018. She saw her GP again on 12 October. The record reports "*worsening anxiety and low mood with anhedonia buy no thoughts of self-harm due to stress at work. Present for 8 months but a lot worse for 5 weeks. Currently seeking advice through her union. Employer apparently has a bad reputation and apparently has not been following due process with her grievance procedure. Today receive*

emails from them threatening legal action and insisting she contact them today for a welfare check" . The claimant was prescribed an anti-depressant on that occasion. The claimant saw her GP again on 5 November by which time she was reporting a significant decrease in stress because she had left the respondent and was due to start a new job the next day. The claimant produced an offer letter from her employer which is dated 1 November 2018 and which references the fact that the employer had been undertaking pre-employment checks.

44. The claimant's oral evidence was that she returned from her honeymoon and on 13 September 2018 and became aware of Mr Lloyds planned return. She she contacted Miss Mackenzie for reassurance and, being met with silence, began to apply for any jobs she could see in the local area. She had an interview for a job shortly after having surgery in mid-October and received an offer of employment on 1 November starting on 6 November. The letter makes reference to the claimant having successfully completed pre-employment checks. The claimant denied that she left on 31 October because she had another job to go to. Mr Lovejoy contended that the oral evidence which the claimant gave was wholly inconsistent, that GP records indicated that the claimant had already decided to leave before the investigation had concluded and had interviewed for a job before she went on holiday. He contended that given that the claimant received a formal offer on 1 November which indicated that she had already been undergoing pre-employment checks it was not true that the claimant did not have another job to go to when she resigned.

45. I find that the claimant may have applied for some other jobs before going on holiday in late August but that she began look in earnest for a new job after 13 September 2018. She did so because she was very concerned that the respondent was going to expect her to work alongside Mr Lloyd and this was something that she was genuinely distressed and anxious about. However, despite her concerns she did not resign at this time and she continued to press the respondent not to allow Mr Lloyd to return to Wallis House and to deal with her grievance. It was not until 31 October that she resigned. It is likely that by this time she knew that she had successfully obtained another job. However, I find that the reason she decided to resign at that time was that the respondent had still not replied to her email of 17 October and, in particular, had not acknowledged her wish to appeal against its handling of her July grievance.

Unauthorised deduction from wages

46. The respondent made deductions from the claimant's final payslip because the claimant had taken more annual leave than she was entitled to. It appears that the payslip included a rebate of tax paid in the sum of £241.40 and that the deductions made by the respondent swallowed up this rebate.

The claimant as put forward no other evidence of unauthorised deductions being made.

Law

47. The definition of wages for the purpose of determining a claim of unauthorised deduction from wages is that set out in section 27 of the Employment Rights Act 1996.

> ***"27.— Meaning of "wages" etc.***
>
> *(1) In this Part "wages", in relation to a worker, means any sums payable to the worker in connection with his employment, including—*
>
> *(a) any fee, bonus, commission, holiday pay or other emolument referable to his employment, whether payable under his contract or otherwise,……..*
>
> *……*
>
> *but excluding any payments within subsection (2).*
>
> *(2) Those payments are—*
>
> *……..*
>
> *(e) any payment to the worker otherwise than in his capacity as a worker.*

48. Regulation 11 of the Working Time Regulations 1998 sets out the legal entitlement to a weekly rest period:

> ***"11.— Weekly rest period***
>
> ***(1)*** *Subject to paragraph (2), [a worker]1 is entitled to an uninterrupted rest period of not less than 24 hours in each seven-day period during which he works for his employer.*
>
> *(2) If his employer so determines, [a worker]1 shall be entitled to either–*
>
> *(a) two uninterrupted rest periods each of not less than 24 hours in each 14-day period during which he works for his employer; or*
>
> *(b) one uninterrupted rest period of not less than 48 hours in each such 14-day period,*
>
> *in place of the entitlement provided for in paragraph (1)"*

49. Section 207A TULRCA provides as follows:

> **207A Effect of failure to comply with Code: adjustment of awards**
>
> *(1) This section applies to proceedings before an employment tribunal relating to a claim by an employee under any of the jurisdictions listed in Schedule A2.*

(2) If, in the case of proceedings to which this section applies, it appears to the employment tribunal that—

(a) the claim to which the proceedings relate concerns a matter to which a relevant Code of Practice applies,

(b) the employer has failed to comply with that Code in relation to that matter, and

(c) that failure was unreasonable,

the employment tribunal may, if it considers it just and equitable in all the circumstances to do so, increase any award it makes to the employee by no more than 25%.

