



EMPLOYMENT TRIBUNALS

Claimant:

Miss A McDonnell

v

Respondent:

St Mungo's Community
Housing Association

Heard at:

Reading

On: 20 and 21 January 2020

Before:

Employment Judge Milner-Moore (sitting alone)

Appearances

For the Claimant: In person

For the Respondent: Mr L Wilson of Counsel

RESERVED JUDGMENT

1. The claim of unfair dismissal fails and is dismissed.

REASONS

1. This case was originally listed for a four day hearing to consider a claim of constructive unfair dismissal. Listing difficulties meant that it was not possible to adhere to the four day listing but the parties agreed that the claim could probably be heard within two days and this has proved to be the case.

CLAIMS AND ISSUES

2. The claim brought was one of constructive unfair dismissal and the following issues arose:
 - 2.1 Was there an act or series of acts which caused the claimant's resignation?
 - 2.2 Did these acts amount to a fundamental repudiatory breach of contract entitling the claimant to resign? The claimant relied on a number of matters which were said cumulatively to amount to a breach of the implied term of trust and confidence. Accordingly, the question was whether or not there was reasonable and proper cause for the conduct in question and, if not, whether the conduct did, or was likely to, seriously damage the relationship of trust and confidence. The claimant suggested that there was a marked

change in the respondent's attitude towards her after she was nominated for an award. She complained, in particular, of the following matters:

- 2.2.1 what she considered to be an unreasonable instruction that she should limit the amount of her time spent on work on modern slavery and exploitation of sex workers,
- 2.2.2 A pattern of bullying which included making a change to the claimant's appraisal after it had been discussed with her,
- 2.2.3 subjecting the claimant to unjustified criticism,
- 2.2.4 encouraging colleagues to look at the claimant's social media as part of an attempt to tarnish her reputation,
- 2.2.5 the withdrawal of a night shift which the claimant operated once a month to access sex worker clients,
- 2.2.6 contact whilst the claimant was on sick leave which she regarded as harassing,
- 2.2.7 the claimant's demotion,
- 2.2.8 a lack of support to the claimant, and
- 2.2.9 the unfair contrivance of a disciplinary investigation which resulted in the claimant's suspension for many months.

- 2.3 Did the claimant resign in response to these matters?
- 2.4 Had the claimant affirmed the contract of employment by not resigning earlier?
- 2.5 The respondent did not assert that there was a potentially fair reason for any constructive dismissal.
- 2.6 If the claimant were found to have been unfairly dismissed two further issues arose:
 - 2.6.1 What is the likelihood that, following a fair process, the claimant would have been fairly dismissed or would have resigned in circumstances not amounting to a constructive dismissal?
 - 2.6.2 Did the claimant contribute to her own dismissal by blameworthy conduct such that any compensation paid to her should be reduced on that basis?

3 I heard evidence from a number of witnesses:

Claimant

- The claimant,
- Mr Sanders (her trade union representative),
- Ms O Abwa (colleague of the claimant)
- Mr D O'Connor (colleague of the claimant)

Respondent

- Ms S Jackson (part of the claimant's line management chain)
 - Ms S Willcox (who investigated the claimant's first grievance and conducted the disciplinary investigation)
 - Ms H Denyer (who was the claimant's countersigning officer and investigated her second grievance).
3. I was also supplied with a bundle of 445 pages and, without any objection being raised, some additional documents were handed up during the course of the hearing.

FINDINGS OF FACT

4. In the light of the evidence, I made the following factual findings. The claimant began employment as an "outreach caseworker" in 2009 working for a predecessor organisation. She was promoted to "reconnection worker" in 2010. The claimant's employment was the subject of a TUPE transfer to employment with the respondent in 2014. A restructure occurred in 2015, as a result of which her role became redundant and thereafter she worked once again as an outreach worker. (This is what the claimant refers to as a demotion).
5. The respondent is a not for profit association providing support to homeless people in Oxford. The claimant worked in the Oxford Street Population Outreach Team ("OXSPOT"). The OXSPOT team delivered services under the respondent's contract with Oxford City Council. Under that contract, OXSPOT was responsible for assessing rough sleepers and assisting them to get accommodation and other services by engaging with them and carrying out assessments of their needs. Rough sleepers could self-refer or could be referred by members of the public or other service providers. However, in order to secure assistance from OXSPOT, the rough sleepers needed to be "verified". Rough sleepers would only be "verified" if they were observed sleeping in the open air. The respondent was not contracted to provide any significant assistance to people who were in insecure accommodation, for example, squatting or sofa-surfing, or those who may have considered themselves homeless but were not currently rough sleeping. The respondent's provision of the service was to be measured by reference to indicators to be agreed (such as keeping the numbers of rough sleepers below a defined level) and part of its payment for the service would be by reference
6. The respondent's services under the contract were commissioned by staff of Oxford City Council referred to as "commissioners". At the relevant time, those involved in commissioning were Sophia Stone and Rachel Laurence. In addition, there were other staff at Oxford City Council that the respondent's staff, including the claimant, dealt with; in particular, Linda Ludlow, the strategic lead for human exploitation. The claimant also worked with other external contacts, Charlotte Blakely, Head of Services at

Homeless Oxfordshire and with Thames Valley Police in relation to her work supporting sex workers.