50. The ACAS Code of Conduct on Discipline and Grievances requires an an employee to raise a grievance in writing setting out the nature of the grievance. Where an employee has done so the employer should arrange a formal meeting to discuss the grievance. Where the grievance relates to a breach of a duty owed by the employer the statutory right to be accompanied is engaged and the employee is entitled to be accompanied by a companion. After the meeting the employer should decide on appropriate action. "*Decisions should be communicated to the employee, without unreasonable delay and, where appropriate should set out what action the employer intends to take to resolve the grievance. The employee should be informed that they can appeal if they are not content with the action taken.*" Where the employee appeals any appeal should be heard without unreasonable delay.

51. Section 95(1)(c) of the Employment Rights Act states that a dismissal occurs where an employee terminates a contract of employment "with or without notice in circumstances in which he is entitled to terminate the contract without notice by reason of the employer's conduct". An employee is entitled to terminate a contract without notice where the employer is in fundamental breach of contract. The test is that set out in Western Excavating v Sharp, a fundamental breach of contract occurs where the employer commits a significant breach, which goes 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. In such a case, the employee is entitled to treat himself as discharged from any further performance and resign. The test in Western Excavating v Sharp is an objective one and it is not sufficient that the employee subjectively perceives that there is a fundamental breach, that must be a reasonable perception. The employee may resign without giving any notice at all or alternatively he may give notice. In either event, he must make up his mind and must resign soon after the alleged breach of contract or he may be regarded as having affirmed the contract. The burden is on the employee to show that a dismissal has occurred.

52. A constructive dismissal may result from a breach of an express term or from a breach of one of the implied terms of the contract of employment. Where the implied term said to be breached is the implied term of mutual trust and confidence the test is that set out in Malik v BCCI (1) did the employer have reasonable and proper cause for the conduct complained of and, if not (2) was the conduct likely to destroy or seriously damage the relationship of trust and confidence. A breach of the implied term of trust and confidence will always amount to a fundamental breach of contract.

53. A fundamental breach of contract may result from a single act, or from the cumulative effect of a series of acts culminating in a "last straw". The last straw need not be a breach of contract in itself but it must have been preceded by other culpable acts and must be capable of contributing something to the cumulative breach of contract. An entirely innocuous act cannot therefore be a last straw London Borough of Waltham Forest v Omilaju. The case of Kaur v Leeds NHS Trust affirms the reasoning in Omilaju provides guidance about the approach to be adopted in constructive dismissal cases involving a last straw. The judgment of Underhill LJ suggests that it is helpful for Tribunals to approach such cases by asking a series of questions:

1. What was the most recent act or omission on the part of the employer which the employee says caused or triggered his or her resignation
2. Has he or she affirmed the contract since that act?
3. If not was that act or omission by itself a repudiatory breach of contract?
4. If not was it nevertheless a part, applying the approach explained in ***Omilaju*** *of a course of conduct comprising several acts or omissions which, viewed cumulatively, amounted to a breach of the* ***Malik*** *term. (If it was there is no need for any separate consideration of a possible previous affirmation, for the reason given at the end of para 45 above).*
5. *Did the employee resign in response (or partly in response to the breach)*"

54. The Court of Appeal's judgment in Nottingham CC v Meikle [2005 I.C.R 1] establishes that any repudiatory breach of contract need not be the sole, or even the principal cause of resignation ,but it must play a part in the decision to resign.

"It has been held by the EAT in Jones v Sirl & Son (Furnishers) Ltd that in constructive dismissal cases the repudiatory breach by the employer need not be the sole cause of the employee's resignation. The EAT there pointed out that there may well be concurrent causes operating on the mind of an employee whose employer has committed fundamental breaches of contract and that the employee may leave because of both those breaches and another factor such as the availability of another job. It suggested that the test to be applied was whether the breach or breaches were the 'effective cause' of the resignation. I see the attractions of that approach but there are dangers in

> getting drawn too far into questions about the employee's motives. It must be remembered that we are dealing here with a contractual relationship and constructive dismissal is a form of termination of contract by a repudiation by one party which is accepted by the other; see the Western Excavating case. The proper approach therefore, once a repudiation of the contract by the employer has been established, is to ask whether the employee has accepted that repudiation by treating the contract of employment as at an end. It must be in response to the repudiation but the fact that the employee also objected to other actions or inactions of the employer not amounting to a breach of contract would not vitiate the acceptance of the repudiation …"

Conclusions

55. The claimant's case on constructive dismissal relates to alleged breaches of contract that can be split in to two categories: disparate allegations of poor treatment in the period up to June 2018 and allegations relating to the manner in which the respondent dealt with the claimant after she submitted her grievance on 7 July 2018. I have found that the claimant's complaints in relation to the allegations of poor treatment up to June 2018 were not established on the facts (with the exception of the allegation regarding a lack of support and supervision at Rosedale House). I have adopted the approach advised in the Kaur case and begun by focussing on the most recent act which is said to have triggered resignation.

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

56. The claimant's email of resignation sets out the events which triggered her resignation. It references, in particular, the following sequence of events which occurred from mid-September 2018 onwards. First, the respondent's delay and lack of transparency in communicating with the claimant about the outcome of its investigations and the proposed return of Mr Lloyd, in particular on 13 and 14 September 2020. Second, the respondent's refusal on 8 October 2018 to accept that the allegations made by the claimant on 7 July, in addition to raising safeguarding concerns, were also a grievance submitted by the claimant about Mr Lloyd's behaviour to her. Third, the letter sent by Ms Muchatuta on 10 October 2018 which suggested that the claimant may have committed a criminal act by engaging in secondary employment and/or that there were safeguarding concerns regarding the claimant. Finally, the respondent's failure respond to the concerns raised by the claimant in her email of 17 October 2018 about Ms Muchatuta's letter or to the claimant's request that she be permitted to appeal against the manner in which her grievance had been dealt with. I consider that the specific trigger or the final straw which led to the claimant's resignation was the failure to reply to the email of 17 October 2018.

Has she affirmed the contract since that act?

57. I consider that the claimant did not affirm the contract by not resigning sooner. The claimant resigned on 31 October 2018. The respondent had by this point had two weeks in which to reply to the claimant's email of 17 October 2018 but had failed to do so. It was reasonable for the claimant to allow some time for the respondent to reply and, having waited two weeks and heard nothing, the claimant resigned promptly on 31 October 2018.

If not was that act or omission by itself a repudiatory breach of contract?

58. Delay of a few weeks in replying to a complaint by an employee would not necessarily amount to a repudiatory breach of contract. However, I consider that the respondent's failure to reply, even by way of a simple acknowledgement, to the claimant's email of 17 October 2018 was indeed a repudiatory breach of contract in the circumstances of this case. First, there was no reasonable and proper cause for the respondent's conduct. Absent some good explanation, it is unreasonable for an employer not to even acknowledge an email from an employee in which she raises serious concerns. However, the respondent has put forward no such explanation. Second, the respondent's conduct was likely to seriously damage the relationship of trust and confidence in the circumstances. The respondent knew that the claimant was signed off with stress and so vulnerable because of that condition. It was therefore particularly important that the respondent dealt promptly and sensitively with any concerns raised by the claimant. The claimant had made the respondent aware, by her email of 27 September 2018, that she considered that her grievance had not been appropriately dealt with and that this failure, in itself, was a cause of her current stress. She then raised complaints in her email of 17 October 2018, not only about the handling of her July grievance, but also about the email sent by Ms Muchatuta on 10 October 2018. The respondent's failure to deal with these matters was self-evidently likely to exacerbate or prolong the claimant's stress. The claimant's perception was that, having failed to deal properly with her 7 July grievance, the respondent was compounding its failure by not dealing properly with the further concerns that she had raised in her email of 17 October 2018 or allowing her to appeal in relation to the handling of her grievance. That was a reasonable perception in circumstances where she had received no response whatsoever to her email for two weeks. The employer's obligation to deal promptly and fairly with grievances is a matter that is central to the relationship of trust and confidence and the respondent's failings were therefore likely to seriously damage that relationship.