7. The claimant's core responsibility as an outreach worker was to assist a caseload of people allocated to her who had been identified as rough sleepers. Outreach workers visited sites where rough sleepers might be found to identify them and record and assess their needs so that they could help them to access accommodation and other support. Outreach workers were required to complete records evidencing the contacts made with, and assistance provided to, the rough sleepers, and to enter this onto the respondent's IT system ("Chain"). Individuals who had either disappeared (and so could no longer be observed rough sleeping) or who had sourced accommodation were to be removed from the case list. An average case list would usually have between 20 – 30 individuals on it.
8. The claimant developed a particular interest in providing support to sex workers and/or those at risk of modern slavery. During 2018, she underwent training dealing with these issues and she also delivered training to others. She began to do a monthly night shift aimed at identifying sex workers. The night shift was necessary because it was difficult to make contact with them on the standard shift patterns operated by the respondent. She worked in conjunction with Thames Valley Police and she also attended a number of multi-agency meetings with Oxford City Council and others. However, the provision of support to sex workers per se was not part of the respondent's contract as commissioned by Oxford City Council. There were other agencies who offered support to this group. The respondent's contracted function covered assisting sex workers and those at risk of modern slavery only insofar as they were also verified rough sleepers.
9. Between March and August 2017, Sue Jackson became responsible for the supervision of the claimant and there are records of various supervision meetings between the two of them. It is fair to say that those were broadly positive appraisals of the claimant's work although there were some comments about the claimant expressing negativity about the respondent organisation. The claimant explained this by saying that she was concerned about whether or not the organisation would retain its contract with Oxford City Council. She was asked not appropriate to express such negativity, in particular, in front of new joiners, who might be deterred by the claimant's assessment of the situation. No concerns were raised at the claimant's performance of her outreach function but Ms Jackson took the claimant at her word that she was on top of her cases and she did not undertake any detailed enquiry into her case list.
10. In or around August 2017, responsibility for the claimant's supervision passed to Sarah Hirsi. In September 2017, the claimant was nominated by Thames Valley Police for a Marsh award for outstanding contribution to the fight against modern slavery. She was one of a small number of individuals who was nominated for the award and she was invited to a reception at the House of Commons. Although she was not the recipient of the award, it was obviously a matter of pride and satisfaction to her that she had been nominated. The claimant was congratulated by Sue Jackson and Sarah Hirsi

at various points for having been nominated for this award. However, the claimant received no other formal recognition from the senior management of the respondent.

11. From looking at the notes of supervisions that took place with the claimant it is evident that the respondent was supportive of the claimant in a number of respects. Discussions took place in relation to her progression and she was provided with assistance on preparing for interviews. When the claimant raised broader concerns about her working environment for example, that she was fatigued or hot or experiencing personal difficulties, support or assistance was provided to her. She was allowed flexibility to work in a different building. She was referred to the employee assistance programme.
12. In October 2017, Sarah Hirsi performed a review of the claimant's case list. This was something that should have occurred regularly for all the caseworkers, but the claimant's case list had not been reviewed for some time. Sarah Hirsi became concerned that the claimant was focused on supporting her sex worker clients on the list to the detriment of the rest of her caseload. She was concerned that the claimant had maintained on her list sex worker clients who did not appear to be rough sleepers and that she had failed to take steps to remove clients who had disappeared or had been accommodated. She also considered that Chain showed no evidence of any proper contact or assessment being carried out in relation to around 13 individuals from a case list of 31. The note of the supervisory review conducted with the claimant on 31 October recorded that there was "not much movement in her caseload." The claimant did not dispute this assessment. It was also made clear to the claimant that as winter was a particularly busy time (due to the threat posed to rough sleepers by the winter weather conditions) there would be a need to minimise the claimant's focus on sex worker-related work and the claimant was instructed to prioritise her case load. However, the review also referenced the claimant's nomination for the award, recognised that the claimant was disappointed at the lack of recognition from senior management but made clear that both Ms Jackson and Ms Hirsi appreciated "*the great work AM has been doing supporting sex workers*". The claimant acknowledged this and acknowledged the opportunities that she had been given to attend training and conferences.
13. On 21 November 2017, Ms Jackson emailed, suggesting that the monthly night shift that the claimant performed with Thames Valley Police would need to be cancelled because of staffing issues and the need to prioritise normal shifts. The claimant explained that arrangements for the shift were already in place with external agencies. In the end the shift went ahead. However, future night shifts were cancelled and the shifts were not resumed subsequently. This was in part because of the increased strains placed on OXSPOT by the winter weather and in part because there were continuing concerns regarding the claimant's failure to spread her effort more generally across her caseload and to shift her focus from the sex worker clients. The respondent therefore considered that it would be inappropriate for the claimant to resume the night shift until these points had been addressed.