*If not, was it nevertheless a part, applying the approach explained in **Omilaju** of a course of conduct comprising several acts or omissions which, viewed cumulatively, amounted to a breach of the **Malik** term. (If it was there is no need for any separate consideration of a possible previous affirmation…)*

59. Even if I am incorrect to conclude that the failure to reply to the claimant's email of 17 October 2018 was, in and of itself, a repudiatory breach of

contract, I consider that it was part of a broader course of conduct (summarised below) which did amount to such a breach. For the reasons set out below I consider that the respondent had no reasonable and proper cause for such conduct and that such matters were, cumulatively, likely to destroy or seriously damage the relationship of trust and confidence.

<u>The respondent's failure to deal appropriately with the claimant's 7 July 2018 grievance</u>

60. The fact that the complaint made by the claimant on 7 July 2018 also raised safeguarding concerns did not mean that it was not also a grievance regarding the claimant's treatment by one of the respondent's employees. The respondent's initial email acknowledged that it was a grievance but as the complaint progressed the respondent lost sight of this fact. The respondent did not therefore deal with the claimant in the way that its grievance policy required. The respondent did not provide the claimant with any clear explanation of what the outcome of the investigation was or what findings had been reached. She was not told that the investigation report recommended that Mr Lloyd be moved to a different workplace, nor that the report had recommended that she be offered counselling. If the respondent had actively decided not to treat the complaint as a grievance, it should have informed the claimant of this so that she could challenge that decision. The respondent's lack of transparency meant that the claimant was left in the dark about a matter that was self-evidently of great concern to her.

61. Once the claimant made clear that she wished to have the 7 July 2018 complaint treated as a grievance, the respondent behaved unreasonably in refusing to do so, at least in so far as the complaint related to her treatment by Mr Lloyd in the workplace. Even if the complaint raised safeguarding matters and even if the complaint of sexual assault was regarded as having arisen outside work, there was no basis on which the respondent could reasonably take the view that the allegation of sexual harassment whilst at work was not capable of being a grievance. The claimant was therefore entitled to a written explanation of the respondent's decision on this point and to exercise a right of appeal against that decision. The respondent has put forward no explanation for its failures to deal appropriately with the claimant's grievance and I consider that there was no reasonable and proper cause for its conduct. This was a significant failure to deal promptly and fairly with a grievance and was a matter that was likely to seriously damage the relationship of trust and confidence.

62. Although Ms Muchatuta assured the claimant in August that no changes would be made until 19 September, it appears that the respondent had, in fact, already decided that Mr Lloyd would be returning to Wallis House. The respondent ought reasonably to have known that his return would cause distress and anxiety to the claimant. On 13 September 2018, when the

claimant became aware of Mr Lloyd's proposed return and asked Miss Mackenzie for reassurance, Miss Mackenzie failed to contact the claimant, despite promising to do so and despite the claimant's stating she was upset and did not feel she could return to work alongside Mr Lloyd. The claimant's anxiety about the prospect of encountering Mr Lloyd resulted in her being signed off work with stress. It was not until 17 September that the respondent explained its position regarding Mr Lloyd's return. I consider that the respondent's failure to deal promptly with the concerns expressed by the claimant on 13 September 2018 was unreasonable and further contributed to the damage to the relationship of trust and confidence.