14. In December 2017, the claimant emailed Linda Ludlow, having discussed with her the cancellation of the night shift and the possibility that Linda Ludlow might provide funding to enable it to continue. The email sent by the claimant stated that she was sure she would get some “back lash” about this.
15. During December, she also sent emails to Linda Ludlow and others at Thames Valley Police from her work email and during office hours asking whether anyone would commission or fund work on sex workers or modern slavery. She said that a Charlotte Blake at O’Hanlon House was interested in taking her on if the funding could be secured. On 18 December 2017, Sophia Stone emailed the claimant asking to meet.
16. On 14 December 2017, the claimant’s appraisal meeting with Ms Hirsi took place. The appraisal reflected Ms Hirsi’s views and evidence contained in 360° feedback from the claimant’s colleagues and others. The claimant’s performance was assessed as a level 3 (acceptable). The appraisal contained recognition of her work with sex workers and of her positive qualities, i.e. that she was a knowledgeable and supportive colleague. However, it also made a number of criticisms regarding matters such as: her failure to properly manage her general caseload due to her prioritisation of the sex worker clients, a lack of professionalism in meetings and in written communications and a resistance to change and negativity about the organisation. Some specific objectives were set for the claimant with the intention that she should adjust her ways of working. The appraisal was subsequently revised, following its being reviewed by Sue Jackson, to include additional negative commentary and to downgrade the rating to a 2 which represented performance which was “below standard – improvement needed”. The revised appraisal also included more detailed objectives about the limitation of her work on sex worker clients, not attending meetings focussing on sex workers other than those that had been agreed, the removal of the night shift during the busy winter period, and so on. There is a dispute as to whether or not the revised appraisal was ever shown to the claimant at this time or whether she first saw it in March when it was uploaded to the respondent’s HR system.
17. There is an email from Sarah Hirsi dated 30 January 2018 at page 95 of the bundle which suggests that it was shown to her at the time. It states:

“Hi Sue. I’ve discussed final scoring with April and explained why. She has agreed to the work plan. I added comment in “understanding and doing”- that is unacceptable and need to address this behaviour. Please do get back to me if I have missed anything.”
18. On 30 January 2018, Sarah Hirsi had a further supervision with the claimant which is recorded which states:

“In AM Dec 2017 appraisal it was made very clear to AM to start prioritising rough sleepers and to limit the amount of time she spends working in her champion area. I have also had many discussions with her to start focusing on her caseloads. Despite the many discussions, AM still continues to

prioritise her sex workers over other rough sleepers. It was made very clear again with AM that she needs to start making progress with her caseload with rough sleepers. She was advised apart from the SWIP, bubblegum and anti-slavery meetings she cannot attend any other meeting due to capacity. AM progress will continue to be monitored.”

“By the next supervision and client review in February AM [this was scheduled for 20 February 2018] to evidence arranging or making contact with all her clients on her caseload with clear plan action for each client”

The matters set out in the January record of supervision reflect the objectives set in the revised appraisal and this, combined with the email referred to above, lead me to conclude that it is likely that the claimant was informed of the revised appraisal before it was uploaded to the respondent's HR system in March 2018.

19. On 26 January 2018, Sue Jackson sent an email to staff, including the claimant, setting out the respondent's expectations regarding lines of communication with the commissioners. She stated:

“I just wanted to revisit the communication that we have all had with the rough sleepers' team at OCC as obviously elements have changed enormously over the past year. As much as possible, I would like to remain the main contact for Rachel Lawrence so if you have an enquiry from her, please forward to me. Sophia's main contacts are Sarah and Karen as she will be asking for historic data so please refer her to one of these two or me. Stephanie obviously will need to communicate with you all regarding different clients. I would just ask you all to keep in mind that any email should be very carefully worded and ensure that they are always factual and don't contain any opinions or non-substantiated judgements. One of the reasons that I am raising this particularly now is that with all the media and public interest we need to be especially careful and emails shared with OCC are subject to the Freedom of Information Act and could therefore be requested and released. Just be factual and formal.”

20. One of the meetings that the claimant did attend was the SWIP meeting. A SWIP meeting was due to take place on 13 February 2018. In the supervision meeting of 30 January 2018, Sarah Hirsi specifically recorded that the claimant could attend the 13 February meeting. Despite this on 12 February 2018, the claimant forwarded to Linda Ludlow an email sent to her by Sarah Hirsi (which said merely that Sarah Hirsi would like to discuss the SWIP meeting with the claimant before she attended it). The claimant added a comment: *“See I am sure that they are going to prevent me attending”*.

21. On 14 February, the claimant sent her CV out to Linda Ludlow and another individual. On 20 February, the claimant emailed Linda Ludlow about a position which was about to be advertised by Aspire:

“Hi, Aspire are about to advertise some positions and I have been speaking to the manager who would love to take me on and would integrate modern

slavery and sex working into role but they are offering £5,000 less than I am currently on and I could not take a drop at all let alone this amount but I know someone mentioned some funds within ASBIT. Do you think that they would use this to top up this role? Just a thought as today I had my supervision and in other words was advised I am not good enough at my job. I was honestly almost brought to tears. 10 years and I have never been made to feel like this so right now pretty desperate to find alternative. Let me know what you think. I will do report now."

22. The claimant also sent an email on 20 February to Sophia Stone:
"You know you mentioned ASBT having some funding? Well Aspire may be able to assist. They are advertising or will be and want to including modern slavery sex working in the role but the salary is a lot lower than I am currently on. £5,000 which I could not even consider taking a drop. I just wondered if extra funding could go to them if they are willing to integrate the sex working and modern slavery. Just a thought. Let me know what you think. At least I think it was you who mentioned it lol."

23. Sophia Stone replied on the 21st:

"Hi April

This was discussed in our PHG meeting yesterday and is being actioned for discussion between myself, Jane, Laurie Taylor, Rachel and Richard Adams. It would be part of our end of financial review of the St Mungo's SLA. I can't promise anything but there is lots of support for the work you are doing. It is just a matter of how it can be commissioned and managed between the partners so that it doesn't pull capacity or negatively impact OXSPOT's wider work. I am seeing Aspire on Monday meeting so I will ask about that possibility then. It is best if the information on this additional funding option is brought to us directly from Paul and not from yourself in this instance."

24. The claimant then forwarded the email to Paul Reed of Aspire and asked him to bring it up with OCC and he replied that there could be a -

"specific funded project at Aspire that you may be able to lead on if that does not impact on your St Mungo work. It could be weekend outreach to engage with sex workers led by yourself under the Aspire management"

25. The claimant continued to email Sophia Stone about the proposal of a separately funded outreach role dealing with sex workers that she could perform. Sophia Stone replied on 28 February that she would -

"bring everything together in a document of recommendations and aspects and to consider when we have our meeting please send me anything else worth considering around timings, time, reporting, monitoring equipment, access to any facilities, whatever you think. I will then add it all into the picture information and discuss and see how it goes. Also, how is Linda's work going on your report and impact so far with these women? Even just a one pager demonstrating your impact and changes mentioned so far would

be great both in terms of narrative and numbers and what about your case notes, reports or how you capture your work/intel. Thanks.”

26. Sophia Stone suggested coming to the respondent's offices to meet the claimant and the claimant replied:

“Maybe we could meet in D&G on Cowley Road. Come to office first and we can go for a coffee as our office is not the best and is so hot lol. I will send you all I can think of.”

27. Also on 28 February 2018, the claimant emailed Sophia Stone stating:

“Paul called me yesterday about doing it with them as a part time thing but I just know St Mungo's will say this impacts on my work. Barriers are clearly against me in Oxfordshire. Don't seem to be getting anywhere.”

28. There is no evidence that the claimant ever made her managers aware of the contacts that she was having with Sophia Stone. The claimant relies on the fact that her meeting with Sophia Stone was in the calendar and therefore available to be seen by her managers, However, she did not take any steps to positively make her managers aware of her contact with Sophia Stone or the other individuals, or to clear the discussions that she was having with them.

29. At this time, one of the claimant's colleagues, Adrian Hassell, was being permitted by the respondent to do an overnight shift. The claimant considered this to be unfair. The respondent considered that this was necessary because Adrian Hassell's clients were entrenched rough sleepers who were hard to locate on the respondent's traditional shift pattern. When the claimant became aware that Adrian Hassell was being allowed to do overnight shifts, she protested as she considered that the same could be said of her sex worker clients and she raised this point with Sue Jackson. Sue Jackson's position was that the role of the respondent was not to support sex worker clients unless they were actually rough sleepers. The claimant maintained that her sex worker clients were rough sleepers. As a result Sue Jackson reviewed the claimant's case list to try to establish the position. That review was conducted on 9 February 2018 and indicated that of 35 clients, only 28 were active. Of that 28, 4 were sex workers who were not rough sleepers and 2 were sex workers who were rough sleepers. She was concerned that 21 of the client records showed no evidence of recent engagement. Sue Jackson's evidence, which I accepted, is that she arrived at this view having reviewed not only the case list but also the Chain system records that should have held details of all the contacts that had taken place.

30. On 20 February 2018, Sarah Hirsi conducted a further supervisory review with the claimant. There is a brief note which makes clear that she did raise issues regarding the claimant's work on cases. She sent a subsequent email to HR stating that her review of the claimant's case list had disclosed that the claimant was only actively working with about 5 clients and that she had not addressed concerns raised with her previously about the management

of her caseload. She also raised a number of other matters relating to the claimant's performance, including the appropriateness of her tone in communications.

31. Towards the end of February, Sue Jackson received a call from Paul Reed at Aspire to discuss a potential new role that Aspire could jointly fund focussing on sex workers. Sue Jackson had known nothing of this and so began looking into the discussions that had taken place between the claimant and others. As a result the claimant's emails with Sophia Stone and others came to light. This sparked a disciplinary process.
32. On 8 March 2018, the claimant was invited to a preliminary interview to discuss these matters and asked why, despite Sue Jackson's email of 26 January 2018, she had not informed her managers of her discussions with Sophia Stone. The claimant's explanation was that the contact had been initiated by Sophia Stone and so she did not regard it as an issue. She said that she had assumed that Sue Jackson and Sarah Hirsi were aware that proposals on sex worker/modern slavery were under consideration.
33. In a follow up meeting, the claimant was shown the various emails referenced above, in which she had made negative comments regarding the respondent's support for sex worker clients and the possibility of Aspire receiving funding for that work. The claimant maintained that there was nothing wrong with what she had done; she had not intended emails to be read negatively and was simply trying to ensure funding so this work could continue. She said that she had been led by the commissioners to believe that Ms Jackson and others were aware. During these meetings the claimant gave assurances to the respondent that she had only approached Sophia Stone and Aspire about these matters.
34. On 9 March 2018, the respondent wrote to the claimant to advise her that there would be a formal disciplinary process in relation to allegations of gross misconduct as follows:

"1. You have engaged in discussions with external parties including our commissioners which could be prejudicial to St Mungo's reputation and/or interests. These include emails you sent in February/March to a commissioning officer discussing work within modern slavery exploitation which could provoke a negative perception of St Mungo's.