Ms Muchatuta's email 10 October 2020

63. Ms Muchatuta suggested that her email regarding the claimant's secondary employment was not unreasonable as she was merely seeking an explanation from the claimant as to whether she was indeed working elsewhere whilst signed off sick. However, I consider that the email went further than this and that its sending was unreasonable and, in combination with the matters set out above, an act likely to seriously damage the relationship of trust and confidence. The email did not merely ask whether the claimant was working for HFT it stated that, were she doing so, she would be receiving sick pay on "*false pretences*" and potentially engaging in criminal action. However, even if the claimant was working at HFT, that would not be sufficient to establish that she was not also genuinely unfit to attend for work with the respondent. Ms Muchatuta knew that the reason that the claimant was signed off was her anxiety at the prospect that she might encounter Mr Lloyd at Wallis House. The claimant had made this clear to Miss Mackenzie and the respondent had recorded as much in its own occupation health referral. There was no good basis for the suggestion that the claimant might be claiming sick pay under false pretences. Ms Muchatuta was aware that the claimant was signed off with stress and could be expected to anticipate that a letter suggesting that the claimant might be reported to the Police would further increase the claimant's stress and anxiety.

Did the employee resign in response (or partly in response to the breach)?

64. I consider that the claimant did indeed resign in response to the breaches of contract that I have identified above. The respondent contends that the fact that the claimant had applied for other jobs before going on holiday in late August shows that she had already formed an intention to leave and left because she had obtained a new job and not because of any fundamental breach of contract by the respondent. However, the fact that the claimant may have made job applications at an earlier stage is not inconsistent with her eventual resignation on 31 October 2020 being motivated by the respondent's breaches of contract. I have found that after

13 September 2018 the claimant was very concerned that the respondent was going to expect her to work alongside Mr Lloyd and this was something that she was genuinely distressed and anxious about. As a result, she made increased efforts to find new employment. However, she did not resign at this time and she continued to press the respondent not to allow Mr Lloyd to return to Wallis House and to deal with her grievance and she did this for a further 6 weeks. However, when the respondent failed to reply to her email of 17 October it was evident that the respondent was not going to deal with her grievance or allow her a right of appeal and so she resigned. It is likely that when the claimant resigned on 31 October she knew that she had another job to go to. Nonetheless, I consider that what motivated her resignation was the respondent's breach of the implied term of mutual trust and confidence through the actions detailed above.

ACAS uplift

65. I consider that the respondent has failed to comply with the ACAS Code of Conduct in refusing to treat the 7 July 2018 complaint as a grievance, in failing to provide the claimant with a sufficient written explanation of the action it proposed to take, and in failing to deal promptly with the claimant's appeal. I have found that the respondent had no reasonable and proper cause for its actions. The initial failure may have been the result of an oversight, or a misunderstanding of the status of the claimant's 7 July 2018 complaint. The respondent refused to treat the 7 July 2018 complaint as a grievance even after the claimant had specifically requested this on 27 September 2018. The respondent also failed to deal promptly with the claimant's appeal. The respondent was aware when it did these things that the claimant was experiencing stress and anxiety related to this complaint and the respondent's handling of it. I therefore consider it just and equitable that any compensation awarded to the claimant should be increased by 25%.

Deduction from Wages

66. The onus is on the claimant to provide specific information as to the amounts of wages said to have been deducted. The only matter that the claimant has identified specifically as a deduction from wages is the respondent's failure to pass on to the claimant a tax rebate received from HMRC. That is not a sum payable to the claimant by her employer in her capacity as a worker but is a sum due to her from HMRC in her capacity as a taxpayer. As such I consider that it is excluded from the definition of wages at section 27 of the Employment Rights Act 1996.

Weekly rest breaks

67. The claimant has not established that she was prevented from taking daily rest breaks in accordance with the requirements of Regulation 11 of the Working Time Regulations 1998.

Employment Judge Milner-Moore
Dated 30 December 2020

Sent to the parties on: ....30/12/2020..
T Henry-Yeo
.....
For the Tribunals Office

Public access to employment tribunal decisions:
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Note:
Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.