2. You have engaged in improper use of your position for private gain. This is in reference to discussions you have engaged with potentially sourcing funding for a role in modern slavery exploitation which you intend on leading while still in the role of outreach worker at St Mungo's.

3. You have committed a serious act of insubordination by communicating directly with commissioners regarding a role you would like to carry out around modern slavery exploitation despite having been clearly advised of the correct channels of communication with the commissioners and that your focus should be on your caseload rather than this area of interest.

4. *You have used St Mungo's work time and your St Mungo's email address to communicate with the commissioners regarding a role that you would like to carry out around modern slavery exploitation. This is viewed as a personal interest activity due to it having been made clear to you that your focus should be on case work and not on this area.*"

35. Two matters deemed to be serious misconduct were added:

"You have failed to effectively manage your caseload and carry out key tasks within your role such as updating client records, risk assessments and support clients despite the importance of this being highlighted to you on multiple occasions and you have displayed discourteous and unprofessional behaviour both in person and in your written communication."

36. The letter went on to say that suspension had been considered as a precautionary measure but –

*"At this stage, the decision had been made not to suspend you on the basis that the following measures can be put in place to mitigate risk-
You will not attend any external meetings relating to modern slavery and sex working;*

You will not have any contact with commissioners. Any necessary contact should be referred to your manager;

You will not discuss any matter related to the sex worker exploitation work that you have done or any potential further work on this subject with any of the following:

OXSPOT team or other members of St Mungo's with the exception of managers involved in the investigation;

Any staff or partner agencies;

Any member of OCC or the commissioners' office and

you will not discuss this investigation and your views on this with members of the team."

The letter also advised that failure to comply with these measures might be regarded as misconduct in and of itself.

37. On 14 March 2018, the claimant replied to an email from Linda Ludlow at Oxford City Council enquiring why she had not attended the SWIP that day and she stated:

"Can you give me a call on personal after 3 today"

and provided her mobile number -

"I am unable to discuss anything??? Shouldn't even be emailing. This email alone could make it so much worse."

38. The claimant subsequently said that she wanted Linda Ludlow to contact her about her sister's dissertation and not in connection with her work. However, I regard this as implausible. Were this the case, she could simply have replied to say that she could not discuss these matters with Linda

Ludlow and could have provided contact details for Linda Ludlow to deal with her sister directly. The clear implication is that she wanted to have discussions with Linda Ludlow about what had been going on at work but not using any means that would enable her employers to know that this had taken place.

39. During March 2018, Sue Jackson interviewed staff in OXSPOT and various external stakeholders. These included Sophia Stone, who answered questions via email. She stated that the claimant had told her that she was not feeling supported and considered that her work was not being recognised at St Mungo's, that she was being prevented from carrying out the sex worker/modern slavery work by management, could not understand why she was being prevented from undertaking work that was part of her remit and did not understand why her shifts for night work had been cancelled but Adrian Hassal's were being permitted to continue. Sophia Stone also confirmed that the claimant had also mentioned that Aspire had funding available and that Sophia Stone had suggested that this should be dealt with directly between Aspire and the OCC or Aspire and the respondent and that the claimant should not be initiating this.

40. Charlotte Blake confirmed that:

"April had initiated conversation about this area of work and funding being available and that Charlotte had asked April to come to a meeting on 6 February with her and others from Homeless Oxfordshire to discuss changing demographics of rough sleepers."

She stated that the claimant had expressed her dissatisfaction that St Mungo's were not interested in furthering her role in sex worker exploitation. The claimant had then approached Charlotte in January 2018 and told her that there was some money available from OCC (Linda Ludlow). The claimant did not feel that St Mungo's would be interested in taking up this funding/role, and she asked if Charlotte would consider applying for this funding and creating a role. Whilst *it* was not stated explicitly she considered that it was obvious from the conversation that the claimant was referring to a role that she, herself, would carry out.

41. On 26 March, a further informal investigatory meeting was held with the claimant in which it was put to her that, in breach of the conditions set, she had been in contact with Linda Ludlow and also that she had not given a truthful account of the extent of her contacts with external persons. The claimant was suspended as a result of these concerns, which the respondent considered undermined its trust and confidence in the claimant.
42. The claimant was invited to a further investigatory meeting but then filed a grievance. The grievance was very lengthy but was critical of the institution of disciplinary proceedings against her. It complained about the limitations that had been placed on her work with sex workers and the withdrawal of the night shift. She asserted that Sarah Hirsi put her down in team meetings and had bullied her. She queried the fairness of her appraisal. She stated

that Adrian Hassell's night shift had been concealed from her. She complained of the decision to arrange a further informal interview by telephone without her being represented. She also complained at a comment made by Sarah Hirsi during one of the investigation meetings about whether it was appropriate that someone at the claimant's "level" should communicate with the commission.

43. The disciplinary process was paused whilst the grievance was investigated by Ms Wilcox. The grievance outcome letter was provided on 2 July 2018. It was a lengthy and detailed response to the claimant's grievance and recorded the investigations that had been conducted in to the matters raised in the grievance. She also reviewed the claimant's case list to establish whether it was correct, as the claimant asserted, that a large part of her case list constituted sex workers who were indeed rough sleepers. She concluded that this was not correct. She investigated the reasons for the instruction to the claimant to limit her work on sex workers, on the discontinuation of the night shift and concluded that there were reasonable grounds for these. She reviewed the fairness of the claimant's appraisal and whether the 360° feedback had been fairly reflected in this appraisal and she concluded that it was. She interviewed a number of the claimant's colleagues to see whether there was any substance to the allegation that Sarah Hirsi put her down in meetings and bullied her and concluded that there was no evidence of this occurring.
44. The grievance was in large part rejected but Ms Wilcox did find that there had been a delay in providing the claimant with the final version of her appraisal. It does not appear that the email of 29 January 2018 (which records Ms Hirsi's having discussed the appraisal with the claimant) was ever brought to her attention. She also considered that Ms Hirsi's language in referring to someone of the claimant's "level" was inappropriate.
45. During the period of the claimant's suspension, she was signed off sick. The claimant appealed against the rejection of her grievance and was offered an appeal hearing on 27 July 2018 before Paul Hudson. The respondent declined to further postpone the disciplinary process while the appeal was conducted and maintained that the disciplinary investigation meeting should go ahead. Given the overlap in the issues between the grievance and disciplinary allegations, the respondent took the decision to appoint Ms Wilcox as the investigator for the disciplinary allegations and a second formal investigation meeting was conducted on 31 July 2018.
46. On 9 August 2018, the claimant resigned with one month's notice. She attached a lengthy explanation of her reasons for resigning. She repeated many of the matters that had been set out in her grievance. It was suggested by her trade union representative that the final straw that led to the claimant had resignation was contact from the respondent during her sick leave.
47. On 24 August 2018, Mr Hudson rejected the appeal against the grievance outcome. In the meantime, the claimant had made a subject access request (SAR) and then, on 6 September, she filed a further grievance arising out of emails seen in the response to the SAR.

48. On 7 September 2018, an investigation report was produced by Ms Wilcox which upheld the allegations of gross misconduct that I have detailed but which dismissed the allegations of serious misconduct on the basis that the matters referred to were essentially issues of poor performance. On 21 December 2018, the claimant's second grievance was rejected by Helen Denyer.
49. The claimant has raised a complaint in these proceedings about scrutiny of her social media account. The only evidence on this point is a brief email from Sue Jackson which records a concern that, immediately after the claimant's suspension, she may have closed her social media and this gave rise to a welfare concern. A colleague had looked at the claimant's Facebook account and reported that this in fact was not the case. It is clear when one reads the text of the email that the concern was one of welfare rather than any attempt to monitor the claimant's use of social media in any inappropriate way.
50. The claimant also complained about contact while she was signed off with stress. Sue Jackson's evidence, which I accept, is that a trigger point for absence management had been reached and so an occupational health referral was necessary. In early August 2018 she sent at HR's request an email advising the claimant of this. When she received no response, she followed up with a further email and then eventually with a voicemail. The claimant's trade union representative asked that the contact cease and it was common ground that no further contact took place after that request was made.

SUMMARY OF RELEVANT LEGAL PRINCIPLES

51. Section 95 Employment Rights Act 1996 states that "*an employee is dismissed by his employer if... (c) 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*". The onus is on the claimant to show that the respondent has engaged in conduct, whether that is a single act or omission, or a series of acts or omissions that amount to a fundamental breach of contract. Not all unreasonable conduct will amount to a fundamental breach and the test is that set out in **Western Excavating v Sharp**. A fundamental breach of contract occurs where an employer is guilty of conduct which is a significant breach going to the root of the employment contract or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract. The conduct has to be sufficiently serious to entitle an employee to leave at once. An employee must make up their mind soon after the conduct complained of, as continuing in employment for any length of time without leaving may be regarded as an affirmation of the contract.
52. The contractual term said to be breached here is the implied term of mutual trust and confidence. The test is that set out in **Malik v BCCI**, has the employer without reasonable and proper cause engaged in conduct which is likely to destroy or seriously damage the relationship of trust and

confidence? Any breach of the implied term of trust and confidence will amount to a repudiation of the contract **Woods v WM Car Services Peterborough** [1981] ICR 666. The test of whether or not the implied term has been breached is an objective one.

53. In this case it is said that the breach results from the cumulative effect of a series of matters culminating in a final straw. It is not necessary for any final straw to be a breach of contract or a blameworthy act on the part of the employer provided it is a matter that is not wholly innocuous or trivial, and that is capable of contributing to the cumulative breach of the implied term. In London **Borough of Waltham Forest v Omilaju** [2005] ICR 481, Dyson LJ described the quality of a final straw in the following terms

“I see no need to characterise the final straw as unreasonable or blameworthy conduct. It may be true that an act which is the last in a series of acts which, taken together, amounts to a breach of the implied term of trust and confidence will usually be unreasonable and perhaps even blameworthy. But, viewed in isolation the final straw may not always be unreasonable, still less blameworthy. Nor do I see why it should be. The only question is whether the final straw is the last in a series of acts or incidents which cumulatively amount to a repudiation of the contract by the employer. The last straw must contribute, however, slightly to the breach of the implied term of trust and confidence. Some unreasonable behaviour may be so unrelated to the obligation of trust and confidence that it lacks the essential quality to which I have referred.

If the final straw is nor capable of contributing to a series of earlier acts which cumulatively amount to a breach of the implied term of trust and confidence there is no need to examine the earlier history to see whether the alleged final straw does have that effect. Suppose that an employer has committed a series of acts which amount to a breach of the implied term of trust and confidence but the employee does not resign his employment. Instead he soldiers on and affirms the contract. He cannot subsequently rely on these acts to justify a constructive dismissal unless he can point to a later act which enables him to do so. If the later act which he seeks to rely on is entirely innocuous, it is not necessary to examine the earlier conduct in order to determine that the later act does not permit the employee to invoke the final straw principle.

54. Even where there is a contractual power to suspend, the employer must still exercise that power in a manner which is consistent with the implied term of trust and confidence. Suspension should not therefore be a knee jerk reaction to an allegation and there must be reasonable and proper cause for suspension. An employer should undertake sufficient preliminary enquiries to suggest that there may be a real disciplinary case to answer and there should be proper grounds for considering that suspension is appropriate.

CONCLUSIONS

Dismissal

55. I consider that the respondent did not breach the implied term of mutual trust and confidence because, in so far as the matters complained of occurred, the respondent had reasonable and proper cause for its actions. The claimant was not therefore constructively dismissed by the respondent.

Unreasonable instruction that she should limit the amount of her time spent on work on modern slavery and exploitation of sex workers

56. Although the respondent did instruct the claimant to limit the time that she spent on her work on modern slavery and exploitation that instruction was not unreasonable. It is clear that the focus of the respondent's work is the prevention of rough sleeping by "verified" rough sleepers. Although the claimant argued that rough sleeping sex workers made up a large proportion of her caseload, in fact sex workers were a small proportion of her caseload and of that small group very few were, in fact, "verified" rough sleepers.

57. From October 2017, the respondent had genuine and well-founded concerns that the claimant was prioritising this small group ahead of the bulk of her cases. Those concerns were raised with the claimant in supervision notes and not disputed by her at the time. It was not therefore unreasonable for the respondent to attempt to shift the claimant's focus to the work that it wanted to be carried out and to instruct her to limit her engagement with these matters. That was done in a reasonable and nuanced way – the claimant was allowed to continue with the night shift in October and November and she was allowed to continue to attend some core meetings. Whilst the night shift was discontinued after November, it was reasonable for the respondent to take this action, given that the winter months were particularly busy and that it needed to focus its resources on its core work. She was given instruction in supervisions about prioritising her work and when it became apparent that the point was not being taken on board it was formally recorded in her appraisal.

A pattern of bullying which included making a change to the claimant's appraisal after it had been discussed with her and subjecting the claimant to unjustified criticism

58. I do not consider that the respondent engaged in bullying behaviour towards the claimant. The claimant has suggested that she was subjected to unjustified criticism of her performance. However, there were reasonable and genuine grounds for concern as to her performance. These concerns arose from the individual review of cases conducted by Sarah Hirsi in October. They were raised with her in supervisions which took place in October, December and January. There is no evidence of the claimant disputing the correctness of these concerns at the time. The concerns were further reinforced following Sue Jackson's review of the claimant's case list in February. I also note that Sue Wilcox, who was independent of the claimant's line management and who also reviewed these matters when conducting the grievance and disciplinary investigations, also considered that the claimant's performance was wanting.

59. It is clear that the claimant's appraisal was changed after she had her discussion with Sarah Hirsi. Whilst it is not best practice for an appraisal

score to change after a meeting, it is not unreasonable for a more senior manager to take a different view as to the appropriate performance grading or to wish to set additional objectives. I have found that the claimant was made aware of the change of appraisal in late January.

Encouraging colleagues to look at the claimant's social media as part of an attempt to tarnish her reputation

60. The allegation that the claimant's colleagues were encouraged to look at her social media as part of an attempt to tarnish her reputation is unfounded. There is no evidence of any such attempts and I have found that the reason for looking at the claimant's social media was that there was a welfare concern about the claimant's state of mind following her suspension. That was not unreasonable conduct on the respondent's part.

The withdrawal of a night shift which the claimant operated once a month

61. For the reasons set out above, I consider that there was reasonable and proper cause for the decision to withdraw the night shift operated by the claimant. Whilst Adrian Hassell was treated differently in this respect, this was not unreasonable: there were no performance concerns with Adrian Hassell nor were there concerns that Adrian Hassell was targeting, via his night shift, individuals who fell outside the terms of the respondent's commissioning contract.

Contact whilst on sick leave

62. The claimant has complained of continued contact while she was on sick leave which she regarded as harassing and which she relied on as a final straw. There is limited evidence as to the contact which took place but I accept Sue Jackson's evidence that contact was aimed merely at advising the claimant of an occupational health referral which was required under its policies and that it consisted of a couple of emails and a few phone messages. No further contact took place once the trade union representative complained. There is nothing inherently unreasonable about an employer contacting an employee, even one who is off sick with stress, where it is necessary for the employer to do so, for example, in order to manage the sickness absence. There was nothing unreasonable about the volume or nature of the respondent's contact with the claimant in relation to these matters.

63. The claimant has also suggested that contacting her for the purpose of the informal investigation by telephone while she was off sick with stress was inappropriate but again I consider that the respondent had reasonable and proper cause to do so given the new allegations that had come to light and given that it was contemplating suspending the claimant.

Demotion

64. The claimant also suggested that her demotion formed part of the bullying but as I have found, this is something which occurred in 2015 as part of a redundancy process and was a step which ensured that the claimant was not made redundant. There is no evidence whatsoever that the claimant was unwilling to be demoted in order to avoid redundancy or that the respondent behaved unreasonably in this respect.

Lack of support

65. The claimant has also asserted that she was unsupported but I do not consider that this is borne out by the documentary evidence. She was recognised and congratulated by both Sue Jackson and Sarah Hirsi for her work with sex workers; she was provided training in that field and allowed opportunities to continue with that work even whilst there were broader performance concerns. For example, she was allowed to continue attending the three multi-agency meetings. It is also clear from looking at the notes of supervisions that when the claimant raised concerns about, for example, working conditions, these were addressed. Whilst the claimant received some criticism during supervisions and during her formal appraisal, it was not unreasonable for the respondent to raise these matters with her in order to encourage her to improve her performance.

Contrived disciplinary investigation resulting in a lengthy suspension

66. The most serious allegation made by the claimant is that there was a contrived disciplinary investigation which resulted in her lengthy suspension. However, I consider that the respondent did have reasonable and proper cause for starting a disciplinary investigation in relation to the matters that were dealt with as potential gross misconduct. The claimant had been given a clear instruction as to the appropriate lines of contact with commissioners. She had acted in breach of that instruction. Although Sophia Stone had initiated contact with the claimant before the instruction was given, the claimant continued to contact Sophia Stone after the instruction. She did not make her managers aware of the discussions that she was having with Sophia Stone or obtain their approval for the discussions. Her comments regarding the respondent in emails to OCC staff, including Sophia Stone, gave a negative impression of the respondent's organisation, both in relation to its motivation to provide support to sex workers and in relation to its treatment of her personally. It is also clear from those emails that the claimant was lobbying her professional contacts to attempt to create a funded role in relation to sex workers. In doing so she was proposing funding for other external organisations, in particular Aspire and O'Hanlon House, in the expectation that she would be retained by them in order to perform this role. That is certainly how her communications were understood by others. It was not therefore unreasonable for the respondent to consider that there was potential disciplinary misconduct of a serious nature which required investigation. It had evidence that the claimant appeared to have disregarded management instructions, potentially injured its reputation with the organisation that commissioned and funded its work, that she had done so with a view to securing a new role for herself in an area of work which the respondent had sought to limit her exposure to, because she was not performing the core work for which she was employed.

67. The respondent did not suspend the claimant at first. However, she was later suspended because the respondent considered that she had breached the conditions which it set by her dealings with Linda Ludlow and because she had not given a full and truthful account of the extent of her contacts

with others so that its trust and confidence in her was undermined. Again, I consider that the respondent had reasonable grounds for concern on both points. It was not unreasonable to suspend. The respondent had grounds for concern that the claimant had repeated, and so might further repeat, her misconduct. The suspension was lengthy but this was in large part due to the claimant’s pursuit of her grievance in relation to these matters and due to her own sickness absence.

- 68. Although I have concluded that the respondent had reasonable grounds to institute disciplinary proceedings in relation to the matters which gave rise to the gross misconduct allegations, I consider that the respondent was unreasonable in treating matters relating to the claimant’s performance as potential serious misconduct rather than questions of capability. Although performance concerns had been raised with the claimant in supervisions and had been more formally recorded in the December appraisal, she had been given relatively little time to turn these things around by March 2018 when the disciplinary process began. In addition, matters such as the professionalism of her communications did not warrant being dealt with as disciplinary matters. Ultimately, following investigation Ms Wilcox did not consider that there was a disciplinary case to answer on these points. However, even if the respondent behaved unreasonably in instituting a disciplinary investigation of these issues, I do not consider that this is a matter that, in and of itself, would be sufficient to damage or destroy the relationship of trust and confidence, given that this occurred in the context of reasonable steps taken by the respondent to investigate other more serious misconduct.

Did the claimant resign in response to these matters?

- 69. I do not consider that the claimant was constructively dismissed by the respondent. However, I, also, consider that the claimant resigned because she wished to avoid dismissal for disciplinary misconduct, which she must have known was a real risk by the time of her resignation and not as a result of the alleged fundamental breach of contract.
- 70. Having concluded that the claimant was not dismissed by the respondent it is not necessary to consider reductions to compensation on **Polkey** or contributory conduct ground

Employment Judge Milner-Moore

Date: 17 March 2020.....

Sent to the parties on: 14 April 2020

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For the Tribunals Office

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